# Background Documentation

# INTERACTION BETWEEN THE EIA AND THE NATURE DIRECTIVES



## A. European Nature Protection Law

| | **EU Documents:** |
|---|---|
| **01** | DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (Birds Directive) |
| **02** | COUNCIL REGULATION (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 |
| **03** | COUNCIL REGULATION (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein |
| **04** | COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) |
| **05** | COUNCIL DECISION 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention) |
| **06** | Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive" |
| **07** | MANAGING NATURA 2000 SITES: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC |
| **08** | Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC |
| **09** | The implementation of the Birds and Habitats Directives in estuaries and coastal zones |
| **10** | Wind energy developments and Natura 2000 |
| **11** | Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC |
| **12** | Natura 2000 and forests 'Challenges and opportunities' |
| **13** | Sustainable tourism and Natura 2000: Guidelines, initiatives and good practices in Europe |

| | |
|---|---|
| **14** | Guidelines for the establishment of the Natura 2000 network in the marine environment: Application of the Habitats and Birds Directives |
| **15** | Appendix 1 : Marine Habitat types definitions. Update of "Interpretation Manual of European Union Habitats" |
| **16** | Appendix 2: Lists of existing marine Habitat types and Species for different Member States |
| **17** | Appendix 3: Examples of the technique of the use of matrix as a management tool for decision-making. |
| **18** | Appendix 4 I: Good experiences and examples of implementation of Natura 2000 in the marine environment including LIFE fund actions in the marine environment |
| **19** | Appendix 4 II: LIFE and the marine environment: Promoting sustainable management of Europe's seas |
| **20** | Appendix 5: Bibliography |
| | **Selected CJEU Case Law** |
| **21** | C-258/11 Judgment of the Court (Third Chamber) of 11 April 2013. Peter Sweetman and Others v An Bord Pleanála. Reference for a preliminary ruling: Supreme Court - Ireland. |
| **22** | C-340/10 Judgment of the Court (Fourth Chamber) of 15 March 2012, European Commission v Republic of Cyprus. |
| **23** | C-182/10 Judgment of the Court (Fourth Chamber) of 16 February 2012, Marie-Noëlle Solvay and Others v Région wallonne. |
| **24** | C-409/09 Judgment of the Court (Third Chamber) of 9 June 2011, José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA. |
| **25** | C-491/08 Judgment of the Court (Fourth Chamber) of 10 June 2010. European Commission v Italian Republic. |
| **26** | C-241/08 Judgment of the Court (Second Chamber) of 4 March 2010, European Commission v French Republic. |
| **27** | C-226/08 Judgment of the Court (Second Chamber) of 14 January 2010, Stadt Papenburg v Bundesrepublik Deutschland. |
| **28** | C-362/06 Judgment of the Court (Second Chamber) of 23 April 2009. Markku Sahlstedt and Others v Commission of the European Communities. |
| **29** | C-418/04 Judgment of the Court (Second Chamber) of 13 December 2007, Commission of the European Communities v Ireland. |

| | |
|---|---|
| **30** | C-342/05 Judgment of the Court (Second Chamber) of 14 June 2007, Commission of the European Communities v Republic of Finland. |
| **31** | C-508/04 Judgment of the Court (Fourth Chamber) of 10 May 2007, Commission of the European Communities v Republic of Austria. |
| **32** | C-518/04 Judgment of the Court (Fifth Chamber) of 16 March 2006, Commission of the European Communities v Hellenic Republic. |
| **33** | C-98/03 Judgment of the Court (Second Chamber) of 10 January 2006, Commission of the European Communities v Federal Republic of Germany. |
| **34** | C-6/04 Judgment of the Court (Second Chamber) of 20 October 2005, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. |
| **35** | C-494/01 JUDGMENT OF THE COURT (GRAND CHAMBER) OF 26 APRIL 2005. COMMISSION OF THE EUROPEAN COMMUNITIES V IRELAND. |
| **36** | C-441/03 Judgment of the Court (Second Chamber) of 14 April 2005, Commission of the European Communities v Kingdom of the Netherlands. |
| **37** | C-117/03 Judgment of the Court (Second Chamber) of 13 January 2005, Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia. |
| **38** | C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij. |
| **39** | C-407/03 Judgment of 15 July 2004, Commission v Finland. |
| **40** | C-143/02 Judgment of the Court (Third Chamber) of 20 March 2003, Commission of the European Communities v Italian Republic. |
| **41** | C-415/01 Judgment of the Court (Sixth Chamber) of 27 February 2003. Commission of the European Communities v Kingdom of Belgium. |
| **42** | C-75/01 Judgment of the Court (Sixth Chamber) of 13 February 2003, Commission of the European Communities v Grand Duchy of Luxemburg. |
| **43** | C-103/00 Judgment of the Court (Sixth Chamber) of 30 January 2002, Commission of the European Communities v Hellenic Republic. |
| **44** | C-67/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Ireland. |

| | |
|---|---|
| **45** | C-71/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v Federal Republic of Germany. |
| **46** | C-220/99 Judgment of the Court (Sixth Chamber) of 11 September 2001. Commission of the European Communities v French Republic. |
| **47** | C-374/98 Judgment of the Court (Sixth Chamber) of 7 December 2000, Commission of the European Communities v French Republic. |
| **48** | C-371/98 Judgment of the Court of 7 November 2000, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust. |
| **49** | C-256/98 Judgment of the Court (Fifth Chamber) of 6 April 2000, Commission of the European Communities v French Republic. |
| **50** | C-3/96 Judgment of the Court of 19 May 1998, Commission of the European Communities v Kingdom of the Netherlands. |
| **51** | C-329/96 Judgment of the Court (Fifth Chamber) of 26 June 1997. Commission of the European Communities v Hellenic Republic. |
| **52** | C-44/95 Judgment of the Court of 11 July 1996, Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds. |
| **53** | C-57/89 Judgment of the Court of 28 February 1991. Commission of the European Communities v Federal Republic of Germany. |
| **54** | C-396/92 Judgment of the Court of 9 August 1994. Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf and others v Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut. |

## B. Environmental Impact Assessment

| | **EU Documents** |
|---|---|
| **55** | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2012 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment |
| **56** | DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment |
| **57** | DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the |

| | |
|---|---|
| | environment and amending with regard to public participation and access to justice |
| **58** | DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive) |
| | **International Documents** |
| **59** | UNECE Convention on Transboundary EIA (Espoo) 1991 |
| **60** | CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention) |
| **61** | European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 |
| **62** | CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01) |
| | **Selected CJEU Case Law** |
| **63** | C-121/11 Judgment of the Court (Third Chamber) of 19 April 2012, Pro-Braine ASBL and Others v Commune de Braine-le-Château. |
| **64** | C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia. |
| **65** | C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg. |
| **66** | C-275/09 Judgment of the Court (First Chamber) of 17 March 2011, Brussels Hoofdstedelijk Gewest and Others v Vlaamse Gewest. |
| **67** | C-50/09 Judgment of the Court (First Chamber) of 3 March 2011, European Commission v Ireland. |
| **68** | C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government. |
| **69** | C-142/07 Judgment of the Court (Third Chamber) of 25 July 2008, Ecologistas en Acción-CODA v Ayuntamiento de Madrid. |
| **70** | C-156/07 Order of the Court (Sixth Chamber) of 10 July 2008, Salvatore Aiello and Others v Regione Lombardia and Others. |
| **71** | C-215/06 Judgment of the Court (Second Chamber) of 3 July 2008, Commission of the European Communities v Ireland. |
| **72** | C-2/07 Judgment of the Court (Second Chamber) of 28 February 2008, |

| | |
|---|---|
| | Paul Abraham and Others v Région wallonne and Others |
| **73** | C-508/03 Judgment of the Court (First Chamber) of 4 May 2006, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. |
| **74** | C-290/03 Judgment of the Court (First Chamber) of 4 May 2006, The Queen, on the application of: Diane Barker v London Borough of Bromley. |
| **75** | C-332/04 Judgment of the Court (Third Chamber) of 16 March 2006, Commission of the European Communities v Kingdom of Spain. |
| **76** | C-227/01 Judgment of the Court (Second Chamber) of 16 September 2004, Commission of the European Communities v Kingdom of Spain. |
| **77** | C-87/02 Judgment of the Court (First Chamber) of 10 June 2004, Commission of the European Communities v Italian Republic. |
| **78** | C-201/02 Judgment of the Court (Fifth Chamber) of 7 January 2004, The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions. |
| **79** | C-230/00 Judgment of the Court (Third Chamber) of 14 June 2001, Commission of the European Communities v Kingdom of Belgium. |
| **80** | C-287/98 Judgment of the Court of 19 September 2000, Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster |
| **81** | C-392/96 Judgment of the Court (Fifth Chamber) of 21 September 1999, Commission of the European Communities v Ireland. |
| **82** | C-435/97 Judgment of the Court (Sixth Chamber) of 16 September 1999, World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others. |
| **83** | C-301/95 Judgment of the Court (Sixth Chamber) of 22 October 1998, Commission of the European Communities v Federal Republic of Germany. |
| **84** | C-72/95 Judgment of the Court of 24 October 1996, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland. |
| **85** | C-133/94 Judgment of the Court (Sixth Chamber) of 2 May 1996, Commission of the European Communities v Kingdom of Belgium. |
| **86** | C-431/92 Judgment of the Court of 11 August 1995, Commission of the European Communities v Federal Republic of Germany. |
| **87** | C-360/87 Judgment of the Court of 28 February 1991, Commission of the European Communities v Italian Republic. |
| **88** | C-96/81 Judgment of the Court of 25 May 1982, Commission of the |

| | |
|---|---|
| | European Communities v Kingdom of the Netherlands. |
| **89** | C-103/88 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v Comune di Milano. |
| **90** | C-427/07 Judgment of the Court (Second Chamber) of 16 July 2009. Commission of the European Communities v Ireland. |
| **91** | C-205/08 Judgment of the Court (Second Chamber) of 10 December 2009. Umweltanwalt von Kärnten v Kärntner Landesregierung. |
| **92** | C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009. Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd. |
| **93** | C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg. |
| **94** | C-420/11 Judgment of the Court (Fourth Chamber) of 14 March 2013. Jutta Leth v Republik Österreich and Land Niederösterreich. |
| **95** | C-244/12 Judgment of the Court (Fifth Chamber) of 21 March 2013. Salzburger Flughafen GmbH v Umweltsenat. |
| | **International Case law** |
| **96** | INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 20 APRIL 2010, PULP MILLS ON THE RIVER URUGUAY (ARGENTINA v. URUGUAY) |
| **97** | INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 25 SEPTEMBER 1997 CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARYISLOVAKIA) |
| **98** | REPORTS OF INTERNATIONAL ARBITRAL AWARDS of 16 April 1938 and 11 March 1941, Trail smelter case (United States, Canada) |

## C. Role of the EIA and the Nature directives in judicial review proceedings at national level: substantive and procedural aspects

| | |
|---|---|
| | **EU Documents** |
| **99** | Selected articles from the consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, including Statute of the Court of Justice of the European Union (OJ C 83 of 30 March 2010, p.1) |
| **100** | Rules of Procedure of the Court of Justice (consolidated version of 25 September 2012) |

| | |
|---|---|
| **101** | Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure (OJ C 338 of 6 November 2012, p. 1) |
| | **Selected CJEU Case Law** |
| **102** | C-260/11 Judgment of the Court (Fourth Chamber) of 11 April 2013, The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others. |
| **103** | C-530/11 Judgment of the Court (Second Chamber) of 13 February 2014, European Commission v United Kingdom of Great Britain and Northern Ireland. |
| **104** | C-416/10 Judgment of the Court (Grand Chamber) of 15 January 2013, Jozef Križan and Others v Slovenská inšpekcia životného prostredia. |
| **105** | Case 283/81 Cilfit and Others [1982] ECR 3415 |
| **106** | Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835 |
| **107** | C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky. |
| **108** | C-45/76 Judgment of the Court of 16 December 1976. Comet BV v Produktschap voor Siergewassen. |
| **109** | C-33/76 Judgment of the Court of 16 December 1976. Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland. |
| **110** | C-106/89 Judgment of the Court (Sixth Chamber) of 13 November 1990. Marleasing SA v La Comercial Internacional de Alimentacion SA. |
| **111** | C-6/90 Judgment of the Court of 19 November 1991. Andrea Francovich and Danila Bonifaci and others v Italian Republic. Joined cases C-6/90 and C-9/90. |
| **112** | C-46/93 Judgment of the Court of 5 March 1996. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. Joined cases C-46/93 and C-48/93. |
| **113** | C-168/95 Judgment of the Court (Fourth Chamber) of 26 September 1996. Criminal proceedings against Luciano Arcaro. |
| **114** | C-129/96 Judgment of the Court of 18 December 1997. Inter-Environnement Wallonie ASBL v Région wallonne. |
| **115** | C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia |

| | |
|---|---|
| | Slovenskej republiky. |

IV

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

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

## of 30 November 2009

## on the conservation of wild birds

**(codified version)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

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

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

Whereas:

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

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

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

*Article 2*

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

*Article 3*

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

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

(a) creation of protected areas;

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

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.

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

*Article 4*

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

In this connection, account shall be taken of:

(a) species in danger of extinction;

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

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

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

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

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

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

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

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

*Article 5*

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

(a) deliberate killing or capture by any method;

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

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

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

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

*Article 6*

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

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

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

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

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

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

*Article 7*

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

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

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

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

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

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

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

*Article 8*

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

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

*Article 9*

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

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

— in the interests of air safety,

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

— for the protection of flora and fauna;

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

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

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

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

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

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

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

(e) the controls which will be carried out.

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

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

*Article 10*

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

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

*Article 11*

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

*Article 12*

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

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

*Article 13*

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

*Article 14*

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

*Article 15*

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

*Article 16*

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

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

*Article 17*

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

*Article 18*

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

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

*Article 19*

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

*Article 20*

This Directive is addressed to the Member States.

Done at Brussels, 30 November 2009.

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

*ANNEX I*

GAVIIFORMES

Gaviidae

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

PODICIPEDIFORMES

Podicipedidae

- *Podiceps auritus*

PROCELLARIIFORMES

Procellariidae

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

Hydrobatidae

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

PELECANIFORMES

Pelecanidae

- *Pelecanus onocrotalus*
- *Pelecanus crispus*

Phalacrocoracidae

- *Phalacrocorax aristotelis desmarestii*
- *Phalacrocorax pygmeus*

CICONIIFORMES

Ardeidae

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

Ciconiidae

- *Ciconia nigra*
- *Ciconia ciconia*

Threskiornithidae

- *Plegadis falcinellus*
- *Platalea leucorodia*

PHOENICOPTERIFORMES

Phoenicopteridae

- *Phoenicopterus ruber*

ANSERIFORMES

Anatidae

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

FALCONIFORMES

Pandionidae

- *Pandion haliaetus*

Accipitridae

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

*Aquila chrysaetos*
*Hieraaetus pennatus*
*Hieraaetus fasciatus*

Falconidae

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

GALLIFORMES

Tetraonidae

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

Phasianidae

*Alectoris graeca*
*Alectoris barbara*
*Perdix perdix italica*
*Perdix perdix hispaniensis*

GRUIFORMES

Turnicidae

*Turnix sylvatica*

Gruidae

*Grus grus*

Rallidae

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

Otididae

*Tetrax tetrax*
*Chlamydotis undulata*
*Otis tarda*

CHARADRIIFORMES

Recurvirostridae

*Himantopus himantopus*
*Recurvirostra avosetta*

Burhinidae

*Burhinus oedicnemus*

Glareolidae

*Cursorius cursor*
*Glareola pratincola*

Charadriidae

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

Scolopacidae

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

Laridae

*Larus melanocephalus*
*Larus genei*
*Larus audouinii*
*Larus minutus*

Sternidae

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

Alcidae

*Uria aalge ibericus*

PTEROCLIFORMES

Pteroclididae

*Pterocles orientalis*
*Pterocles alchata*

COLUMBIFORMES

Columbidae

*Columba palumbus azorica*
*Columba trocaz*
*Columba bollii*
*Columba junoniae*

STRIGIFORMES

Strigidae

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

CAPRIMULGIFORMES

Caprimulgidae

- *Caprimulgus europaeus*

APODIFORMES

Apodidae

- *Apus caffer*

CORACIIFORMES

Alcedinidae

- *Alcedo atthis*

Coraciidae

- *Coracias garrulus*

PICIFORMES

Picidae

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

PASSERIFORMES

Alaudidae

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

Motacillidae

- *Anthus campestris*

Troglodytidae

- *Troglodytes troglodytes fridariensis*

Muscicapidae (Turdinae)

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

Muscicapidae (Sylviinae)

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

Muscicapidae (Muscicapinae)

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

Paridae

- *Parus ater cypriotes*

Sittidae

- *Sitta krueperi*
- *Sitta whiteheadi*

Certhiidae

- *Certhia brachydactyla dorotheae*

Laniidae

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

Corvidae

- *Pyrrhocorax pyrrhocorax*

Fringillidae (Fringillinae)

- *Fringilla coelebs ombriosa*
- *Fringilla teydea*

Fringillidae (Carduelinae)

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

Emberizidae (Emberizinae)

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

*ANNEX II*

PART A

ANSERIFORMES

Anatidae

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

GALLIFORMES

Tetraonidae

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

Phasianidae

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

GRUIFORMES

Rallidae

- *Fulica atra*

CHARADRIIFORMES

Scolopacidae

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

COLUMBIFORMES

Columbidae

- *Columba livia*
- *Columba palumbus*

PART B

ANSERIFORMES

Anatidae

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

GALLIFORMES

Meleagridae

- *Meleagris gallopavo*

Tetraonidae

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

Phasianidae

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

GRUIFORMES

Rallidae

- *Rallus aquaticus*
- *Gallinula chloropus*

CHARADRIIFORMES

Haematopodidae

- *Haematopus ostralegus*

Charadriidae

*Pluvialis apricaria*

*Pluvialis squatarola*

*Vanellus vanellus*

Scolopacidae

*Calidris canutus*

*Philomachus pugnax*

*Limosa limosa*

*Limosa lapponica*

*Numenius phaeopus*

*Numenius arquata*

*Tringa erythropus*

*Tringa totanus*

*Tringa nebularia*

Laridae

*Larus ridibundus*

*Larus canus*

*Larus fuscus*

*Larus argentatus*

*Larus cachinnans*

*Larus marinus*

COLUMBIFORMES

Columbidae

*Columba oenas*

*Streptopelia decaocto*

*Streptopelia turtur*

PASSERIFORMES

Alaudidae

*Alauda arvensis*

Muscicapidae

*Turdus merula*

*Turdus pilaris*

*Turdus philomelos*

*Turdus iliacus*

*Turdus viscivorus*

Sturnidae

*Sturnus vulgaris*

Corvidae

*Garrulus glandarius*

*Pica pica*

*Corvus monedula*

*Corvus frugilegus*

*Corvus corone*

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

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

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

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

*ANNEX III*

PART A

ANSERIFORMES

Anatidae

*Anas platyrhynchos*

GALLIFORMES

Tetraonidae

*Lagopus lagopus lagopus, scoticus et hibernicus*

Phasianidae

*Alectoris rufa*

*Alectoris barbara*

*Perdix perdix*

*Phasianus colchicus*

COLUMBIFORMES

Columbidae

*Columba palumbus*

PART B

ANSERIFORMES

Anatidae

*Anser albifrons albifrons*

*Anser anser*

*Anas penelope*

*Anas crecca*

*Anas acuta*

*Anas clypeata*

*Aythya ferina*

*Aythya fuligula*

*Aythya marila*

*Somateria mollissima*

*Melanitta nigra*

GALLIFORMES

Tetraonidae

*Lagopus mutus*

*Tetrao tetrix britannicus*

*Tetrao urogallus*

GRUIFORMES

Rallidae

*Fulica atra*

CHARADRIIFORMES

Charadriidae

*Pluvialis apricaria*

Scolopacidae

*Lymnocryptes minimus*

*Gallinago gallinago*

*Scolopax rusticola*

*ANNEX IV*

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

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

— explosives,

— nets, traps, poisoned or anaesthetic bait,

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

(b) — aircraft, motor vehicles,

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

---

*ANNEX V*

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

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

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

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

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

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

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

---

*ANNEX VI*

PART A

**REPEALED DIRECTIVE WITH LIST OF ITS SUCCESSIVE AMENDMENTS**

(referred to in Article 18)

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

PART B

**LIST OF TIME LIMITS FOR TRANSPOSITION INTO NATIONAL LAW**

(referred to in Article 18)

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

*ANNEX VII*

**CORRELATION TABLE**

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

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

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

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

On page 7, in Article 1, first indent:

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

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

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

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

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

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

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

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

On page 22, in Article 62, first subparagraph:

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

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

On page 23, in Article 63(3):

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

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

On page 32, in Article 102(1):

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

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

On page 52, in Article 155:

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

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

On page 53, in Annex I, title:

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

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

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

►**B**

# COUNCIL REGULATION (EC) No 338/97

## of 9 December 1996

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

(OJ L 61, 3.3.1997, p. 1)

Amended by:

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

Corrected by:

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

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

▼B

# COUNCIL REGULATION (EC) No 338/97

## of 9 December 1996

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

THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

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

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

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

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

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

---

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

▼B

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

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

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

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

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

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

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

▼B

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

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

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

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

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

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

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

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

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

▼B

HAS ADOPTED THIS REGULATION:

### *Article 1*

### Object

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

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

### *Article 2*

### Definitions

For the purposes of this Regulation:

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

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

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

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

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

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

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

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

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

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

▼B

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

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

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

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

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

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

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

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

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

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

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

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

▼B

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

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

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

### *Article 3*

### Scope

1. Annex A shall contain:

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

(b) any species:

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

or

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

2. Annex B shall contain:

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

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

▼B

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

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

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

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

or

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

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

3. Annex C shall contain:

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

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

4. Annex D shall contain:

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

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

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

### *Article 4*

### Introduction into the Community

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

▼B

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

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

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

(ii) is taking place:

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

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

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

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

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

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

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

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

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

▼B

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

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

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

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

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

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

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

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

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

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

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

▼M14

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

▼B

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

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

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

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

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

▼M14

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

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

▼B

### *Article 5*

### Export or re-export from the Community

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

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

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

▼B

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

(c) the management authority is satisfied that:

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

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

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

and

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

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

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

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

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

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

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

▼B

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

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

▼M14

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

▼B

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

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

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

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

▼M14

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

▼B

*Article 6*

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

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

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

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

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

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

*Article 7*

**Derogations**

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

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

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

(i) the use of phytosanitary certificates;

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

(iii) trade in hybrids.

▼M14

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

▼B

2. ***Transit***

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

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

▼M14

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

3. ***Personal and household effects***

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

4. ***Scientific institutions***

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

▼B

***Article 8***

**Provisions relating to the control of commercial activities**

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

▼B

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

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

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

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

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

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

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

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

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

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

▼M14

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

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

▼B

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

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

### *Article 9*

### Movement of live specimens

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

2. Such authorization shall:

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

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

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

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

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

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

▼M14

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

▼B

*Article 10*

**Certificates to be issued**

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

*Article 11*

**Validity of and special conditions for permits and certificates**

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

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

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

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

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

▼M14

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

▼B

*Article 12*

**Places of introduction and export**

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

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

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

▼M14

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

▼B

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

*Article 13*

**Management and scientific authorities and other competent authorities**

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

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

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

▼B

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

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

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

***Article 14***

**Monitoring of compliance and investigation of infringements**

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

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

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

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

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

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

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

▼B

*Article 15*

**Communication of information**

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

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

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

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

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

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

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

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

▼M14

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

▼B

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

### *Article 16*

### Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

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

▼B

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

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

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

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

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

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

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

### *Article 17*

### The Scientific Review Group

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

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

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

▼M9

### *Article 18*

1. The Commission shall be assisted by a committee.

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

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

▼**M9**

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

▼**M14**

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

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

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

***Article 19***

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

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

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

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

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

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

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

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

▼M14

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

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

▼B

### *Article 20*

### Final provisions

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

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

### *Article 21*

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

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

▼M14

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

▼B

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

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

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

▼B

***Article 22***

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

It shall apply from 1 June 1997.

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

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

▼**M17**

***ANNEX***

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

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

   (a) by the name of the species; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

▼**M17**

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

#1 Designates all parts and derivatives, except:

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

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

(c) cut flowers of artificially propagated plants; and

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

#2 Designates all parts and derivatives, except:

(a) seeds and pollen; and

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

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

#4 Designates all parts and derivatives, except:

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

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

(c) cut flowers of artificially propagated plants;

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

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

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

#5 Designates logs, sawn wood and veneer sheets.

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

▼**M17**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 4 Logs, sawn wood and veneer sheets.

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

▼M17

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

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

►**B**

# COUNCIL DIRECTIVE 92/43/EEC

## of 21 May 1992

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

(OJ L 206, 22.7.1992, p. 7)

Amended by:

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

Amended by:

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

Corrected by:

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

▼B

# COUNCIL DIRECTIVE 92/43/EEC

## of 21 May 1992

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

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

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

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

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

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

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

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

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

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

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

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

---

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

▼B

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

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

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

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

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

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

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

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

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

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

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

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

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

▼B

HAS ADOPTED THIS DIRECTIVE:

**Definitions**

*Article 1*

For the purpose of this Directive:

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

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

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

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

or

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

or

▼M3

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

▼B

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

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

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

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

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

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

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

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

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

▼B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

▼B

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

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

*Article 2*

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

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

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

**Conservation of natural habitats and habitats of species**

*Article 3*

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

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

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

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

*Article 4*

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

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

▼B

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

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

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

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

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

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

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

*Article 5*

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

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

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

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

*Article 6*

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

▼B

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

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

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

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

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

*Article 7*

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

*Article 8*

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

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

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

▼B

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

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

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

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

*Article 9*

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

*Article 10*

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

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

*Article 11*

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

**Protection of species**

*Article 12*

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

▼B

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

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

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

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

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

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

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

*Article 13*

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

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

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

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

*Article 14*

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

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

— regulations regarding access to certain property,

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

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

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

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

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

▼B

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

— assessment of the effect of the measures adopted.

*Article 15*

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

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

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

*Article 16*

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

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

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

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

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

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

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

3. The reports shall specify:

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

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

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

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

▼B

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

**Information**

*Article 17*

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

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

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

**Research**

*Article 18*

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

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

**Procedure for amending the Annexes**

*Article 19*

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

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

▼B

**Committee**

▼M2

*Article 20*

The Commission shall be assisted by a committee.

*Article 21*

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

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

2. The Committee shall adopt its rules of procedure.

▼B

**Supplementary provisions**

*Article 22*

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

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

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

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

**Final provisions**

*Article 23*

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

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

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

▼B

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

*Article 24*

This Directive is addressed to the Member States.

▼M3

*ANNEX I*

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

**Interpretation**

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

The code corresponds to the NATURA 2000 code.

The sign '*' indicates priority habitat types.

1. COASTAL AND HALOPHYTIC HABITATS

**11. Open sea and tidal areas**

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

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

1130 Estuaries

1140 Mudflats and sandflats not covered by seawater at low tide

1150 * Coastal lagoons

1160 Large shallow inlets and bays

1170 Reefs

1180 Submarine structures made by leaking gases

**12. Sea cliffs and shingle or stony beaches**

1210 Annual vegetation of drift lines

1220 Perennial vegetation of stony banks

1230 Vegetated sea cliffs of the Atlantic and Baltic Coasts

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

1250 Vegetated sea cliffs with endemic flora of the Macaronesian coasts

**13. Atlantic and continental salt marshes and salt meadows**

1310 *Salicornia* and other annuals colonizing mud and sand

1320 *Spartina* swards (*Spartinion maritimae*)

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

1340 * Inland salt meadows

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

1410 Mediterranean salt meadows (*Juncetalia maritimi*)

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

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

**15. Salt and gypsum inland steppes**

1510 * Mediterranean salt steppes (*Limonietalia*)

1520 * Iberian gypsum vegetation (*Gypsophiletalia*)

1530 * Pannonic salt steppes and salt marshes

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

▼M3

**16. Boreal Baltic archipelago, coastal and landupheaval areas**

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

1620 Boreal Baltic islets and small islands

1630 * Boreal Baltic coastal meadows

1640 Boreal Baltic sandy beaches with perennial vegetation

1650 Boreal Baltic narrow inlets

2. COASTAL SAND DUNES AND INLAND DUNES

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

2110 Embryonic shifting dunes

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

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

2140 * Decalcified fixed dunes with *Empetrum nigrum*

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

2160 Dunes with *Hippophaë rhamnoides*

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

2180 Wooded dunes of the Atlantic, Continental and Boreal region

2190 Humid dune slacks

21A0 Machairs (* in Ireland)

**22. Sea dunes of the Mediterranean coast**

2210 *Crucianellion maritimae* fixed beach dunes

2220 Dunes with *Euphorbia terracina*

2230 *Malcolmietalia* dune grasslands

2240 *Brachypodietalia* dune grasslands with annuals

2250 * Coastal dunes with *Juniperus* spp.

2260 *Cisto-Lavenduletalia* dune sclerophyllous scrubs

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

**23. Inland dunes, old and decalcified**

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

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

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

2340 * Pannonic inland dunes

3. FRESHWATER HABITATS

**31. Standing water**

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

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

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

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

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

3160 Natural dystrophic lakes and ponds

3170 * Mediterranean temporary ponds

3180 * Turloughs

▼M3

3190 Lakes of gypsum karst

31A0 * Transylvanian hot-spring lotus beds

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

3210 Fennoscandian natural rivers

3220 Alpine rivers and the herbaceous vegetation along their banks

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

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

3250 Constantly flowing Mediterranean rivers with *Glaucium flavum*

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

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

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

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

4. TEMPERATE HEATH AND SCRUB

**4010 Northern Atlantic wet heaths with *Erica tetralix***

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

4030 European dry heaths

4040 * Dry Atlantic coastal heaths with *Erica vagans*

4050 * Endemic macaronesian heaths

4060 Alpine and Boreal heaths

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

4080 Sub-Arctic *Salix* spp. Scrub

4090 Endemic oro-Mediterranean heaths with gorse

40A0 * Subcontinental peri-Pannonic scrub

40B0 Rhodope *Potentilla fruticosa* thickets

40C0 * Ponto-Sarmatic deciduous thickets

5. SCLEROPHYLLOUS SCRUB (MATORRAL)

**51. Sub-Mediterranean and temperate scrub**

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

5120 Mountain *Cytisus purgans* formations

5130 *Juniperus communis* formations on heaths or calcareous grasslands

5140 * *Cistus palhinhae* formations on maritime wet heaths

**52. Mediterranean arborescent matorral**

5210 Arborescent matorral with *Juniperus* spp.

5220 * Arborescent matorral with *Zyziphus*

5230 * Arborescent matorral with *Laurus nobilis*

**53. Thermo-Mediterranean and pre-steppe brush**

5310 *Laurus nobilis* thickets

5320 Low formations of Euphorbia close to cliffs

5330 Thermo-Mediterranean and pre-desert scrub

▼M3

**54. Phrygana**

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

5420 Sarcopoterium spinosum phryganas

5430 Endemic phryganas of the *Euphorbio-Verbascion*

6. NATURAL AND SEMI-NATURAL GRASSLAND FORMATIONS

**61. Natural grasslands**

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

6120 * Xeric sand calcareous grasslands

6130 Calaminarian grasslands of the *Violetalia calaminariae*

6140 Siliceous Pyrenean *Festuca eskia* grasslands

6150 Siliceous alpine and boreal grasslands

6160 Oro-Iberian *Festuca indigesta* grasslands

6170 Alpine and subalpine calcareous grasslands

6180 Macaronesian mesophile grasslands

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

**62. Semi-natural dry grasslands and scrubland facies**

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

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

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

6240 * Sub-Pannonic steppic grasslands

6250 * Pannonic loess steppic grasslands

6260 * Pannonic sand steppes

6270 * Fennoscandian lowland species-rich dry to mesic grasslands

6280 * Nordic alvar and precambrian calcareous flatrocks

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

62B0 * Serpentinophilous grassland of Cyprus

62C0 * Ponto-Sarmatic steppes

62D0 Oro-Moesian acidophilous grasslands

**63. Sclerophillous grazed forests (dehesas)**

6310 Dehesas with evergreen *Quercus* spp.

**64. Semi-natural tall-herb humid meadows**

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

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

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

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

6450 Northern boreal alluvial meadows

6460 Peat grasslands of Troodos

**65. Mesophile grasslands**

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

6520 Mountain hay meadows

6530 * Fennoscandian wooded meadows

▼M3

7. RAISED BOGS AND MIRES AND FENS

**71. Sphagnum acid bogs**

7110 * Active raised bogs

7120 Degraded raised bogs still capable of natural regeneration

7130 Blanket bogs (* if active bog)

7140 Transition mires and quaking bogs

7150 Depressions on peat substrates of the *Rhynchosporion*

7160 Fennoscandian mineral-rich springs and springfens

**72. Calcareous fens**

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

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

7230 Alkaline fens

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

**73. Boreal mires**

7310 * Aapa mires

7320 * Palsa mires

8. ROCKY HABITATS AND CAVES

**81. Scree**

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

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

8130 Western Mediterranean and thermophilous scree

8140 Eastern Mediterranean screes

8150 Medio-European upland siliceous screes

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

**82. Rocky slopes with chasmophytic vegetation**

8210 Calcareous rocky slopes with chasmophytic vegetation

8220 Siliceous rocky slopes with chasmophytic vegetation

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

8240 * Limestone pavements

**83. Other rocky habitats**

8310 Caves not open to the public

8320 Fields of lava and natural excavations

8330 Submerged or partially submerged sea caves

8340 Permanent glaciers

9. FORESTS

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

**90. Forests of Boreal Europe**

9010 * Western Taïga

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

▼**M3**

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

▼**M3**

91AA * Eastern white oak woods

91BA Moesian silver fir forests

91CA Rhodopide and Balkan Range Scots pine forests

**92. Mediterranean deciduous forests**

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

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

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

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

9250 *Quercus trojana* woods

9260 *Castanea sativa* woods

9270 Hellenic beech forests with *Abies borisii-regis*

9280 *Quercus frainetto* woods

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

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

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

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

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

**93. Mediterranean sclerophyllous forests**

9310 Aegean *Quercus brachyphylla* woods

9320 *Olea* and *Ceratonia* forests

9330 *Quercus suber* forests

9340 *Quercus ilex* and *Quercus rotundifolia* forests

9350 *Quercus macrolepis* forests

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

9370 * Palm groves of *Phoenix*

9380 Forests of *Ilex aquifolium*

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

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

**94. Temperate mountainous coniferous forests**

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

9420 Alpine *Larix decidua* and/or *Pinus cembra* forests

9430 Subalpine and montane *Pinus uncinata* forests (* if on gypsum or limestone)

**95. Mediterranean and Macaronesian mountainous coniferous forests**

9510 * Southern Apennine *Abies alba* forests

9520 *Abies pinsapo* forests

9530 * (Sub-) Mediterranean pine forests with endemic black pines

9540 Mediterranean pine forests with endemic Mesogean pines

9550 Canarian endemic pine forests

9560 * Endemic forests with *Juniperus* spp.

▼**M3**

| | |
|---|---|
| 9570 | * *Tetraclinis articulata* forests |
| 9580 | * Mediterranean *Taxus baccata* woods |
| 9590 | * *Cedrus brevifolia* forests (*Cedrosetum brevifoliae*) |
| 95A0 | High oro-Mediterranean pine forests |

▼**M3**

*ANNEX II*

## ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

### Interpretation

(a) Annex II follows on from Annex I for the establishment of a consistent network of special areas of conservation.

(b) The species listed in this Annex are indicated:

— by the name of the species or subspecies, or

— by all the species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(c) Symbols

An asterisk (*) before the name of a species indicates that it is a priority species.

Most species listed in this Annex are also listed in Annex IV. Where a species appears in this Annex but does not appear in either Annex IV or Annex V, the species name is followed by the symbol (o); where a species which appears in this Annex also appears in Annex V but does not appear in Annex IV, its name is followed by the symbol (V).

### (a) *ANIMALS*

*VERTEBRATES*

**MAMMALS**

INSECTIVORA

Talpidae

*Galemys pyrenaicus*

CHIROPTERA

Rhinolophidae

*Rhinolophus blasii*

*Rhinolophus euryale*

*Rhinolophus ferrumequinum*

*Rhinolophus hipposideros*

*Rhinolophus mehelyi*

Vespertilionidae

*Barbastella barbastellus*

*Miniopterus schreibersii*

*Myotis bechsteinii*

*Myotis blythii*

*Myotis capaccinii*

*Myotis dasycneme*

*Myotis emarginatus*

*Myotis myotis*

Pteropodidae

*Rousettus aegyptiacus*

RODENTIA

Gliridae

▼**M3**

*Myomimus roachi*

Sciuridae

* *Marmota marmota latirostris*

* *Pteromys volans (Sciuropterus russicus)*

*Spermophilus citellus (Citellus citellus)*

* *Spermophilus suslicus (Citellus suslicus)*

Castoridae

*Castor fiber* (except the Estonian, Latvian, Lithuanian, Finnish and Swedish populations)

Cricetidae

*Mesocricetus newtoni*

Microtidae

*Microtus cabrerae*

* *Microtus oeconomus arenicola*

* *Microtus oeconomus mehelyi*

*Microtus tatricus*

Zapodidae

*Sicista subtilis*

CARNIVORA

Canidae

* *Alopex lagopus*

* *Canis lupus* (except the Estonian population; Greek populations: only south of the 39th parallel; Spanish populations: only those south of the Duero; Latvian, Lithuanian and Finnish populations).

Ursidae

* *Ursus arctos* (except the Estonian, Finnish, and Swedish populations)

Mustelidae

* *Gulo gulo*

*Lutra lutra*

*Mustela eversmanii*

* *Mustela lutreola*

*Vormela peregusna*

Felidae

*Lynx lynx* (except the Estonian, Latvian and Finnish populations)

* *Lynx pardinus*

Phocidae

*Halichoerus grypus* (V)

* *Monachus monachus*

*Phoca hispida bottnica* (V)

* *Phoca hispida saimensis*

*Phoca vitulina* (V)

ARTIODACTYLA

Cervidae

* *Cervus elaphus corsicanus*

*Rangifer tarandus fennicus* (o)

▼**M3**

Bovidae

* *Bison bonasus*

*Capra aegagrus* (natural populations)

* *Capra pyrenaica pyrenaica*

*Ovis gmelini musimon (Ovis ammon musimon)* (natural populations — Corsica and Sardinia)

*Ovis orientalis ophion (Ovis gmelini ophion)*

* *Rupicapra pyrenaica ornata(Rupicapra rupicapra ornata)*

*Rupicapra rupicapra balcanica*

* *Rupicapra rupicapra tatrica*

CETACEA

*Phocoena phocoena*

*Tursiops truncatus*

**REPTILES**

CHELONIA (TESTUDINES)

Testudinidae

*Testudo graeca*

*Testudo hermanni*

*Testudo marginata*

Cheloniidae

* *Caretta caretta*

* *Chelonia mydas*

Emydidae

*Emys orbicularis*

*Mauremys caspica*

*Mauremys leprosa*

SAURIA

Lacertidae

*Lacerta bonnali (Lacerta monticola)*

*Lacerta monticola*

*Lacerta schreiberi*

*Gallotia galloti insulanagae*

* *Gallotia simonyi*

*Podarcis lilfordi*

*Podarcis pityusensis*

Scincidae

*Chalcides simonyi (Chalcides occidentalis)*

Gekkonidae

*Phyllodactylus europaeus*

OPHIDIA (SERPENTES)

Colubridae

* *Coluber cypriensis*

*Elaphe quatuorlineata*

*Elaphe situla*

* *Natrix natrix cypriaca*

▼**M3**

Viperidae

* *Macrovipera schweizeri (Vipera lebetina schweizeri)*

*Vipera ursinii (*except *Vipera ursinii rakosiensis)*

* *Vipera ursinii rakosiensis*

**AMPHIBIANS**

CAUDATA

Salamandridae

*Chioglossa lusitanica*

*Mertensiella luschani (Salamandra luschani)*

* *Salamandra aurorae (Salamandra atra aurorae)*

*Salamandrina terdigitata*

*Triturus carnifex (Triturus cristatus carnifex)*

*Triturus cristatus (Triturus cristatus cristatus)*

*Triturus dobrogicus (Triturus cristatus dobrogicus)*

*Triturus karelinii (Triturus cristatus karelinii)*

*Triturus montandoni*

*Triturus vulgaris ampelensis*

Proteidae

* *Proteus anguinus*

Plethodontidae

*Hydromantes (Speleomantes) ambrosii*

*Hydromantes (Speleomantes) flavus*

*Hydromantes (Speleomantes) genei*

*Hydromantes (Speleomantes) imperialis*

*Hydromantes (Speleomantes) strinatii*

*Hydromantes (Speleomantes) supramontis*

ANURA

Discoglossidae

* *Alytes muletensis*

*Bombina bombina*

*Bombina variegata*

*Discoglossus galganoi(including Discoglossus 'jeanneae')*

*Discoglossus montalentii*

*Discoglossus sardus*

Ranidae

*Rana latastei*

Pelobatidae

* *Pelobates fuscus insubricus*

**FISH**

PETROMYZONIFORMES

Petromyzonidae

*Eudontomyzon spp.* (o)

*Lampetra fluviatilis* (V) (except the Finnish and Swedish populations)

*Lampetra planeri* (o) (except the Estonian, Finnish, and Swedish populations)

▼**M3**

*Lethenteron zanandreai* (V)

*Petromyzon marinus* (o) (except the Swedish populations)

ACIPENSERIFORMES

Acipenseridae

* *Acipenser naccarii*

* *Acipenser sturio*

CLUPEIFORMES

Clupeidae

*Alosaspp.* (V)

SALMONIFORMES

Salmonidae

*Hucho hucho* (natural populations) (V)

*Salmo macrostigma* (o)

*Salmo marmoratus* (o)

*Salmo salar (only in fresh water)* (V) (except the Finnish populations)

Coregonidae

* *Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea)

Umbridae

*Umbra krameri* (o)

CYPRINIFORMES

Cyprinidae

*Alburnus albidus* (o) *(Alburnus vulturius)*

*Anaecypris hispanica*

*Aspius aspius* (V) (except the Finnish populations)

*Barbus comiza* (V)

*Barbus meridionalis* (V)

*Barbus plebejus* (V)

*Chalcalburnus chalcoides* (o)

*Chondrostoma genei* (o)

*Chondrostoma lusitanicum* (o)

*Chondrostoma polylepis* (o) *(including C. willkommi)*

*Chondrostoma soetta* (o)

*Chondrostoma toxostoma* (o)

*Gobio albipinnatus* (o)

*Gobio kessleri* (o)

*Gobio uranoscopus* (o)

*Iberocypris palaciosi* (o)

* *Ladigesocypris ghigii* (o)

*Leuciscus lucumonis* (o)

*Leuciscus souffia* (o)

*Pelecus cultratus* (V)

*Phoxinellus spp.* (o)

* *Phoxinus percnurus*

*Rhodeus sericeus amarus* (o)

▼**M3**

*Rutilus pigus* (V)

*Rutilus rubilio* (o)

*Rutilus arcasii* (o)

*Rutilus macrolepidotus* (o)

*Rutilus lemmingii* (o)

*Rutilus frisii meidingeri* (V)

*Rutilus alburnoides* (o)

*Scardinius graecus* (o)

Cobitidae

*Cobitis elongata* (o)

*Cobitis taenia* (o) (except the Finnish populations)

*Cobitis trichonica* (o)

*Misgurnus fossilis* (o)

*Sabanejewia aurata* (o)

*Sabanejewia larvata* (o) *(Cobitis larvata* and *Cobitis conspersa)*

SILURIFORMES

Siluridae

*Silurus aristotelis* (V)

ATHERINIFORMES

Cyprinodontidae

*Aphanius iberus* (o)

*Aphanius fasciatus* (o)

* *Valencia hispanica*

* *Valencia letourneuxi (Valencia hispanica)*

PERCIFORMES

Percidae

*Gymnocephalus baloni*

*Gymnocephalus schraetzer* (V)

* *Romanichthys valsanicola*

*Zingel spp. (*(o) except *Zingel asper* and *Zingel zingel* (V)*)*

Gobiidae

*Knipowitschia (Padogobius) panizzae* (o)

*Padogobius nigricans* (o)

*Pomatoschistus canestrini* (o)

SCORPAENIFORMES

Cottidae

*Cottus gobio* (o) (except the Finnish populations)

*Cottus petiti* (o)

*INVERTEBRATES*

**ARTHROPODS**

CRUSTACEA

Decapoda

*Austropotamobius pallipes* (V)

* *Austropotamobius torrentium* (V)

▼**M3**

Isopoda

* *Armadillidium ghardalamensis*

INSECTA

Coleoptera

*Agathidium pulchellum* (o)

*Bolbelasmus unicornis*

*Boros schneideri* (o)

*Buprestis splendens*

*Carabus hampei*

*Carabus hungaricus*

* *Carabus menetriesi pacholei*

* *Carabus olympiae*

*Carabus variolosus*

*Carabus zawadszkii*

*Cerambyx cerdo*

*Corticaria planula* (o)

*Cucujus cinnaberinus*

*Dorcadion fulvum cervae*

*Duvalius gebhardti*

*Duvalius hungaricus*

*Dytiscus latissimus*

*Graphoderus bilineatus*

*Leptodirus hochenwarti*

*Limoniscus violaceus* (o)

*Lucanus cervus* (o)

*Macroplea pubipennis* (o)

*Mesosa myops* (o)

*Morimus funereus* (o)

* *Osmoderma eremita*

*Oxyporus mannerheimii* (o)

*Pilemia tigrina*

* *Phryganophilus ruficollis*

*Probaticus subrugosus*

*Propomacrus cypriacus*

* *Pseudogaurotina excellens*

*Pseudoseriscius cameroni*

*Pytho kolwensis*

*Rhysodes sulcatus* (o)

* *Rosalia alpina*

*Stephanopachys linearis* (o)

*Stephanopachys substriatus* (o)

*Xyletinus tremulicola* (o)

Hemiptera

*Aradus angularis* (o)

▼**M3**

Lepidoptera

*Agriades glandon aquilo* (o)

*Arytrura musculus*

* *Callimorpha (Euplagia, Panaxia) quadripunctaria* (o)

*Catopta thrips*

*Chondrosoma fiduciarium*

*Clossiana improba* (o)

*Coenonympha oedippus*

*Colias myrmidone*

*Cucullia mixta*

*Dioszeghyana schmidtii*

*Erannis ankeraria*

*Erebia calcaria*

*Erebia christi*

*Erebia medusa polaris* (o)

*Eriogaster catax*

*Euphydryas (Eurodryas, Hypodryas) aurinia* (o)

*Glyphipterix loricatella*

*Gortyna borelii lunata*

*Graellsia isabellae* (V)

*Hesperia comma catena* (o)

*Hypodryas maturna*

*Leptidea morsei*

*Lignyoptera fumidaria*

*Lycaena dispar*

*Lycaena helle*

*Maculinea nausithous*

*Maculinea teleius*

*Melanargia arge*

* *Nymphalis vaualbum*

*Papilio hospiton*

*Phyllometra culminaria*

*Plebicula golgus*

*Polymixis rufocincta isolata*

*Polyommatus eroides*

*Pseudophilotes bavius*

*Xestia borealis* (o)

*Xestia brunneopicta* (o)

* *Xylomoia strix*

Mantodea

*Apteromantis aptera*

Odonata

*Coenagrion hylas* (o)

*Coenagrion mercuriale* (o)

▼**M3**

*Coenagrion ornatum* (o)

*Cordulegaster heros*

*Cordulegaster trinacriae*

*Gomphus graslinii*

*Leucorrhinia pectoralis*

*Lindenia tetraphylla*

*Macromia splendens*

*Ophiogomphus cecilia*

*Oxygastra curtisii*

Orthoptera

*Baetica ustulata*

*Brachytrupes megacephalus*

*Isophya costata*

*Isophya harzi*

*Isophya stysi*

*Myrmecophilus baronii*

*Odontopodisma rubripes*

*Paracaloptenus caloptenoides*

*Pholidoptera transsylvanica*

*Stenobothrus (Stenobothrodes) eurasius*

ARACHNIDA

Pseudoscorpiones

*Anthrenochernes stellae* (o)

**MOLLUSCS**

GASTROPODA

*Anisus vorticulus*

*Caseolus calculus*

*Caseolus commixta*

*Caseolus sphaerula*

*Chilostoma banaticum*

*Discula leacockiana*

*Discula tabellata*

*Discus guerinianus*

*Elona quimperiana*

*Geomalacus maculosus*

*Geomitra moniziana*

*Gibbula nivosa*

* *Helicopsis striata austriaca* (o)

*Hygromia kovacsi*

*Idiomela (Helix) subplicata*

*Lampedusa imitatrix*

* *Lampedusa melitensis*

*Leiostyla abbreviata*

*Leiostyla cassida*

▼**M3**

*Leiostyla corneocostata*

*Leiostyla gibba*

*Leiostyla lamellosa*

* *Paladilhia hungarica*

*Sadleriana pannonica*

*Theodoxus transversalis*

*Vertigo angustior* (o)

*Vertigo genesii* (o)

*Vertigo geyeri* (o)

*Vertigo moulinsiana* (o)

BIVALVIA

Unionoida

*Margaritifera durrovensis (Margaritifera margaritifera)* (V)

*Margaritifera margaritifera* (V)

*Unio crassus*

Dreissenidae

*Congeria kusceri*

(b) ***PLANTS***

**PTERIDOPHYTA**

ASPLENIACEAE

*Asplenium jahandiezii* (Litard.) Rouy

*Asplenium adulterinum* Milde

BLECHNACEAE

*Woodwardia radicans* (L.) Sm.

DICKSONIACEAE

*Culcita macrocarpa* C. Presl

DRYOPTERIDACEAE

*Diplazium sibiricum* (Turcz. ex Kunze) Kurata

* *Dryopteris corleyi* Fraser-Jenk.

*Dryopteris fragans* (L.) Schott

HYMENOPHYLLACEAE

*Trichomanes speciosum* Willd.

ISOETACEAE

*Isoetes boryana* Durieu

*Isoetes malinverniana* Ces. & De Not.

MARSILEACEAE

*Marsilea batardae* Launert

*Marsilea quadrifolia* L.

*Marsilea strigosa* Willd.

OPHIOGLOSSACEAE

*Botrychium simplex* Hitchc.

*Ophioglossum polyphyllum* A. Braun

**GYMNOSPERMAE**

PINACEAE

▼**M3**

* *Abies nebrodensis* (Lojac.) Mattei

**ANGIOSPERMAE**

ALISMATACEAE

* *Alisma wahlenbergii* (Holmberg) Juz.

*Caldesia parnassifolia* (L.) Parl.

*Luronium natans* (L.) Raf.

AMARYLLIDACEAE

*Leucojum nicaeense* Ard.

*Narcissus asturiensis* (Jordan) Pugsley

*Narcissus calcicola* Mendonça

*Narcissus cyclamineus* DC.

*Narcissus fernandesii* G. Pedro

*Narcissus humilis* (Cav.) Traub

* *Narcissus nevadensis* Pugsley

*Narcissus pseudonarcissus* L. subsp. *nobilis* (Haw.) A. Fernandes

*Narcissus scaberulus* Henriq.

*Narcissus triandrus* L. subsp. *capax* (Salisb.) D. A. Webb.

*Narcissus viridiflorus* Schousboe

ASCLEPIADACEAE

*Vincetoxicum pannonicum* (Borhidi) Holub

BORAGINACEAE

* *Anchusa crispa* Viv.

*Echium russicum* J.F.Gemlin

* *Lithodora nitida* (H. Ern) R. Fernandes

*Myosotis lusitanica* Schuster

*Myosotis rehsteineri* Wartm.

*Myosotis retusifolia* R. Afonso

*Omphalodes kuzinskyanae* Willk.

* *Omphalodes littoralis* Lehm.

* *Onosma tornensis* Javorka

*Solenanthus albanicus* (Degen & al.) Degen & Baldacci

* *Symphytum cycladense* Pawl.

CAMPANULACEAE

*Adenophora lilifolia* (L.) Ledeb.

*Asyneuma giganteum* (Boiss.) Bornm.

* *Campanula bohemica* Hruby

* *Campanula gelida* Kovanda

*Campanula romanica* Săvul.

* *Campanula sabatia* De Not.

* *Campanula serrata* (Kit.) Hendrych

*Campanula zoysii* Wulfen

*Jasione crispa* (Pourret) Samp. subsp. *serpentinica* Pinto da Silva

*Jasione lusitanica* A. DC.

CARYOPHYLLACEAE

▼**M3**

*Arenaria ciliata* L. subsp. *pseudofrigida* Ostenf. & O.C. Dahl

*Arenaria humifusa* Wahlenberg

* *Arenaria nevadensis* Boiss. & Reuter

*Arenaria provincialis* Chater & Halliday

* *Cerastium alsinifolium* Tausch *Cerastium dinaricum* G. Beck & Szysz.

*Dianthus arenarius* L. subsp. *arenarius*

* *Dianthus arenarius* subsp. *bohemicus* (Novak) O.Schwarz

*Dianthus cintranus* Boiss. & Reuter subsp. *cintranus* Boiss. & Reuter

* *Dianthus diutinus* Kit.

* *Dianthus lumnitzeri* Wiesb.

*Dianthus marizii* (Samp.) Samp.

* *Dianthus moravicus* Kovanda

* *Dianthus nitidus* Waldst. et Kit.

*Dianthus plumarius* subsp. *regis-stephani* (Rapcs.) Baksay

*Dianthus rupicola* Biv.

* *Gypsophila papillosa* P. Porta

*Herniaria algarvica* Chaudhri

* *Herniaria latifolia* Lapeyr. subsp. *litardierei* Gamis

*Herniaria lusitanica* (Chaudhri) subsp. *berlengiana* Chaudhri

*Herniaria maritima* Link

* *Minuartia smejkalii* Dvorakova

*Moehringia jankae* Griseb. ex Janka

*Moehringia lateriflora* (L.) Fenzl.

*Moehringia tommasinii* Marches.

*Moehringia villosa* (Wulfen) Fenzl

*Petrocoptis grandiflora* Rothm.

*Petrocoptis montsicciana* O. Bolos & Rivas Mart.

*Petrocoptis pseudoviscosa* Fernández Casas

*Silene furcata* Rafin. subsp. *angustiflora* (Rupr.) Walters

* *Silene hicesiae* Brullo & Signorello

*Silene hifacensis* Rouy ex Willk.

* *Silene holzmanii* Heldr. ex Boiss.

*Silene longicilia* (Brot.) Otth.

*Silene mariana* Pau

* *Silene orphanidis* Boiss

* *Silene rothmaleri* Pinto da Silva

* *Silene velutina* Pourret ex Loisel.

CHENOPODIACEAE

* *Bassia (Kochia) saxicola* (Guss.) A. J. Scott

* *Cremnophyton lanfrancoi* Brullo et Pavone

* *Salicornia veneta* Pignatti & Lausi

CISTACEAE

*Cistus palhinhae* Ingram

*Halimium verticillatum* (Brot.) Sennen

▼**M3**

*Helianthemum alypoides* Losa & Rivas Goday

*Helianthemum caput-felis* Boiss.

* *Tuberaria major* (Willk.) Pinto da Silva & Rozeira

COMPOSITAE

* *Anthemis glaberrima* (Rech. f.) Greuter

*Artemisia campestris* L. subsp. *bottnica* A.N. Lundström ex Kindb.

* *Artemisia granatensis* Boiss.

* *Artemisia laciniata* Willd.

*Artemisia oelandica* (Besser) Komaror

* *Artemisia pancicii* (Janka) Ronn.

* *Aster pyrenaeus* Desf. ex DC

* *Aster sorrentinii* (Tod) Lojac.

*Carlina onopordifolia* Besser

* *Carduus myriacanthus* Salzm. ex DC.

* *Centaurea alba* L. subsp. *heldreichii* (Halacsy) Dostal

* *Centaurea alba* L. subsp. *princeps* (Boiss. & Heldr.) Gugler

* *Centaurea akamantis* T. Georgiadis & G. Chatzikyriakou

* *Centaurea attica* Nyman subsp. *megarensis* (Halacsy & Hayek) Dostal

* *Centaurea balearica* J. D. Rodriguez

* *Centaurea borjae* Valdes-Berm. & Rivas Goday

* *Centaurea citricolor* Font Quer

*Centaurea corymbosa* Pourret

*Centaurea gadorensis* G. Blanca

* *Centaurea horrida* Badaro

*Centaurea immanuelis-loewii* Degen

*Centaurea jankae* Brandza

* *Centaurea kalambakensis* Freyn & Sint.

*Centaurea kartschiana* Scop.

* *Centaurea lactiflora* Halacsy

*Centaurea micrantha* Hoffmanns. & Link subsp. *herminii* (Rouy) Dostál

* *Centaurea niederi* Heldr.

* *Centaurea peucedanifolia* Boiss. & Orph.

* *Centaurea pinnata* Pau

*Centaurea pontica* Prodan & E. I. Nyárády

*Centaurea pulvinata* (G. Blanca) G. Blanca

*Centaurea rothmalerana* (Arènes) Dostál

*Centaurea vicentina* Mariz

*Cirsium brachycephalum* Juratzka

* *Crepis crocifolia* Boiss. & Heldr.

*Crepis granatensis* (Willk.) B. Blanca & M. Cueto

*Crepis pusilla* (Sommier) Merxmüller

*Crepis tectorum* L. subsp. *nigrescens*

*Erigeron frigidus* Boiss. ex DC.

* *Helichrysum melitense* (Pignatti) Brullo et al

▼**M3**

*Hymenostemma pseudanthemis* (Kunze) Willd.

*Hyoseris frutescens* Brullo et Pavone

* *Jurinea cyanoides* (L.) Reichenb.

* *Jurinea fontqueri* Cuatrec.

* *Lamyropsis microcephala* (Moris) Dittrich & Greuter

*Leontodon microcephalus* (Boiss. ex DC.) Boiss.

*Leontodon boryi* Boiss.

* *Leontodon siculus* (Guss.) Finch & Sell

*Leuzea longifolia* Hoffmanns. & Link

*Ligularia sibirica* (L.) Cass.

* *Palaeocyanus crassifolius* (Bertoloni) Dostal

*Santolina impressa* Hoffmanns. & Link

*Santolina semidentata* Hoffmanns. & Link

*Saussurea alpina* subsp. *esthonica* (Baer ex Rupr) Kupffer

* *Senecio elodes* Boiss. ex DC.

*Senecio jacobea* L. subsp. *gotlandicus* (Neuman) Sterner

*Senecio nevadensis* Boiss. & Reuter

* *Serratula lycopifolia* (Vill.) A.Kern

*Tephroseris longifolia (*Jacq.) Griseb et Schenk subsp. *moravica*

CONVOLVULACEAE

* *Convolvulus argyrothamnus* Greuter

* *Convolvulus fernandesii* Pinto da Silva & Teles

CRUCIFERAE

*Alyssum pyrenaicum* Lapeyr.

* *Arabis kennedyae* Meikle

*Arabis sadina* (Samp.) P. Cout.

*Arabis scopoliana* Boiss

* *Biscutella neustriaca* Bonnet

*Biscutella vincentina* (Samp.) Rothm.

*Boleum asperum* (Pers.) Desvaux

*Brassica glabrescens* Poldini

*Brassica hilarionis* Post

*Brassica insularis* Moris

* *Brassica macrocarpa* Guss.

*Braya linearis* Rouy

* *Cochlearia polonica* E. Fröhlich

* *Cochlearia tatrae* Borbas

* *Coincya rupestris* Rouy

* *Coronopus navasii* Pau

*Crambe tataria* Sebeok

*Diplotaxis ibicensis* (Pau) Gómez-Campo

* *Diplotaxis siettiana* Maire

*Diplotaxis vicentina* (P. Cout.) Rothm.

*Draba cacuminum* Elis Ekman

▼**M3**

*Draba cinerea* Adams

*Draba dorneri* Heuffel.

*Erucastrum palustre* (Pirona) Vis.

* *Erysimum pieninicum* (Zapal.) Pawl.

* *Iberis arbuscula* Runemark

*Iberis procumbens* Lange subsp. *microcarpa* Franco & Pinto da Silva

* *Jonopsidium acaule* (Desf.) Reichenb.

*Jonopsidium savianum* (Caruel) Ball ex Arcang.

*Rhynchosinapis erucastrum* (L.) Dandy ex Clapham subsp. *cintrana* (Coutinho) Franco & P. Silva *(Coincya cintrana* (P. Cout.) Pinto da Silva)

*Sisymbrium cavanillesianum* Valdés & Castroviejo

*Sisymbrium supinum* L.

*Thlaspi jankae* A.Kern.

CYPERACEAE

*Carex holostoma* Drejer

* *Carex panormitana* Guss.

*Eleocharis carniolica* Koch

DIOSCOREACEAE

* *Borderea chouardii* (Gaussen) Heslot

DROSERACEAE

*Aldrovanda vesiculosa* L.

ELATINACEAE

*Elatine gussonei* (Sommier) Brullo et al

ERICACEAE

*Rhododendron luteum* Sweet

EUPHORBIACEAE

* *Euphorbia margalidiana* Kuhbier & Lewejohann

*Euphorbia transtagana* Boiss.

GENTIANACEAE

* *Centaurium rigualii* Esteve

* *Centaurium somedanum* Lainz

*Gentiana ligustica* R. de Vilm. & Chopinet

*Gentianella anglica* (Pugsley) E. F. Warburg

* *Gentianella bohemica* Skalicky

GERANIACEAE

* *Erodium astragaloides* Boiss. & Reuter

*Erodium paularense* Fernández-González & Izco

* *Erodium rupicola* Boiss.

GLOBULARIACEAE

* *Globularia stygia* Orph. ex Boiss.

GRAMINEAE

*Arctagrostis latifolia* (R. Br.) Griseb.

*Arctophila fulva* (Trin.) N. J. Anderson

*Avenula hackelii* (Henriq.) Holub

*Bromus grossus* Desf. ex DC.

▼**M3**

*Calamagrostis chalybaea* (Laest.) Fries

*Cinna latifolia* (Trev.) Griseb.

*Coleanthus subtilis* (Tratt.) Seidl

*Festuca brigantina* (Markgr.-Dannenb.) Markgr.-Dannenb.

*Festuca duriotagana* Franco & R. Afonso

*Festuca elegans* Boiss.

*Festuca henriquesii* Hack.

*Festuca summilusitana* Franco & R. Afonso

*Gaudinia hispanica* Stace & Tutin

*Holcus setiglumis* Boiss. & Reuter subsp. *duriensis Pinto da Silva*

*Micropyropsis tuberosa* Romero — Zarco & Cabezudo

*Poa granitica* Br.-Bl. subsp. *disparilis* (E. I. Nyárády) E. I. Nyárády

* *Poa riphaea* (Ascher et Graebner) Fritsch

*Pseudarrhenatherum pallens* (Link) J. Holub

*Puccinellia phryganodes* (Trin.) Scribner + Merr.

*Puccinellia pungens* (Pau) Paunero

* *Stipa austroitalica* Martinovsky

* *Stipa bavarica* Martinovsky & H. Scholz

*Stipa danubialis* Dihoru & Roman

* *Stipa styriaca* Martinovsky

* *Stipa veneta* Moraldo

* *Stipa zalesskii* Wilensky

*Trisetum subalpestre* (Hartman) Neuman

GROSSULARIACEAE

* *Ribes sardoum* Martelli

HIPPURIDACEAE

*Hippuris tetraphylla* L. Fil.

HYPERICACEAE

* *Hypericum aciferum* (Greuter) N.K.B. Robson

IRIDACEAE

*Crocus cyprius* Boiss. et Kotschy

*Crocus hartmannianus* Holmboe

*Gladiolus palustris* Gaud.

*Iris aphylla* L. subsp. *hungarica* Hegi

*Iris humilis* Georgi subsp. *arenaria* (Waldst. et Kit.) A. et D.Löve

JUNCACEAE

*Juncus valvatus* Link

*Luzula arctica* Blytt

LABIATAE

*Dracocephalum austriacum* L.

* *Micromeria taygetea* P. H. Davis

*Nepeta dirphya* (Boiss.) Heldr. ex Halacsy

* *Nepeta sphaciotica* P. H. Davis

*Origanum dictamnus* L.

▼**M3**

*Phlomis brevibracteata* Turril

*Phlomis cypria* Post

*Salvia veneris* Hedge

*Sideritis cypria* Post

*Sideritis incana* subsp. *glauca* (Cav.) Malagarriga

*Sideritis javalambrensis* Pau

*Sideritis serrata* Cav. ex Lag.

*Teucrium lepicephalum* Pau

*Teucrium turredanum* Losa & Rivas Goday

* *Thymus camphoratus* Hoffmanns. & Link

*Thymus carnosus* Boiss.

* *Thymus lotocephalus* G. López & R. Morales *(Thymus cephalotos* L.*)*

LEGUMINOSAE

*Anthyllis hystrix* Cardona, Contandr. & E. Sierra

* *Astragalus algarbiensis* Coss. ex Bunge

* *Astragalus aquilanus* Anzalone

*Astragalus centralpinus* Braun-Blanquet

* *Astragalus macrocarpus* DC. subsp. *lefkarensis*

* *Astragalus maritimus* Moris

*Astragalus peterfii* Jáv.

*Astragalus tremolsianus* Pau

* *Astragalus verrucosus* Moris

* *Cytisus aeolicus* Guss. ex Lindl.

*Genista dorycnifolia* Font Quer

*Genista holopetala* (Fleischm. ex Koch) Baldacci

*Melilotus segetalis* (Brot.) Ser. subsp. *fallax Franco*

* *Ononis hackelii* Lange

*Trifolium saxatile* All.

* *Vicia bifoliolata* J.D. Rodríguez

LENTIBULARIACEAE

* *Pinguicula crystallina* Sm.

*Pinguicula nevadensis* (Lindb.) Casper

LILIACEAE

*Allium grosii* Font Quer

* *Androcymbium rechingeri* Greuter

* *Asphodelus bento-rainhae* P. Silva

* *Chionodoxa lochiae* Meikle in Kew Bull.

*Colchicum arenarium* Waldst. et Kit.

*Hyacinthoides vicentina* (Hoffmans. & Link) Rothm.

* *Muscari gussonei* (Parl.) Tod.

*Scilla litardierei* Breist.

* *Scilla morrisii* Meikle

*Tulipa cypria* Stapf

*Tulipa hungarica* Borbas

▼**M3**

LINACEAE

* *Linum dolomiticum* Borbas

* *Linum muelleri* Moris *(Linum maritimum muelleri)*

LYTHRACEAE

* *Lythrum flexuosum* Lag.

MALVACEAE

*Kosteletzkya pentacarpos* (L.) Ledeb.

NAJADACEAE

*Najas flexilis* (Willd.) Rostk. & W.L. Schmidt

*Najas tenuissima* (A. Braun) Magnus

OLEACEAE

*Syringa josikaea* Jacq. Fil. ex Reichenb.

ORCHIDACEAE

*Anacamptis urvilleana* Sommier et Caruana Gatto

*Calypso bulbosa* L.

* *Cephalanthera cucullata* Boiss. & Heldr.

*Cypripedium calceolus* L.

*Dactylorhiza kalopissii* E.Nelson

*Gymnigritella runei* Teppner & Klein

*Himantoglossum adriaticum* Baumann

*Himantoglossum caprinum* (Bieb.) V.Koch

*Liparis loeselii* (L.) Rich.

* *Ophrys kotschyi* H.Fleischm. et Soo

* *Ophrys lunulata* Parl.

*Ophrys melitensis* (Salkowski) J et P Devillers-Terschuren

*Platanthera obtusata* (Pursh) subsp. *oligantha* (Turez.) Hulten

OROBANCHACEAE

*Orobanche densiflora* Salzm. ex Reut.

PAEONIACEAE

*Paeonia cambessedesii* (Willk.) Willk.

*Paeonia clusii* F.C. Stern subsp. *rhodia* (Stearn) Tzanoudakis

*Paeonia officinalis* L. subsp. *banatica* (Rachel) Soo

*Paeonia parnassica* Tzanoudakis

PALMAE

*Phoenix theophrasti* Greuter

PAPAVERACEAE

*Corydalis gotlandica* Lidén

*Papaver laestadianum* (Nordh.) Nordh.

*Papaver radicatum* Rottb. subsp. *hyperboreum* Nordh.

PLANTAGINACEAE

*Plantago algarbiensis* Sampaio *(Plantago bracteosa* (Willk.) G. Sampaio)

*Plantago almogravensis* Franco

PLUMBAGINACEAE

*Armeria berlengensis* Daveau

▼**M3**

* *Armeria helodes* Martini & Pold

*Armeria neglecta* Girard

*Armeria pseudarmeria* (Murray) Mansfeld

* *Armeria rouyana* Daveau

*Armeria soleirolii* (Duby) Godron

*Armeria velutina* Welw. ex Boiss. & Reuter

*Limonium dodartii* (Girard) O. Kuntze subsp. *lusitanicum* (Daveau) Franco

* *Limonium insulare* (Beg. & Landi) Arrig. & Diana

*Limonium lanceolatum* (Hoffmans. & Link) Franco

*Limonium multiflorum* Erben

* *Limonium pseudolaetum* Arrig. & Diana

* *Limonium strictissimum* (Salzmann) Arrig.

POLYGONACEAE

*Persicaria foliosa* (H. Lindb.) Kitag.

*Polygonum praelongum* Coode & Cullen

*Rumex rupestris* Le Gall

PRIMULACEAE

*Androsace mathildae* Levier

*Androsace pyrenaica* Lam.

* *Cyclamen fatrense* Halda et Sojak

* *Primula apennina* Widmer

*Primula carniolica* Jacq.

*Primula nutans* Georgi

*Primula palinuri* Petagna

*Primula scandinavica* Bruun

*Soldanella villosa* Darracq.

RANUNCULACEAE

* *Aconitum corsicum* Gayer *(Aconitum napellus* subsp. *corsicum)*

*Aconitum firmum* (Reichenb.) Neilr subsp. *moravicum* Skalicky

*Adonis distorta* Ten.

*Aquilegia bertolonii* Schott

*Aquilegia kitaibelii* Schott

* *Aquilegia pyrenaica* D.C. subsp. *cazorlensis* (Heywood) Galiano

* *Consolida samia* P.H. Davis

* *Delphinium caseyi* B.L.Burtt

*Pulsatilla grandis* Wenderoth *Pulsatilla patens* (L.) Miller

* *Pulsatilla pratensis* (L.) Miller subsp. *hungarica* Soo

* *Pulsatilla slavica* G.Reuss.

* *Pulsatilla subslavica* Futak ex Goliasova

*Pulsatilla vulgaris* Hill. subsp. *gotlandica* (Johanss.) Zaemelis & Paegle

*Ranunculus kykkoensis* Meikle

*Ranunculus lapponicus* L.

* *Ranunculus weyleri* Mares

RESEDACEAE

▼**M3**

**Reseda decursiva Forssk.*

ROSACEAE

*Agrimonia pilosa* Ledebour

*Potentilla delphinensis* Gren. & Godron

*Potentilla emilii-popii* Nyárády

* *Pyrus magyarica* Terpo

*Sorbus teodorii* Liljefors

RUBIACEAE

*Galium cracoviense* Ehrend.

* *Galium litorale* Guss.

*Galium moldavicum* (Dobrescu) Franco

* *Galium sudeticum* Tausch

* *Galium viridiflorum* Boiss. & Reuter

SALICACEAE

*Salix salvifolia* Brot. subsp. *australis* Franco

SANTALACEAE

*Thesium ebracteatum* Hayne

SAXIFRAGACEAE

*Saxifraga berica* (Beguinot) D.A. Webb

*Saxifraga florulenta* Moretti

*Saxifraga hirculus* L.

*Saxifraga osloënsis* Knaben

*Saxifraga tombeanensis* Boiss. ex Engl.

SCROPHULARIACEAE

*Antirrhinum charidemi* Lange

*Chaenorrhinum serpyllifolium* (Lange) Lange subsp. *lusitanicum* R. Fernandes

* *Euphrasia genargentea* (Feoli) Diana

*Euphrasia marchesettii* Wettst. ex Marches.

*Linaria algarviana* Chav.

*Linaria coutinhoi* Valdés

*Linaria loeselii* Schweigger

* *Linaria ficalhoana* Rouy

*Linaria flava* (Poiret) Desf.

* *Linaria hellenica* Turrill

*Linaria pseudolaxiflora* Lojacono

* *Linaria ricardoi* Cout.

*Linaria tonzigii* Lona

* *Linaria tursica* B. Valdés & Cabezudo

*Odontites granatensis* Boiss.

* *Pedicularis sudetica Willd.*

*Rhinanthus oesilensis* (Ronniger & Saarsoo) Vassilcz

*Tozzia carpathica* Wol.

*Verbascum litigiosum* Samp.

*Veronica micrantha* Hoffmanns. & Link

▼**M3**

* *Veronica oetaea* L.-A. Gustavsson

SOLANACEAE

**Atropa baetica* Willk.

THYMELAEACEAE

* *Daphne arbuscula* Celak

*Daphne petraea* Leybold

* *Daphne rodriguezii* Texidor

ULMACEAE

*Zelkova abelicea* (Lam.) Boiss.

UMBELLIFERAE

* *Angelica heterocarpa* Lloyd

*Angelica palustris* (Besser) Hoffm.

* *Apium bermejoi* Llorens

*Apium repens* (Jacq.) Lag.

*Athamanta cortiana* Ferrarini

* *Bupleurum capillare* Boiss. & Heldr.

* *Bupleurum kakiskalae* Greuter

*Eryngium alpinum* L.

* *Eryngium viviparum* Gay

* *Ferula sadleriana* Lebed.

*Hladnikia pastinacifolia* Reichenb.

* *Laserpitium longiradium* Boiss.

* *Naufraga balearica* Constans & Cannon

* *Oenanthe conioides* Lange

*Petagnia saniculifolia* Guss.

*Rouya polygama* (Desf.) Coincy

* *Seseli intricatum* Boiss.

*Seseli leucospermum* Waldst. et Kit

*Thorella verticillatinundata* (Thore) Briq.

VALERIANACEAE

*Centranthus trinervis* (Viv.) Beguinot

VIOLACEAE

*Viola delphinantha* Boiss.

* *Viola hispida* Lam.

*Viola jaubertiana* Mares & Vigineix

*Viola rupestris* F.W. Schmidt subsp. *relicta* Jalas

**LOWER PLANTS**

BRYOPHYTA

*Bruchia vogesiaca* Schwaegr. (o)

*Bryhnia novae-angliae* (Sull & Lesq.) Grout (o)

* *Bryoerythrophyllum campylocarpum* (C. Müll.) Crum. *(Bryoerythrophyllum machadoanum* (Sergio) M. O. Hill) (o)

*Buxbaumia viridis* (Moug.) Moug. & Nestl. (o)

*Cephalozia macounii* (Aust.) Aust. (o)

*Cynodontium suecicum* (H. Arn. & C. Jens.) I. Hag. (o)

▼M3

*Dichelyma capillaceum* (Dicks) Myr. (o)

*Dicranum viride* (Sull. & Lesq.) Lindb. (o)

*Distichophyllum carinatum* Dix. & Nich. (o)

*Drepanocladus (Hamatocaulis) vernicosus* (Mitt.) Warnst. (o)

*Encalypta mutica* (I. Hagen) (o)

*Hamatocaulis lapponicus* (Norrl.) Hedenäs (o)

*Herzogiella turfacea* (Lindb.) I. Wats. (o)

*Hygrohypnum montanum* (Lindb.) Broth. (o)

*Jungermannia handelii* (Schiffn.) Amak. (o)

*Mannia triandra* (Scop.) Grolle (o)

* *Marsupella profunda* Lindb. (o)

*Meesia longiseta* Hedw. (o)

*Nothothylas orbicularis* (Schwein.) Sull. (o)

*Ochyraea tatrensis* Vana (o)

*Orthothecium lapponicum* (Schimp.) C. Hartm. (o)

*Orthotrichum rogeri* Brid. (o)

*Petalophyllum ralfsii* (Wils.) Nees & Gott. (o)

*Plagiomnium drummondii* (Bruch & Schimp.) T. Kop. (o)

*Riccia breidleri* Jur. (o)

*Riella helicophylla* (Bory & Mont.) Mont. (o)

*Scapania massolongi* (K. Müll.) K. Müll. (o)

*Sphagnum pylaisii* Brid. (o)

*Tayloria rudolphiana* (Garov) B. & S. (o)

*Tortella rigens* (N. Alberts) (o)

**SPECIES FOR MACARONESIA**

**PTERIDOPHYTA**

HYMENOPHYLLACEAE

*Hymenophyllum maderensis* Gibby & Lovis

DRYOPTERIDACEAE

* *Polystichum drepanum* (Sw.) C. Presl.

ISOETACEAE

*Isoetes azorica* Durieu & Paiva ex Milde

MARSILEACEAE

* *Marsilea azorica* Launert & Paiva

**ANGIOSPERMAE**

ASCLEPIADACEAE

*Caralluma burchardii* N. E. Brown

* *Ceropegia chrysantha* Svent.

BORAGINACEAE

*Echium candicans* L. fil.

* *Echium gentianoides* Webb & Coincy

*Myosotis azorica* H. C. Watson

*Myosotis maritima* Hochst. in Seub.

CAMPANULACEAE

▼**M3**

* *Azorina vidalii* (H. C. Watson) Feer

*Musschia aurea* (L. f.) DC.

* *Musschia wollastonii* Lowe

CAPRIFOLIACEAE

* *Sambucus palmensis* Link

CARYOPHYLLACEAE

*Spergularia azorica* (Kindb.) Lebel

CELASTRACEAE

*Maytenus umbellata* (R. Br.) Mabb.

CHENOPODIACEAE

*Beta patula* Ait.

CISTACEAE

*Cistus chinamadensis* Banares & Romero

* *Helianthemum bystropogophyllum* Svent.

COMPOSITAE

*Andryala crithmifolia* Ait.

* *Argyranthemum lidii* Humphries

*Argyranthemum thalassophylum* (Svent.) Hump.

*Argyranthemum winterii* (Svent.) Humphries

* *Atractylis arbuscula* Svent. & Michaelis

*Atractylis preauxiana* Schultz.

*Calendula maderensis* DC.

*Cheirolophus duranii* (Burchard) Holub

*Cheirolophus ghomerytus* (Svent.) Holub

*Cheirolophus junonianus* (Svent.) Holub

*Cheirolophus massonianus* (Lowe) Hansen & Sund.

*Cirsium latifolium* Lowe

*Helichrysum gossypinum* Webb

*Helichrysum monogynum* Burtt & Sund.

*Hypochoeris oligocephala* (Svent. & Bramw.) Lack

* *Lactuca watsoniana* Trel.

* *Onopordum nogalesii* Svent.

* *Onorpordum carduelinum* Bolle

* *Pericallis hadrosoma* (Svent.) B. Nord.

*Phagnalon benettii* Lowe

*Stemmacantha cynaroides* (Chr. Son. in Buch) Ditt

*Sventenia bupleuroides* Font Quer

* *Tanacetum ptarmiciflorum* Webb & Berth

CONVOLVULACEAE

* *Convolvulus caput-medusae* Lowe

* *Convolvulus lopez-socasii* Svent.

* *Convolvulus massonii* A. Dietr.

CRASSULACEAE

*Aeonium gomeraense* Praeger

▼**M3**

*Aeonium saundersii* Bolle

*Aichryson dumosum* (Lowe) Praeg.

*Monanthes wildpretii* Banares & Scholz

*Sedum brissemoretii* Raymond-Hamet

CRUCIFERAE

* *Crambe arborea* Webb ex Christ

*Crambe laevigata* DC. ex Christ

* *Crambe sventenii* R. Petters ex Bramwell & Sund.

* *Parolinia schizogynoides* Svent.

*Sinapidendron rupestre* (Ait.) Lowe

CYPERACEAE

*Carex malato-belizii* Raymond

DIPSACACEAE

*Scabiosa nitens* Roemer & J. A. Schultes

ERICACEAE

*Erica scoparia* L. subsp. *azorica* (Hochst.) D. A. Webb

EUPHORBIACEAE

* *Euphorbia handiensis* Burchard

*Euphorbia lambii* Svent.

*Euphorbia stygiana* H. C. Watson

GERANIACEAE

* *Geranium maderense* P. F. Yeo

GRAMINEAE

*Deschampsia maderensis* (Haeck. & Born.) Buschm.

*Phalaris maderensis* (Menezes) Menezes

GLOBULARIACEAE

* *Globularia ascanii* D. Bramwell & Kunkel

* *Globularia sarcophylla* Svent.

LABIATAE

* *Sideritis cystosiphon* Svent.

* *Sideritis discolor* (Webb ex de Noe) Bolle

*Sideritis infernalis* Bolle

*Sideritis marmorea* Bolle

*Teucrium abutiloides* L'Hér.

*Teucrium betonicum* L'Hér.

LEGUMINOSAE

* *Anagyris latifolia* Brouss. ex. Willd.

*Anthyllis lemanniana* Lowe

* *Dorycnium spectabile* Webb & Berthel

* *Lotus azoricus* P. W. Ball

*Lotus callis-viridis* D. Bramwell & D. H. Davis

* *Lotus kunkelii* (E. Chueca) D. Bramwell & al.

* *Teline rosmarinifolia* Webb & Berthel.

* *Teline salsoloides* Arco & Acebes.

▼**M3**

*Vicia dennesiana* H. C. Watson

LILIACEAE

* *Androcymbium psammophilum* Svent.

*Scilla maderensis* Menezes

*Semele maderensis* Costa

LORANTHACEAE

*Arceuthobium azoricum* Wiens & Hawksw.

MYRICACEAE

* *Myrica rivas-martinezii* Santos.

OLEACEAE

*Jasminum azoricum* L.

*Picconia azorica* (Tutin) Knobl.

ORCHIDACEAE

*Goodyera macrophylla* Lowe

PITTOSPORACEAE

* *Pittosporum coriaceum* Dryand. ex. Ait.

PLANTAGINACEAE

*Plantago malato-belizii* Lawalree

PLUMBAGINACEAE

* *Limonium arborescens* (Brouss.) Kuntze

*Limonium dendroides* Svent.

**Limonium spectabile* (Svent.) Kunkel & Sunding

**Limonium sventenii* Santos & Fernández Galván

POLYGONACEAE

*Rumex azoricus* Rech. fil.

RHAMNACEAE

*Frangula azorica* Tutin

ROSACEAE

* *Bencomia brachystachya* Svent.

*Bencomia sphaerocarpa* Svent.

* *Chamaemeles coriacea* Lindl.

*Dendriopoterium pulidoi* Svent.

*Marcetella maderensis* (Born.) Svent.

*Prunus lusitanica* L. subsp. *azorica* (Mouillef.) Franco

*Sorbus maderensis* (Lowe) Dode

SANTALACEAE

*Kunkeliella subsucculenta* Kammer

SCROPHULARIACEAE

* *Euphrasia azorica* H.C. Watson

*Euphrasia grandiflora* Hochst. in Seub.

* *Isoplexis chalcantha* Svent. & O'Shanahan

*Isoplexis isabelliana* (Webb & Berthel.) Masferrer

*Odontites holliana* (Lowe) Benth.

*Sibthorpia peregrina* L.

▼**M3**

SOLANACEAE

* *Solanum lidii* Sunding

UMBELLIFERAE

*Ammi trifoliatum* (H. C. Watson) Trelease

*Bupleurum handiense* (Bolle) Kunkel

*Chaerophyllum azoricum* Trelease

*Ferula latipinna* Santos

*Melanoselinum decipiens* (Schrader & Wendl.) Hoffm.

*Monizia edulis* Lowe

*Oenanthe divaricata* (R. Br.) Mabb.

*Sanicula azorica* Guthnick ex Seub.

VIOLACEAE

*Viola paradoxa Lowe*

**LOWER PLANTS**

BRYOPHYTA

* *Echinodium spinosum* (Mitt.) Jur. (o)

* *Thamnobryum fernandesii* Sergio (o).

▼B

*ANNEX III*

**CRITERIA FOR SELECTING SITES ELIGIBLE FOR IDENTIFICATION AS SITES OF COMMUNITY IMPORTANCE AND DESIGNATION AS SPECIAL AREAS OF CONSERVATION**

STAGE 1: **Assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (including priority natural habitat types and priority species)**

A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat ►C1 type on the site. ◄

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.

C. On the basis of these criteria, Member States will classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A and B above.

STAGE 2: **Assessment of the Community importance of the sites included on the national lists**

1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance.

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both ►C1 the characteristic or unique ◄ aspect of its features and the way they are combined.

▼**M3**

*ANNEX IV*

**ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST IN NEED OF STRICT PROTECTION**

The species listed in this Annex are indicated:

— by the name of species or subspecies, or

— by the body of species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(a) ***ANIMALS***

*VERTEBRATES*

**MAMMALS**

INSECTIVORA

Erinaceidae

*Erinaceus algirus*

Soricidae

*Crocidura canariensis*

*Crocidura sicula*

Talpidae

*Galemys pyrenaicus*

MICROCHIROPTERA

All species

MEGACHIROPTERA

Pteropodidae

*Rousettus aegyptiacus*

RODENTIA

Gliridae

All species except *Glis glis* and *Eliomys quercinus*

Sciuridae

*Marmota marmota latirostris*

*Pteromys volans (Sciuropterus russicus)*

*Spermophilus citellus (Citellus citellus)*

*Spermophilus suslicus (Citellus suslicus)*

*Sciurus anomalus*

Castoridae

*Castor fiber* (except the Estonian, Latvian, Lithuanian, Polish, Finnish and Swedish, populations)

Cricetidae

*Cricetus cricetus* (except the Hungarian populations)

*Mesocricetus newtoni*

Microtidae

*Microtus cabrerae*

*Microtus oeconomus arenicola*

*Microtus oeconomus mehelyi*

*Microtus tatricus*

▼**M3**

Zapodidae

*Sicista betulina*

*Sicista subtilis*

Hystricidae

*Hystrix cristata*

CARNIVORA

Canidae

*Alopex lagopus*

*Canis lupus (*except the Greek populations north of the 39th parallel; Estonian populations, Spanish populations north of the Duero; Bulgarian, Latvian, Lithuanian, Polish, Slovak populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)

Ursidae

*Ursus arctos*

Mustelidae

*Lutra lutra*

*Mustela eversmanii*

*Mustela lutreola*

*Vormela peregusna*

Felidae

*Felis silvestris*

*Lynx lynx* (except the Estonian population)

*Lynx pardinus*

Phocidae

*Monachus monachus*

*Phoca hispida saimensis*

ARTIODACTYLA

Cervidae

*Cervus elaphus corsicanus*

Bovidae

*Bison bonasus*

*Capra aegagrus* (natural populations)

*Capra pyrenaica pyrenaica*

*Ovis gmelini musimon (Ovis ammon musimon)* (natural populations — Corsica and Sardinia)

*Ovis orientalis ophion (Ovis gmelini ophion)*

*Rupicapra pyrenaica ornata (Rupicapra rupicapra ornata)*

*Rupicapra rupicapra balcanica*

*Rupicapra rupicapra tatrica*

CETACEA

All species

**REPTILES**

TESTUDINATA

Testudinidae

*Testudo graeca*

▼**M3**

*Testudo hermanni*

*Testudo marginata*

Cheloniidae

*Caretta caretta*

*Chelonia mydas*

*Lepidochelys kempii*

*Eretmochelys imbricata*

Dermochelyidae

*Dermochelys coriacea*

Emydidae

*Emys orbicularis*

*Mauremys caspica*

*Mauremys leprosa*

SAURIA

Lacertidae

*Algyroides fitzingeri*

*Algyroides marchi*

*Algyroides moreoticus*

*Algyroides nigropunctatus*

*Gallotia atlantica*

*Gallotia galloti*

*Gallotia galloti insulanagae*

*Gallotia simonyi*

*Gallotia stehlini*

*Lacerta agilis*

*Lacerta bedriagae*

*Lacerta bonnali (Lacerta monticola)*

*Lacerta monticola*

*Lacerta danfordi*

*Lacerta dugesi*

*Lacerta graeca*

*Lacerta horvathi*

*Lacerta schreiberi*

*Lacerta trilineata*

*Lacerta viridis*

*Lacerta vivipara pannonica*

*Ophisops elegans*

*Podarcis erhardii*

*Podarcis filfolensis*

*Podarcis hispanica atrata*

*Podarcis lilfordi*

*Podarcis melisellensis*

*Podarcis milensis*

*Podarcis muralis*

▼**M3**

*Podarcis peloponnesiaca*

*Podarcis pityusensis*

*Podarcis sicula*

*Podarcis taurica*

*Podarcis tiliguerta*

*Podarcis wagleriana*

Scincidae

*Ablepharus kitaibelii*

*Chalcides bedriagai*

*Chalcides ocellatus*

*Chalcides sexlineatus*

*Chalcides simonyi (Chalcides occidentalis)*

*Chalcides viridianus*

*Ophiomorus punctatissimus*

Gekkonidae

*Cyrtopodion kotschyi*

*Phyllodactylus europaeus*

*Tarentola angustimentalis*

*Tarentola boettgeri*

*Tarentola delalandii*

*Tarentola gomerensis*

Agamidae

*Stellio stellio*

Chamaeleontidae

*Chamaeleo chamaeleon*

Anguidae

*Ophisaurus apodus*

OPHIDIA

*Colubridae*

*Coluber caspius*

*Coluber cypriensis*

*Coluber hippocrepis*

*Coluber jugularis*

*Coluber laurenti*

*Coluber najadum*

*Coluber nummifer*

*Coluber viridiflavus*

*Coronella austriaca*

*Eirenis modesta*

*Elaphe longissima*

*Elaphe quatuorlineata*

*Elaphe situla*

*Natrix natrix cetti*

*Natrix natrix corsa*

▼**M3**

*Natrix natrix cypriaca*

*Natrix tessellata*

*Telescopus falax*

Viperidae

*Vipera ammodytes*

*Macrovipera schweizeri (Vipera lebetina schweizeri)*

*Vipera seoanni* (except Spanish populations)

*Vipera ursinii*

*Vipera xanthina*

Boidae

*Eryx jaculus*

**AMPHIBIANS**

CAUDATA

Salamandridae

*Chioglossa lusitanica*

*Euproctus asper*

*Euproctus montanus*

*Euproctus platycephalus*

*Mertensiella luschani (Salamandra luschani)*

*Salamandra atra*

*Salamandra aurorae*

*Salamandra lanzai*

*Salamandrina terdigitata*

*Triturus carnifex (Triturus cristatus carnifex)*

*Triturus cristatus (Triturus cristatus cristatus)*

*Triturus italicus*

*Triturus karelinii (Triturus cristatus karelinii)*

*Triturus marmoratus*

*Triturus montandoni*

*Triturus vulgaris ampelensis*

Proteidae

*Proteus anguinus*

Plethodontidae

*Hydromantes (Speleomantes) ambrosii*

*Hydromantes (Speleomantes) flavus*

*Hydromantes (Speleomantes) genei*

*Hydromantes (Speleomantes) imperialis*

*Hydromantes (Speleomantes) strinatii (Hydromantes (Speleomantes) italicus)*

*Hydromantes (Speleomantes) supramontis*

ANURA

*Discoglossidae*

*Alytes cisternasii*

*Alytes muletensis*

*Alytes obstetricans*

▼**M3**

*Bombina bombina*

*Bombina variegata*

*Discoglossus galganoi (*including *Discoglossus 'jeanneae')*

*Discoglossus montalentii*

*Discoglossus pictus*

*Discoglossus sardus*

Ranidae

*Rana arvalis*

*Rana dalmatina*

*Rana graeca*

*Rana iberica*

*Rana italica*

*Rana latastei*

*Rana lessonae*

*Pelobatidae*

*Pelobates cultripes*

*Pelobates fuscus*

*Pelobates syriacus*

Bufonidae

*Bufo calamita*

*Bufo viridis*

Hylidae

*Hyla arborea*

*Hyla meridionalis*

*Hyla sarda*

**FISH**

ACIPENSERIFORMES

Acipenseridae

*Acipenser naccarii*

*Acipenser sturio*

SALMONIFORMES

Coregonidae

*Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea, except the Finnish populations)

CYPRINIFORMES

Cyprinidae

*Anaecypris hispanica*

*Phoxinus percnurus*

ATHERINIFORMES

Cyprinodontidae

*Valencia hispanica*

PERCIFORMES

Percidae

*Gymnocephalus baloni*

*Romanichthys valsanicola*

▼**M3**

*Zingel asper*

*INVERTEBRATES*

**ARTHROPODS**

CRUSTACEA

Isopoda

*Armadillidium ghardalamensis*

INSECTA

Coleoptera

*Bolbelasmus unicornis*

*Buprestis splendens*

*Carabus hampei*

*Carabus hungaricus*

*Carabus olympiae*

*Carabus variolosus*

*Carabus zawadszkii*

*Cerambyx cerdo*

*Cucujus cinnaberinus*

*Dorcadion fulvum cervae*

*Duvalius gebhardti*

*Duvalius hungaricus*

*Dytiscus latissimus*

*Graphoderus bilineatus*

*Leptodirus hochenwarti*

*Pilemia tigrina*

*Osmoderma eremita*

*Phryganophilus ruficollis*

*Probaticus subrugosus*

*Propomacrus cypriacus*

*Pseudogaurotina excellens*

*Pseudoseriscius cameroni*

*Pytho kolwensis*

*Rosalia alpina*

Lepidoptera

*Apatura metis*

*Arytrura musculus*

*Catopta thrips*

*Chondrosoma fiduciarium*

*Coenonympha hero*

*Coenonympha oedippus*

*Colias myrmidone*

*Cucullia mixta*

*Dioszeghyana schmidtii*

*Erannis ankeraria*

*Erebia calcaria*

▼**M3**

*Erebia christi*

*Erebia sudetica*

*Eriogaster catax*

*Fabriciana elisa*

*Glyphipterix loricatella*

*Gortyna borelii lunata*

*Hypodryas maturna*

*Hyles hippophaes*

*Leptidea morsei*

*Lignyoptera fumidaria*

*Lopinga achine*

*Lycaena dispar*

*Lycaena helle*

*Maculinea arion*

*Maculinea nausithous*

*Maculinea teleius*

*Melanargia arge*

*Nymphalis vaualbum*

*Papilio alexanor*

*Papilio hospiton*

*Parnassius apollo*

*Parnassius mnemosyne*

*Phyllometra culminaria*

*Plebicula golgus*

*Polymixis rufocincta isolata*

*Polyommatus eroides*

*Proserpinus proserpina*

*Pseudophilotes bavius*

*Xylomoia strix*

*Zerynthia polyxena*

Mantodea

*Apteromantis aptera*

Odonata

*Aeshna viridis*

*Cordulegaster heros*

*Cordulegaster trinacriae*

*Gomphus graslinii*

*Leucorrhinia albifrons*

*Leucorrhinia caudalis*

*Leucorrhinia pectoralis*

*Lindenia tetraphylla*

*Macromia splendens*

*Ophiogomphus cecilia*

*Oxygastra curtisii*

▼**M3**

*Stylurus flavipes*

*Sympecma braueri*

Orthoptera

*Baetica ustulata*

*Brachytrupes megacephalus*

*Isophya costata*

*Isophya harzi*

*Isophya stysi*

*Myrmecophilus baronii*

*Odontopodisma rubripes*

*Paracaloptenus caloptenoides*

*Pholidoptera transsylvanica*

*Saga pedo*

*Stenobothrus (Stenobothrodes) eurasius*

ARACHNIDA

Araneae

*Macrothele calpeiana*

**MOLLUSCS**

GASTROPODA

*Anisus vorticulus*

*Caseolus calculus*

*Caseolus commixta*

*Caseolus sphaerula*

*Chilostoma banaticum*

*Discula leacockiana*

*Discula tabellata*

*Discula testudinalis*

*Discula turricula*

*Discus defloratus*

*Discus guerinianus*

*Elona quimperiana*

*Geomalacus maculosus*

*Geomitra moniziana*

*Gibbula nivosa*

*Hygromia kovacsi*

*Idiomela (Helix) subplicata*

*Lampedusa imitatrix*

*Lampedusa melitensis*

*Leiostyla abbreviata*

*Leiostyla cassida*

*Leiostyla corneocostata*

*Leiostyla gibba*

*Leiostyla lamellosa*

*Paladilhia hungarica*

▼**M3**

*Patella ferruginea*

*Sadleriana pannonica*

*Theodoxus prevostianus*

*Theodoxus transversalis*

BIVALVIA

Anisomyaria

*Lithophaga lithophaga*

*Pinna nobilis*

Unionoida

*Margaritifera auricularia*

*Unio crassus*

Dreissenidae

*Congeria kusceri*

ECHINODERMATA

Echinoidea

*Centrostephanus longispinus*

(b) ***PLANTS***

Annex IV (b) contains all the plant species listed in Annex II (b) ([1]) plus those mentioned below:

**PTERIDOPHYTA**

ASPLENIACEAE

*Asplenium hemionitis* L.

**ANGIOSPERMAE**

AGAVACEAE

*Dracaena draco* (L.) L.

AMARYLLIDACEAE

*Narcissus longispathus* Pugsley

*Narcissus triandrus* L.

BERBERIDACEAE

*Berberis maderensis* Lowe

CAMPANULACEAE

*Campanula morettiana* Reichenb.

*Physoplexis comosa* (L.) Schur.

CARYOPHYLLACEAE

*Moehringia fontqueri* Pau

COMPOSITAE

*Argyranthemum pinnatifidum* (L.f.) Lowe subsp. *succulentum* (Lowe) C. J. Humphries

*Helichrysum sibthorpii* Rouy

*Picris willkommii* (Schultz Bip.) Nyman

*Santolina elegans* Boiss. ex DC.

*Senecio caespitosus* Brot.

*Senecio lagascanus* DC. subsp. *lusitanicus* (P. Cout.) Pinto da Silva

*Wagenitzia lancifolia* (Sieber ex Sprengel) Dostal

([1]) Except bryophytes in Annex II (b).

▼**M3**

CRUCIFERAE

*Murbeckiella sousae* Rothm.

EUPHORBIACEAE

*Euphorbia nevadensis* Boiss. & Reuter

GESNERIACEAE

*Jankaea heldreichii* (Boiss.) Boiss.

*Ramonda serbica* Pancic

IRIDACEAE

*Crocus etruscus* Parl.

*Iris boissieri* Henriq.

*Iris marisca* Ricci & Colasante

LABIATAE

*Rosmarinus tomentosus* Huber-Morath & Maire

*Teucrium charidemi* Sandwith

*Thymus capitellatus* Hoffmanns. & Link

*Thymus villosus* L. subsp. *villosus* L.

LILIACEAE

*Androcymbium europaeum* (Lange) K. Richter

*Bellevalia hackelli* Freyn

*Colchicum corsicum* Baker

*Colchicum cousturieri* Greuter

*Fritillaria conica* Rix

*Fritillaria drenovskii* Degen & Stoy.

*Fritillaria gussichiae* (Degen & Doerfler) Rix

*Fritillaria obliqua* Ker-Gawl.

*Fritillaria rhodocanakis* Orph. ex Baker

*Ornithogalum reverchonii* Degen & Herv.-Bass.

*Scilla beirana* Samp.

*Scilla odorata* Link

ORCHIDACEAE

*Ophrys argolica* Fleischm.

*Orchis scopulorum* Simsmerh.

*Spiranthes aestivalis* (Poiret) L. C. M. Richard

PRIMULACEAE

*Androsace cylindrica* DC.

*Primula glaucescens* Moretti

*Primula spectabilis* Tratt.

RANUNCULACEAE

*Aquilegia alpina* L.

SAPOTACEAE

*Sideroxylon marmulano* Banks ex Lowe

SAXIFRAGACEAE

*Saxifraga cintrana* Kuzinsky ex Willk.

*Saxifraga portosanctana* Boiss.

▼**M3**

*Saxifraga presolanensis* Engl.

*Saxifraga valdensis* DC.

*Saxifraga vayredana* Luizet

SCROPHULARIACEAE

*Antirrhinum lopesianum* Rothm.

*Lindernia procumbens* (Krocker) Philcox

SOLANACEAE

*Mandragora officinarum* L.

THYMELAEACEAE

*Thymelaea broterana* P. Cout.

UMBELLIFERAE

*Bunium brevifolium* Lowe

VIOLACEAE

*Viola athois* W. Becker

*Viola cazorlensis* Gandoger

▼**M3**

*ANNEX V*

**ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST WHOSE TAKING IN THE WILD AND EXPLOITATION MAY BE SUBJECT TO MANAGEMENT MEASURES**

The species listed in this Annex are indicated:

— by the name of the species or subspecies, or

— by the body of species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(a) ***ANIMALS***

*VERTEBRATES*

**MAMMALS**

RODENTIA

Castoridae

*Castor fiber (Finnish, Swedish, Latvian, Lithuanian, Estonian and Polish populations)*

Cricetidae

*Cricetus cricetus (Hungarian populations)*

CARNIVORA

Canidae

*Canis aureus*

*Canis lupus (Spanish populations north of the Duero, Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management, Bulgarian, Latvian, Lithuanian, Estonian, Polish and Slovak populations)*

Mustelidae

*Martes martes*

*Mustela putorius*

Felidae

*Lynx lynx (Estonian population)*

Phocidae

*All species not mentioned in Annex IV*

Viverridae

*Genetta genetta*

*Herpestes ichneumon*

DUPLICIDENTATA

Leporidae

*Lepus timidus*

ARTIODACTYLA

Bovidae

*Capra ibex*

*Capra pyrenaica (exceptCapra pyrenaica pyrenaica)*

*Rupicapra rupicapra (exceptRupicapra rupicapra balcanica,Rupicapra rupicapra ornata andRupicapra rupicapra tatrica)*

▼**M3**

**AMPHIBIANS**

ANURA

Ranidae

*Rana esculenta*

*Rana perezi*

*Rana ridibunda*

*Rana temporaria*

**FISH**

PETROMYZONIFORMES

Petromyzonidae

*Lampetra fluviatilis*

*Lethenteron zanandrai*

ACIPENSERIFORMES

Acipenseridae

*All species not mentioned in Annex IV*

CLUPEIFORMES

Clupeidae

*Alosa spp.*

SALMONIFORMES

Salmonidae

*Thymallus thymallus*

*Coregonus spp. (exceptCoregonus oxyrhynchus — anadromous populations in certain sectors of the North Sea)*

*Hucho hucho*

*Salmo salar (only in fresh water)*

CYPRINIFORMES

Cyprinidae

*Aspius aspius*

*Barbus spp.*

*Pelecus cultratus*

*Rutilus friesii meidingeri*

*Rutilus pigus*

SILURIFORMES

Siluridae

*Silurus aristotelis*

PERCIFORMES

Percidae

*Gymnocephalus schraetzer*

*Zingel zingel*

*INVERTEBRATES*

**COELENTERATA**

CNIDARIA

*Corallium rubrum*

▼**M3**

**MOLLUSCA**

GASTROPODA — STYLOMMATOPHORA

*Helix pomatia*

BIVALVIA — UNIONOIDA

Margaritiferidae

*Margaritifera margaritifera*

Unionidae

*Microcondylaea compressa*

*Unio elongatulus*

**ANNELIDA**

HIRUDINOIDEA — ARHYNCHOBDELLAE

*Hirudinidae*

*Hirudo medicinalis*

**ARTHROPODA**

CRUSTACEA — DECAPODA

Astacidae

*Astacus astacus*

*Austropotamobius pallipes*

*Austropotamobius torrentium*

Scyllaridae

*Scyllarides latus*

INSECTA — LEPIDOPTERA

Saturniidae

*Graellsia isabellae*

(b) ***PLANTS***

**ALGAE**

RHODOPHYTA

CORALLINACEAE

*Lithothamnium coralloides* Crouan frat.

*Phymatholithon calcareum* (Poll.) Adey & McKibbin

**LICHENES**

CLADONIACEAE

*Cladonia* L. subgenus *Cladina* (Nyl.) Vain.

**BRYOPHYTA**

MUSCI

LEUCOBRYACEAE

*Leucobryum glaucum* (Hedw.) AAngstr.

SPHAGNACEAE

*Sphagnum* L. spp. (except *Sphagnum pylaisii* Brid.)

**PTERIDOPHYTA**

*Lycopodium spp.*

**ANGIOSPERMAE**

AMARYLLIDACEAE

*Galanthus nivalis* L.

▼**M3**

*Narcissus bulbocodium* L.

*Narcissus juncifolius* Lagasca

COMPOSITAE

*Arnica montana* L.

*Artemisia eriantha* Tem

*Artemisia genipi* Weber

*Doronicum plantagineum* L. subsp. *tournefortii* (Rouy) P. Cout.

*Leuzea rhaponticoides* Graells

CRUCIFERAE

*Alyssum pintadasilvae* Dudley.

*Malcolmia lacera* (L.) DC. subsp. *graccilima* (Samp.) Franco

*Murbeckiella pinnatifida* (Lam.) Rothm. subsp. *herminii* (Rivas-Martinez) Greuter & Burdet

GENTIANACEAE

*Gentiana lutea* L.

IRIDACEAE

*Iris lusitanica* Ker-Gawler

LABIATAE

*Teucrium salviastrum* Schreber subsp. *salviastrum* Schreber

LEGUMINOSAE

*Anthyllis lusitanica* Cullen & Pinto da Silva

*Dorycnium pentaphyllum* Scop. subsp. *transmontana* Franco

*Ulex densus* Welw. ex Webb.

LILIACEAE

*Lilium rubrum* Lmk

*Ruscus aculeatus* L.

PLUMBAGINACEAE

*Armeria sampaio* (Bernis) Nieto Feliner

ROSACEAE

*Rubus genevieri* Boreau subsp. *herminii* (Samp.) P. Cout.

SCROPHULARIACEAE

*Anarrhinum longipedicelatum* R. Fernandes

*Euphrasia mendonçae* Samp.

*Scrophularia grandiflora* DC. subsp. *grandiflora* DC.

*Scrophularia berminii* Hoffmanns & Link

*Scrophularia sublyrata* Brot.

▼B

*ANNEX VI*

**PROHIBITED METHODS AND MEANS OF CAPTURE AND KILLING AND MODES OF TRANSPORT**

(a) **Non-selective means**

MAMMALS

— Blind or mutilated animals used as live decoys

— Tape recorders

— Electrical and electronic devices capable of killing or stunning

— Artificial light sources

— Mirrors and other dazzling devices

— Devices for illuminating targets

— Sighting devices for night shooting comprising an electronic image magnifier or image converter

— Explosives

— Nets which are non-selective according to their principle or their conditions of use

— Traps which are non-selective according to their principle or their conditions of use

— Crossbows

— Poisons and poisoned or anaesthetic bait

— Gassing or smoking out

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

FISH

— Poison

— Explosives

(b) **Modes of transport**

— Aircraft

— Moving motor vehicles

II

*(Acts whose publication is not obligatory)*

# COUNCIL

## COUNCIL DECISION

**of 3 December 1981**

**concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats**

(82/72/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Whereas a programme of action of the European Communities on the environment was adopted by the declaration of 22 November 1973 (3), and supplemented by the resolution of 17 May 1977 (4); whereas the aim of an environment policy in the Community, as defined in these acts, is to improve the setting and quality of life and the surroundings and living conditions of the peoples of the Community; whereas to this end it is, in particular, necessary to ensure the sound management of resources and of the natural environment and avoid any exploitation of them which causes significant damage to the ecological balance; whereas, further, common solutions to environment problems with States outside the Community should be sought, particularly in international organizations;

Whereas, as part of the Community programme of action on the environment, the Council adopted Directive 79/409/EEC on the conservation of wild birds (5), which covers the protection, management and control of these species and lays down rules for their exploitation;

Whereas the Community has participated in negotiations within the Council of Europe for a Convention on the conservation of European wildlife and natural habitats; whereas that Convention was signed on 19 September 1979;

Whereas participation by the Community in the implementation of the said Convention is necessary in order to attain one of the objectives of the Community; whereas the powers necessary for this end are not provided for by the Treaty, other than Article 235 thereof;

Whereas the Community will take part in such implementation by exercising the powers resulting from existing common rules and those acquired by it by virtue of future acts adopted by the Council as well as by making use of the results of Community action (research — exchange of information) undertaken in the areas concerned;

Whereas it is necessary for the Community to approve the said Convention;

(1) OJ No C 175, 14. 7. 1980, p. 17.
(2) OJ No C 53, 3. 3. 1980, p. 50.
(3) OJ No C 112, 20. 12. 1973, p. 1.
(4) OJ No C 139, 13. 6. 1977, p. 1.
(5) OJ No L 103, 25. 4. 1979, p. 1.

Whereas the conditions of life for wild flora and fauna in Greenland are fundamentally different from those of wild flora and fauna in the other regions of the Community because of the general circumstances and in particular the climate, the low density of population and the exceptional size and geographical situation of the island; whereas, because of this fact, the Council has already had to exclude Greenland from the scope of the Directive on the conservation of wild birds; whereas therefore Greenland should also be excluded from the scope of the Convention,

HAS DECIDED AS FOLLOWS:

*Article 1*

The Convention on the conservation of European wildlife and natural habitats is hereby approved on behalf of the European Economic Community.

The text of the Convention is annexed to this Decision.

*Article 2*

The President of the Council shall deposit the instrument of approval as provided for in Article 19 of the Convention (1) for the territories in which the Treaty establishing the European Economic Community is applied under the conditions laid down in that Treaty, with the exception of Greenland.

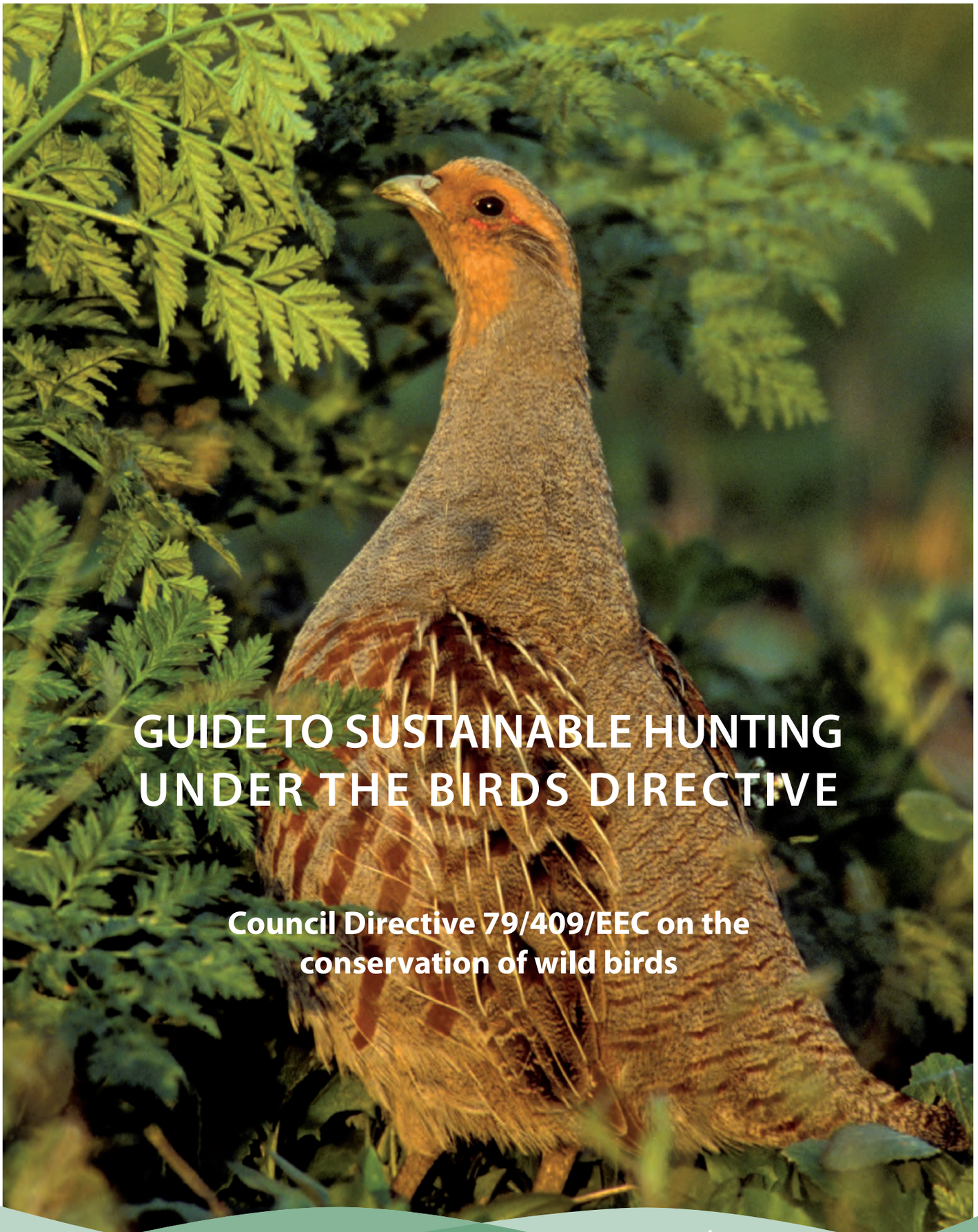
Done at Brussels, 3 December 1981.

*For the Council*

*The President*

T. KING

(1) The date of entry into force of the Convention will be published in the *Official Journal of the European Communities* by the General Secretariat of the Council.



# GUIDE TO SUSTAINABLE HUNTING UNDER THE BIRDS DIRECTIVE

## Council Directive 79/409/EEC on the conservation of wild birds

nature

EUROPEAN COMMISSION

environment

Birds_directive5framed.indd 1 9/12/2008 11:19:23

Cover picture © Eugène Reiter, FACE

Cover_credit.indd 1 6/01/2009 16:41:42

# Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"

Birds_directive5framed.indd 3 9/12/2008 11:19:23

# "Guidance document on Hunting under the Birds Directive"


*FOREWORD* ..... *4*

*1 INTRODUCTION* ..... *7*

**1.1 Hunting within the Overall Scheme of the Directive** ..... **7**

**1.2 Preamble** ..... **7**

**1.3 Species Covered by the Directive** ..... **7**

**1.4 General Orientation of Directive** ..... **8**

**1.5 Conservation of Habitats** ..... **9**

**1.6 Basic Species Protection Prohibitions** ..... **11**

**1.7 Exceptions to Basic Prohibitions** ..... **11**

**1.8 Research** ..... **12**

**1.9 Introduction of Non-naturally occurring Bird Species** ..... **13**

**1.10 Reporting** ..... **13**

**1.11 Stand-Still Clause** ..... **14**

**1.12 Possibility of Stricter National Measures** ..... **14**

**1.13 Adapting the Directive** ..... **14**

*2 PROVISIONS OF ARTICLE 7* ..... *16*

**2.1 Introduction** ..... **16**

**2.2 Formal considerations** ..... **17**

**2.3 Huntable species** ..... **17**

Rationale for allowing hunting ..... 17

Which species can be hunted? ..... 17

**2.4 General principles and criteria to be respected in hunting** ..... **18**

Non jeopardisation of conservation efforts in area of distribution ..... 18

Wise Use ..... 18

Ecologically balanced control ..... 25

**2.5 Specific conditions related to fixing hunting seasons** ..... **26**

The Key concepts work: reproduction and pre-nuptial migration periods ..... 26

**2.6 Assuring a system of complete protection where staggered opening and closing dates are considered** ..... **29**

Risk of confusion ..... 30

Risk of disturbance ..... 31

What conditions need to be met if a Member States wants to avail of staggered opening and/or closing dates for hunting under Article 7(4) of the Directive? ..... 34

**2.7 Overlaps analysis** ..... **35**

*3 PROVISIONS OF ARTICLE 9* ..... *41*

**3.1 Introduction** ..... **41**

**3.2 Formal legal considerations ..... 42**

**3.3 Ensuring that Overall Conditions for Derogations are Satisfied ..... 44**

**3.4 First Condition for Derogations: Showing there is 'No other Satisfactory Solution' ..... 45**

General Considerations ..... 45
"No Other Satisfactory Solution" In Relation to Hunting ..... 48
Possible objectively verifiable factors and scientific and technical considerations ..... 50

**3.5 Second Condition for Derogations: Demonstrating One of the Reasons Allowed Under Article 9(1)(a) (b) and (c) ..... 55**

Article 9(1)(a) derogations ..... 55
Article 9(1)(b) Derogations ..... 58
Article 9(1)(c) Derogations ..... 58

**3.6 Third Condition for Derogations: Satisfying Precise Formal Conditions Set Out in Article 9(2) ..... 67**

Taking Account of Each of the Formal Conditions ..... 67
Authorisations to a General Category of Person ..... 68

**3.7 Article 9.3 and 4 ..... 69**

***4 FIGURES ..... 73***

***5 ANNEX ..... 93***

# FOREWORD

Council Directive 79/409/EEC on the conservation of wild birds[1] (the so-called "Birds Directive") provides a common framework for the conservation of naturally occurring species of wild birds and their habitats throughout the European Union. The directive owes its origin to the fact that wild birds, which are mainly migratory, represent a shared heritage of the Member States and whose effective protection is typically a transfrontier problem entailing common responsibilities.

The Birds Directive fully recognises the legitimacy of hunting of wild birds as a form of sustainable use. Hunting is an activity that provides significant social, cultural, economic and environmental benefits in different regions of the European Union. It is limited to certain species, listed in the Directive, which also provides a series of ecological principles and legal requirements relating to this activity, to be implemented through Member States legislation. This provides the framework for the management of hunting.

There has been a lot of controversy and in recent years some confrontation, over the compatibility of hunting with certain requirements of the Directive. The controversy is often fed by differing interpretations of those requirements.

The Commission has therefore recognised the need to start a new dialogue with a view to developing co-operation between all governmental and non-governmental organisations concerned with the conservation and wise and sustainable use of our wild birds. With a view to this it launched a 'Sustainable Hunting Initiative' in 2001 aimed at improved understanding of the legal and technical aspects of the Directive's provisions on hunting as well as developing a programme of scientific, conservation and awareness raising measures to promote sustainable hunting under the directive.

This guidance document aims to fulfil one of the key objectives of the dialogue by providing better clarification of the requirements of the Directive relating to hunting, within the existing legal framework and strongly based on scientific principles and data and the overall conservation aim of the directive. This builds on the work that has already taken place on the key concepts of Article 7(4) of the Directive[2].

**Why a guide on hunting?**

There is clearly a demand for improved guidance on the hunting provisions of the Directive. This is evident from the extent of litigation on the subject. There have also been many questions to the Commission on this subject including those from the European Parliament. This must also be seen in the context of the increased polarisation as is evidenced by contrasting petitions to Parliament from hunting and bird conservation organisations, which have secured the signatures of millions of people.

[1] OJ No L 103, 25.4.1979, p.1

[2] Key concepts of Article 7(4) of Directive 79/409/EEC. Period of reproduction and prenuptial migration of Annex II bird species in the EU (September 2001).

Linked to this demand is a real need for improved clarity. Some Member States want to know what are the possibilities to fix hunting seasons outside the limits imposed by Article 7(4), which may be overly constraining, as appears to be the case for a small number of problematic species (such as the Mallard *Anas platyrhynchos* and the Wood Pigeon *Columba palumbus*) with early pre-nuptial migration and/or long reproduction periods, and wish to consider recourse to Article 9 derogations.

There is already positive experience from the development of guidance on Article 6 of Council Directive 92/43/EEC[3] on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive"). This is seen as a proactive rather than reactive approach that stimulates coherent reflection and avoids interpretation developing in an ad hoc and inconsistent way. However, it must be recognised that, unlike Article 6 of the Habitats Directive, the provisions of the Birds Directive are much older and have been subject to more extensive case-law, a factor which any interpretative guidance must take into account.

This document will also be of value to the Commission services in any contemplated action in this field and will provide principal stakeholders with some security in terms of what they can expect.

**Limits of the guide**

The guide is intended to be bound by and faithful to the text of the Directive and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such this document reflects only the views of the Commission services and is not of a binding nature.

It should be stressed that **it rests with the EU Court of Justice to provide definitive interpretation of a Directive**. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject.

The guide intends to fully respect the existing case law of the Court, which is already quite extensive. This determines aspects of the guide, especially where clear positions have already been established by the Court.

The guide also aims to explain the ecological principles that underpin the management of hunting under the Directive and makes use of best available scientific data, although it is recognised that the lack of good quality scientific data creates a constraint in so far as trying to correctly and accurately manage populations.

It recognises that the management of hunting is the responsibility of the Member States, including their role in determine hunting seasons within their territory in accordance with the requirements of the Directive.

[3] OJ L206 of 22.07.1992, p.7

## Scope of guide

The essential focus of the guide is on the timing of recreational hunting. However, other issues relevant to hunting are covered as appropriate. Its legal focus is primarily on huntable species listed in Annex II of the Directive as well as the relevant provisions of Articles 7 and 9 but all other Articles will be examined as relevant. Particular consideration is given to examining the basis for exercising derogations, especially under Article 9. 1 (c). The guide not only deals with legal provisions but also covers scientific and technical dimensions given in the directive which are relevant to the conservation of wild birds.

## Structure of the guide

The guide is presented in three main chapters. The first chapter provides an overview of hunting within the framework of the Directive, including consideration of the relevant preambles and Articles.

The second chapter considers in more details the relevant legal and technical provisions of Article 7, including the specific conditions related to fixing hunting seasons under the Directive.

The third chapter then examines the possibilities for allowing for some hunting under the system of derogations that apply under Article 9 of the Directive. Different parts of the document are supplemented by Figures where additional information is considered useful to the guidance.

# INTRODUCTION

Birds_directive5framed.indd 4 9/12/2008 11:19:23



Common Snipes - Acrylic painting by Pieter Verstappen

Photos_chapitres_FR.indd 5 6/01/2009 17:06:23

# 1 INTRODUCTION

## *1.1 Hunting within the Overall Scheme of the Directive*

1.1.1 Council Directive 79/409/EEC is a wide-ranging instrument aimed at the general conservation of wild birds in the European Union. Addressing several aspects of conservation (including safeguards for habitats, controls on trade and hunting and promotion of research), it follows a standard layout for this type of legal instrument: a preamble with recitals, Articles containing substantive provisions, and a series of Annexes.

## *1.2 Preamble*

1.2.1 The recitals in the preamble reflect the structure of the body of the Directive. The preamble is often used as an aid to interpreting the substantive provisions of secondary legislation, and has been cited by the Court in this regard in relation to the Directive[4].

1.2.2 As with any directive the interpretation needs to have regard to the different language versions, all of which are valid. In the context of the present guide it is to be noted that some phrases (e.g. 'judicious use', 'rearing season') in the different language versions merit careful attention. It is important when looking at the different language versions to elicit a meaning that best reflects the purpose and context of the terms under examination.

## *1.3 Species Covered by the Directive*

1.3.1 Article 1 of the Directive states that it relates to the "*conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.*" The case law of the Court confirms that, when implementing the Directive, the Member States have an obligation to protect species of wild birds occurring in the territory of the Community, and not merely those species occurring in their national territories[5].

---

[4] For example, see point 21 of case C-57/89, *Commission of the European Communities v Federal Republic of Germany*. In this case, which concerned the application of the habitat protection provisions of Directive 79/409/EEC, the Court observed : « *That interpretation of Article 4(4) of the Directive is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the Directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds."*

[5] In its judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, the Court noted at paragraph 6 : *« The Directive is based on the consideration that effective bird protection is typically a transfrontier environment problem entailing common responsibilities for the Member States (third recital in the preamble). »*. In this context, the preamble to the Directive notes that *" effective bird protection is typically a trans-frontier environment problem entailing common responsibilities."*

1.3.2 Protection does not extend to specimens bred in captivity[6]. Nonetheless, in cases where captive bred individuals are released into or return to the wild, and are indistinguishable from wild individuals of the same species occurring in the same areas, it is reasonable to consider that the terms of the Directive are applicable[7].

1.3.3 The Commission has sought to list the wild bird species coming within the Directive's scope[8]. This list covers all bird species that naturally occur in the Member States, including accidental visitors. It does not extend to introduced species unless they are explicitly mentioned in one of the Annexes to the Directive (e.g. the Wild Turkey *Meleagris gallopavo*). However, introduced species are covered by the terms of the Directive in a Member State if they are native to another Member State.

### *1.4 General Orientation of Directive*

1.4.1 Article 2 contains the general obligation on Member States to "*take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."* As this Article requires the protection of bird species to be balanced against other interests, a question has arisen as to whether this Article comprises a derogation independent from the general requirements of the Directive. The Court has confirmed that it does not, including with specific regard to hunting[9]. Nonetheless, the Court's pronouncements show that Article 2 is not

---

[6] Judgment of 8 February 1996, Criminal proceedings v Didier Vergy, case C-149/94, ECR 1996, p. 299.

[7] In areas where the only specimens of a huntable species in the wild are of released individuals from captive bred stock it would be reasonable to conclude that hunting seasons for this species must be fixed in a way that takes full regard for non permissible periods for similar species (e.g. release of Chukars *Alectoris chukar* in the Alps and possible confusion risk with Rock Partridge *Alectoris graeca*).

[8] A list of bird species covered by the Directive has been prepared by the Commission and presented to the Committee for the Adaptation to Technical and Scientific Progress (commonly referred to as the ORNIS Committee), established pursuant to Article 16 of the Directive. This is not a legal listing but is intended for guidance in application of the Directive. It is available on the web site of DG ENV at http://ec.europa.eu/environment/nature/conservation/wildbirds/eu_species/index_en.htm

[9] In its judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, the Court noted at paragraph 8 : « *In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation.* » . In its Judgment of 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2. It noted at paragraph 37 : « *…it must be stressed that Article 2, as observed above, is not an independent derogation from the obligations and requirements of the Directive.* »

without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, its provisions have value as a general orientation guide as to what the Directive requires and allows.

### *1.5 Conservation of Habitats*

1.5.1 Article 3 and 4 address the conservation of habitats. They include provisions related to prevention of significant disturbance within special protection areas (SPAs) classified pursuant to Article 4 (1) and (2). The Commission does not consider that socio-economic activities – of which hunting is an example - necessarily contravene these provisions. However, it is necessary that such activities within SPAs to be properly managed and monitored to avoid such significant disturbance[10].

1.5.2 The Commission has already prepared a guidance document covering the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive"), which replace the provisions of Article 4(4), first sentence with regard to classified SPAs[11]. This existing document discusses disturbance. It is appropriate to have regard to the principle of proportionality in considering the matter of hunting under Article 6 of the Habitats Directive. The relevant section of the Article 6 guide is to be read in the sense that effects, which are not significant in terms of the conservation objectives for the NATURA 2000 site, are not to be considered as contravening Article 6(2) of the Habitats Directive.

1.5.3 Hunting is only one of the many potential uses of NATURA 2000 sites, alongside uses such as agriculture, fisheries and other forms of recreation. There is no general presumption against hunting in NATURA 2000 areas under the nature directives. However, it is clear that hunting and other human activities have potential to lead to a temporary reduction in use of habitats within a site. Such activities would be significant if they would lead to a pronounced reduction in the capacity of the site to support the species for which it was designated and would also result in reduced hunting potential.

1.5.4 There will be specific instances where hunting is incompatible with the conservation objectives of individual sites. Examples may be where there is the occurrence of rare species which is highly sensitive to disturbance alongside potential quarry species. Such instances can only be determined on a site by site basis.

[10] The report on a workshop on 'Hunting in and around NATURA 2000 areas' organised by the European Commission during Greenweek in April 2002 is to be found on the web site of DG Environment at :
http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/report_green_week_en.pdf

[11] "Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC", European Commission, Office for Official Publications of the European Communities, Luxembourg

1.5.5 Sustainable hunting can provide beneficial consequences to habitat conservation in and around sites. This is considered further in section 2.4.20-2.4.23 of the guide.

1.5.6 Ensuring that hunting or other activities does not lead to significant disturbance will depend on a variety of factors such as the nature and extent of the site and of the activity as well as on the species present. There is a need to understand the reasons why the site is important for nature conservation leading to its inclusion in NATURA 2000, which provides the basis for determining its conservation objectives. Such an understanding provides an essential starting point for determining the specific management actions that are needed to conserve the site.

1.5.7 In order to reconcile human use with the conservation objectives the Commission advocates the development of management plans, which make provision for ensuring that activities in and around SPAs under the Birds Directive as well as sites designated under the Habitats Directive (which are collectively known as the NATURA 2000 network) are consistent with the ecological requirements of the species or habitats types of EU conservation interest for which these sites have been designated. It is reasonable to expect that those who exploit natural resources such as wild birds have also a responsibility to ensure that their activities are sustainable and not detrimental to the populations concerned. In conclusion, therefore the Commission believes that hunting activities on NATURA 2000 sites are essentially management issues to be determined predominantly at local level. This management would be best structured with a management plan which ensures that activities are compatible with the conservation objectives for which the sites have been designated.

1.5.8 Depending on the nature of the NATURA 2000 sites and hunting practices such management plans should give consideration to the provision of adequate no hunting refuge zones. A comprehensive research programme in Denmark has shown that the careful establishment of hunting free zones can increase at the same time site use by waterfowl and hunting opportunities in the vicinity of such areas[12]. The concept of hunting free zones is also well established in other Member States and is not restricted to NATURA 2000 areas (e.g. reserves de chasse in France).Basic Species Protection Prohibitions.

[12] Madsen, Pihl & Clausen (1998), Establishing a reserve network for waterfowl in Denmark: a biological evaluation of needs and consequences. Biological Conservation 85: 241-256.
Madsen & Fox (1997), The impact of hunting disturbance on waterfowl populations: The concept of flyway networks of disturbance-free areas. *Gibier faune sauvage* 14: 201-209. However, this particular model may not be applicable to Member States or areas where hunters' access and hunting pressure are regulated differently (e.g. private property owners).

### *1.6 Basic Species Protection Prohibitions*

1.6.1 Article 5 of the Directive requires Member States to take the requisite measures to "*establish a general system of protection for all species referred to in Article 1".*
The basic prohibition on hunting is found in Article 5 (a) of the Directive, which requires Member States to prohibit in particular the *"deliberate killing or capture by any method*". [13]

1.6.2 Article 6(1) contains the basic prohibition on trading in birds that are protected under Article 1. Specifically " *Member States shall prohibit, for all the bird species referred to in Article 1, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds."*

### *1.7 Exceptions to Basic Prohibitions*

1.7.1 The Directive provides for exceptions to the general prohibitions set out in Articles 5 and 6.

1.7.2 The trade in species listed in Annex III of the Directive is permitted, provided that the conditions and restrictions within Articles 6 (2) and 6 (3) are observed.

1.7.3 In relation to hunting, species listed in Annex II may be hunted under Article 7 of the Directive owing *"to their population level, geographical distribution level and reproductive rate throughout the Community ".* Where a species is not listed in Annex II, an exception to the prohibitions in Article 5 is only possible where the strict requirements of Article 9 are fulfilled.

1.7.4 The Article 7 hunting exception to the Article 5 prohibitions is subject to several conditions set out in Article 7. Member States are required to ensure "*that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2.*" They are also required to ensure that "*the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds*." The Court of Justice has interpreted the last-mentioned

[13] Article 5 also requires Member States to prohibit the:
- deliberate destruction of, or damage to, their nests and eggs or removal of their nests (Art 5 (b))
- taking their eggs in the wild and keeping these eggs even if empty (Art 5 (c))
- deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive (Art 5 (d))
- keeping birds of species the hunting and capture of which is prohibited (Art 5 (e))

provision as requiring that Member States set the hunting period so as to ensure that the period *"guarantees complete protection of the species concerned*."[14] The requirements of Article 7 are considered in detail in Chapter 2.

1.7.5 Further qualifications are set out in Article 8, which requires Member States to prohibit « *the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV (a).* Hunting from the modes of transport and under the conditions mentioned in Annex IV(b) is also required to be prohibited.

1.7.6 In addition to the exceptions for trade and hunting set out in Articles 6(2),(3) and 7, Article 9 allows Member States to derogate (i.e. depart)from the basic prohibitions in Article 5, 6, 7 and 8 provided three conditions are fulfilled: there is no other satisfactory solution ; one of the reasons listed in 9(1)(a), 9(1)(b), or 9(1)(c) applies; and the technical requirements of Article 9(2) are fulfilled. These conditions are considered in detail in Chapter 3. Article 9 also provides for a system of annual derogation reports from the Member States to the Commission[15].

1.7.7 Derogations under Article 9 are also possible with regard to the prohibitions set out in Article 7 and 8.

### *1.8 Research*

1.8.1 Article 10 requires Member States to encourage research and *« any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. »*. The Court of Justice confirmed that this provision creates an obligation for Member States and has to be transposed and implemented in national domestic legal orders[16]. Particular attention is required to be paid to research and work on subjects listed in Annex V. A number of categories of research listed in Annex V are relevant to hunting, especially items (c) "*listing of data on the population levels of migratory species as shown by ringing*" and (d) "*assessing the influence of taking wild birds on population levels"*. Item (e) "*Developing or refining ecological methods for preventing the type of damage caused by birds*" is also relevant to species which may cause damage. The case-law of the Court of Justice underscores the importance of using the best available scientific information as a basis for implementing the Directive[17].

---

[14] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67 paragraph 13.

[15] On the basis of these annual reports the Commission provides a report on the use of derogations under the Birds Directive to the Convention on the Conservation of European Wildlife and Natural Habitats. This biannual report is provided in fulfilment of Article 9(2) of the Convention.

[16] Judgement of 13 December 2007, Commission/Ireland, C-418/04, paragraphs 266-275.

[17] In its judgment of 17 January 1991, Commission/Italy, Case C-157/89, ECR 1991, p.57, paragraph 15, the Court accepted that, in the absence of specific Italian reference material, the Commission was entitled to rely on a more general ornithological reference work in support of its contentions, especially as the Italian government had not adduced alternative scientific studies.

1.8.2 However, it must be acknowledged that, in relation to the categories of research relevant to huntable species, high quality information on a series of even basic features of the migratory system of many huntable species remains extremely limited. The proper hunting management of migratory birds implies an adequate knowledge of the functional system of staging, moulting, fattening and wintering areas representing a migratory route, or flyway. In order to better apply the Directive, there is a need for enhanced understanding of geographical distribution of flyways, seasonality of movements and ecological requirements of migratory birds across the EU. Relevant studies can best be performed on individually marked birds; recoveries of ringed birds provide exact locations of migrants in time and space, and represent the best source of information for such large-scale analyses. Migration studies can provide the necessary information both at the level of species and geographical population; they also offer the unique opportunity to describe migratory patterns for different sex- and age-classes, which is an important parameter for the proper management of wild populations.

### *1.9 Introduction of Non-naturally occurring Bird Species*

1.9.1 Article 11 relates to the prevention of damage to local flora and fauna by the introduction of bird species which do not occur naturally in the wild state in the European territory of the Member States. One of the most documented cases is the threat posed by the North American Ruddy Duck *Oxyura jamaicensis* to the endangered native European White-headed Duck *Oxyura leucocephala* through hybridisation as well as competition and displacement. There is potential for introductions to not only pose a threat to rare species but also to more widespread species, including those at present subject to hunting.

### *1.10 Reporting*

1.10.1 Article 12 concerns the general reporting obligations of the Member States and Commission. These three-yearly general Member State reports are to be distinguished from the annual Member State derogation reports referred to in Article 9. The Commission reports produced pursuant to Article 12 are a valuable reference for several hunting-related issues. For example, the second report on the implementation of the Directive[18] contained information on the status of Annex II species in the Member States, on special measures taken by the Member States for wise use of hunted species, as well as a record of earlier discussions in the Committee established under the Directive ("the ORNIS Committee") on several important concepts such as wise use and small numbers.

[18] COM(93) 572 final.

### *1.11 Stand-Still Clause*

1.11.1 Article 13 states that *«application of the measures taken pursuant to this Directive may not lead to deterioration of the present situation as regards the conservation of species of birds referred to in Article 1. »* This is an example of a « *stand-still clause. »* Such clauses appear in a significant number of Community environmental Directives. They are aimed at ensuring that the implementation of the Directives concerned will not worsen the initial status of the environmental features sought to be conserved.

### *1.12 Possibility of Stricter National Measures*

1.12.1 Article 14 provides that Member States may introduce stricter protective measures than those provided for under the Directive. This reflects a general approach to Community environmental legislation, which has since been enshrined in the Treaty, whereby Member States retain a freedom to exceed the level of protection agreed by the Community. With reference to hunting, some Member States have set national limitations going beyond what the Directive requires – for example, they have prohibited the hunting of certain species that are huntable under the Directive.

1.12.2 It is important to note that the faculty of adopting stricter measures is not unrestricted. Member States must respect rules in the EC Treaty concerning freedom of trade, as is confirmed by a decision of the Court in Case C-169/89, *Criminal proceedings against Gourmetterie Van den Burg*[19]. In addition, where it can be demonstrated that the huntability of a bird species is clearly linked to conservation benefits for that and/or for other wild bird species as a result of hunting-associated habitat conservation measures, it may be appropriate, where a hunting ban is contemplated, to consider any disbenefits that may arise for habitat conservation.

### *1.13 Adapting the Directive*

1.13.1 Articles 15 to 17 contain provisions relating to the adaptation to technical and scientific progress of Annexes I and V, as well as to the adaptation of Annex III. These provisions give a role to a committee established under Article 16,

[19] Judgment of 23 May 1990, Criminal proceedings v Gourmetterie Van den Burg, case C-169/89, ECR 1990, p. 2143. This case involved a request from a Dutch Court to the Court of Justice for an interpretative ruling following the prosecution in the Netherlands of an individual for possession of a Red Grouse, *Lagopus lagopus,* lawfully shot and killed in the United Kingdom. The Court drew a distinction between migratory species and endangered species listed in Annex I, and other species, such as Red Grouse. Noting the special emphasis the Directive placed on protection of migratory and endangered species, it stated at paragraph 12 : « *It follows from those general objectives laid down by Directive 79/409 for the protection of birds that the Member States are authorized, pursuant to Article 14 of the directive, to introduce stricter measures to ensure that the aforesaid species are protected even more effectively.With regard to the other bird species covered by Directive 79/409, the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, but are not authorized to adopt stricter protective measures than those rovided for under the directive, except as regards species occurring within their territory.*

consisting of representatives of the Member States and Commission. While formally the regulatory role of this committee is quite limited, in practice the representatives on the Committee – now known as the "ORNIS Committee" – have an important advisory role and regularly discuss all aspects of the implementation of the Directive, including hunting aspects. With reference to changes to the hunting provisions of the Directive, the Committee has no formal role. Any relevant amendments to either the body of the Directive or Annex II require adoption by the Council of Ministers and European Parliament[20] on the basis of a proposal from the Commission.

[20] To date Annex II has been amended by one secondary instrument, Council Directive 94/24/EEC. This modified Annex II of Directive 79/409/EEC to include five species of *Corvidae*, which can cause damage to crops, and for which control measures were formerly only possible under Article 9 derogations.

Birds_directive5framed.indd 2 9/12/2008 11:19:23

# 2 PROVISIONS OF ARTICLE 7



Mallards - Oil painting by Pieter Verstappen

Photos_chapitres_FR.indd 7 6/01/2009 17:06:24

# 2 PROVISIONS OF ARTICLE 7

## Text of Article 7

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

*2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this Directive applies.*

*3. The species referred to in Annex II/2 may be hunted only in the member states in respect of which they are indicated.*

*4. Member states shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member states shall send the commission all relevant information on the practical application of their hunting regulations."*

### *2.1 Introduction*

2.1.1 Article 7 provides an explicit basis for hunting under the Directive. By reference to Annex II it lists the species that may be hunted throughout the Community (listed in Annex II part 1) and those that may be hunted within specified Member States (listed in Annex II part 2). It also sets out the principles to be respected with regard to hunting, including with regard to the fixing of hunting seasons.

2.1.2 This chapter of the guide starts with a brief reference to the need for appropriate transposition. It then deals in turn with the species that are huntable, the general principles and criteria to be respected in hunting (non-jeopardisation of conservation efforts, wise use, and ecologically balanced control). It finally considers the specific conditions relating to fixing hunting seasons.

2.1.3 As regards hunting seasons the chapter ends with a discussion of overlaps between the hunting periods and prohibited periods under Article 7(4) of the Directive.

## *2.2 Formal considerations*

2.2.1 The relevant provisions of Article 7 of the Directive need to be fully and clearly transposed by the Member States." In Case C-159/99, *Commission v Italy*[21], the Court observed that "*the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty".* In Case C-339/87, *Commission v the Netherlands,* the Court also noted that "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty."*[22]

## *2.3 Huntable species*

### RATIONALE FOR ALLOWING HUNTING

2.3.1 Article 7 allows for the hunting of certain species of bird. Due to their population level, geographical distribution and reproductive rate throughout the Community, hunting of these species is considered to constitute acceptable exploitation.

2.3.2 Whereas bird hunting in Europe is mainly a recreational activity and is generally not carried out to regulate bird populations, it may also be a tool to control damage-caused by certain bird species (see section 2.4.31 onwards on ecologically balanced control).

### WHICH SPECIES CAN BE HUNTED?

2.3.3 The species that may be hunted are listed in Annex II of the Directive. This comprises two parts. Those species listed in Annex II part 1 may be hunted in all Member States. The species listed in Annex II part 2 may only be hunted in those countries for which they are indicated. The number of potentially huntable species present in each Member State is shown in Figure 1.

2.3.4 Apart from adaptations resulting from the accession of new Member States, there has been one amendment of Annex II part 2 to take account of the latest knowledge on the situation of birds. This resulted in the addition of five species of *Corvidae* to Annex II/2 and the removal of three species of waders from Annex II/2 for Italy (species which closely resemble the globally threatened species Slender-billed Curlew *Numenius tenuirostris).*

2.3.5 Hunting is carried out under national legislation. The listing of a species in Annex II does not oblige a Member State to allow for it to be hunted. It is

[21] Judgment of 17 May 2001, Commission/Italy, case C-159/99, ECR 2001, p.4007, paragraph 32.
[22] Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851. This position reflects the Court's earlier decision in its judgment of 23 February 1988, Commission/Italy, case 429/85, ECR 1988, p.843.

merely an option of which the Member States may or may not avail themselves.

## *2.4 General principles and criteria to be respected in hunting*

2.4.1 Article 7(1) and 7(4) of the Directive provide a number of general principles that must be applied in relation to the practice of hunting. Each of these is considered in turn.

### NON JEOPARDISATION OF CONSERVATION EFFORTS IN AREA OF DISTRIBUTION

2.4.2 Member States must ensure that hunting is compatible with the maintenance of the populations of the species concerned at a satisfactory level and that the practice does not jeopardise conservation efforts in their area of distribution. This clearly implies that the practice of hunting must not represent a significant threat to efforts for the conservation of both huntable as well as non-huntable species. The national hunting regime should take into account this potential disturbing aspect of hunting. This provision needs to be assessed in the light of the nature and geographical scope of the 'conservation efforts' in question, as these may vary from a local to an international level (e.g. flyway management plan).

2.4.3 An example to illustrate this point is the Ferruginous Duck *Aythya nyroca*, a non-huntable bird species, which is globally threatened. This species has a late reproduction period, which can make it vulnerable to the opening of hunting seasons for other species in areas where it is still breeding.

2.4.4 As regards the area of distribution of species it is clear that for most species this is not restricted to the area of the Member State concerned with hunting but applies to the species range. This is particularly relevant to migratory species. If species are subject to excessive hunting along their migration route it may impinge on conservation efforts elsewhere, including those outside the European Union.

2.4.5 The area of application of the Directive is the European territory of the Member States to which the Treaty applies. However, for species whose range extends beyond the area covered by the Directive the international commitments entered into by the Community may also be relevant in this context.

### WISE USE

2.4.6 Wise use is not defined in the Birds Directive. An explanation of the notion of wise use, developed in conjunction with the ORNIS Committee, is given in the second report on the application of the Directive[23]. This looked at potential impact of hunting on species both at the levels of their populations and their use of habitats. I

[23] Pp. 8-9 of Second Report on application of Directive 79/409/EEC (COM(93)572 final). This explanation has been used and further developed in the present guide.

2.4.7 In the context of hunting wise use clearly implies sustainable consumptive use with an emphasis on maintaining populations of species at a favourable conservation status. The concept appears to correspond well with the definition on sustainable utilisation given in Convention on Biological Diversity (CBD)[24]: "*the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations*." The Birds Directive is one of the legal instruments of the European Union to implement this Convention.

2.4.8 Guidance on the issue of wise use has also been developed under the Ramsar Convention. The 3rd Meeting of the Conference of the Contracting Parties to the Convention (1987) have agreed a definition which states that '*the wise use of wetlands is their sustainable utilization*[25] *for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem*'.

2.4.9 It can therefore be reasonably concluded that the concept of wise use is the same as the concept of 'sustainable utilisation' compatible with the conservation of natural resources, thus corresponding to the concept of sustainability laid down in the Community 5th Environmental Action Programme.

2.4.10 Hunting, which represents a consumptive use of wildlife, therefore must be seen in the broader context of sustainable use of resources. The concept of wise use needs not necessarily be limited to consumptive use. It must recognise that birdwatchers, nature lovers, scientists and society as a whole also have a legitimate right to enjoy or explore wildlife, as long as they exercise this right responsibly. It is generally accepted that the value of environmental resources includes both use values and existence values. The principle of wise use thus should cover the provision of access to and enjoyment of wildlife for non-hunter users in the countryside, which should be managed in a sustainable way and should also aim to provide benefits to local communities[26].

[24] The "sustainable use" objective is referred to in most of the substantive Articles of the Convention providing *inter alia* for the integration of sustainable use into national decision-making; the regulation and management of biological resources to ensure their conservation and sustainable use; the adoption of measures to avoid or minimize adverse impacts on biological diversity; the monitoring of ecosystems and habitats required by migratory species and species of economic value or cultural importance; the promotion of research which contributes to sustainable use.

[25] Sustainable utilization is defined as "human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations". Natural properties of the ecosystem are defined as "those physical, biological or chemical components, such as soil, water, plants, animals and nutrients, and the interactions between them".

[26] Recently, IUCN's Policy Statement on Sustainable Use of Wild Living Resources (Annex to Resolution 2.29, Amman, 2000), also concluded that "Both consumptive and non-consumptive use of biological diversity are fundamental to the economies, cultures, and well-being of all nations and peoples."

2.4.11 In the following sections a number of aspects of wise, relevant to huntable bird species are examined. This includes population impact, habitat use, game management and the conservation status of species. These sections underline the challenge of applying the concept of wise use for both sedentary and migratory bird species. Finally, the important role of education, training and awareness raising in promoting wise use is highlighted.

- **Relevance to huntable species**

2.4.12 Most of the scientific work on the sustainability of hunting has been focused on water birds (excluding gulls), tetraonids and partridges (the latter two groups belonging to the Galliformes, often referred to as "gamebirds"). These birds differ very much in ecology and behaviour. Most water birds are typically long-distance migrants, which breed widely in Northern Europe and winter in patchily distributed wetlands in temperate to tropic regions. Because of their congregatory behaviour significant hunting disturbance[27] affects a many times more birds than the numbers actually killed by hunting. However, a recent scientific literature review on energetic physiology of birds has challenged the assumption that hunting always will give rise to disturbance which will significantly threaten the survival of wild birds (see section 2.6.17). Furthermore, a high hunting take restricted to a local level may not affect these local populations in the long term, given sufficient availability of food, where shot birds are able to be replaced by birds from elsewhere or through other biological compensatory mechanisms. However, this may not be the case where high hunting pressure is exercised over wider part of the range of a species.

2.4.13 On the contrary gamebirds that are sedentary species sometimes have complex social systems, of which local populations can benefit much from proper hunting management. A high hunting take may result in population reduction. Water birds and gamebirds are the main quarry species in the Europe, comprising 71% of all Annex II taxa. The remaining categories of Annex II species are gulls (7%), pigeons (6%), and passerines (15%).

- **Wise use and population impact**

2.4.14 Given that the overall objective of the Directive is the maintenance of bird population at a favourable conservation status[28] this should be reflected in the principle of wise use. From a general understanding of population dynamics and the theory of the taking of migratory birds it can be concluded that low

[27] Significant disturbance of birds in wetlands from hunting can cause considerable under-use of the resource, also putting pressure on non-quarry species. Local displacements and reduced stopover times may even have impacts on populations at the flyway level, because of over-winter density-dependence. However, the impact of disturbance at the level of flyway populations is at present poorly understood and therefore meriting investigation.

[28] Whereas the term 'favourable conservation status' is not mentioned explicitly in the Directive (was introduced in 1992 in the Habitats Directive) it is implicit from the requirements of Article 2 of the Directive.

levels of taking are likely to have little effect on spring populations' size[29]. Moderate levels are unlikely to cause populations of huntable species to decline but will reduce the size of the spring population. Very high levels of taking are likely to lead to a decline in populations. For most species this level of taking is unknown[30].

2.4.15 So that hunting does not lead to the decline of huntable species the general approach in wildlife management is to ensure that hunting of species does not exceed the range between 'maximum' and 'optimum' sustainable yield[31]. This concept would appear to be easier to apply to sedentary than to migratory species. In the absence of good information on population dynamics and hunting take of sedentary and migratory species high levels of exploitation should generally be avoided.

2.4.16 Furthermore, there is a need for sound, scientifically based monitoring mechanisms to ensure that any use is maintained at levels which can be sustained by the wild populations without adversely affecting the species' role in the ecosystem or the ecosystem itself. This should include information on bag statistics, which is at present lacking or poorly developed for most species throughout the European Union[32].

- **Wise use and habitat use**

2.4.17 Significant disturbance from hunting or other human activities is likely to restrict the use of habitats where it is taking place. This may result in birds subjected to hunting having to cover greater distances or to adapt their behaviour to escape hunting. It may even result in a failure to utilise habitats with a relatively high human presence. It is therefore important to ensure that the management of such activities is carried out in a way that avoids disturbance which would significantly effect the conservation values of the sites in question (see also section 1.5 of the guide).

---

[29] This depends on the timing of taking. A small take in Spring when the population is usually at its lowest annual level, can have disproportionate effects on population structure, if the species is subject to differential migration

[30] Working Document no. XI/189/91 of the Ornis Committee, as reproduced in the Second report on the application of Directive No 79/409/EEC on the conservation of wild birds (COM (93) 572, 24.11.1993, page 11)

[31] Sustainable yield may be defined as the removal of resources from the environment at a rate that allows balanced replacement by natural processes. Under normal conditions density dependent processes maintain bird populations at a stable level. The yield of a species is directly linked to its reproduction rate and its survival rate. Though annual harvesting can remove a sizeable proportion of a population, this is offset by a lower natural mortality and/or better reproduction rate. The maximum number of birds that can be hunted each year will be achieved when the largest number of birds is breeding at the fastest possible rate. This is achieved when breeding stock is reduced considerably below habitat capacity (Newton, I. 1998. Population limitation in Birds). Hunting usually reduces breeding populations of birds with low natural mortality (K-strategists, i.e geese) but their reproductive rates are higher than in non-hunted populations. This is termed the *maximum sustainable yield*. Because of the vagaries in ecological systems harvesting rates are usually set at a somewhat lower rate, which is defined as the *optimal sustainable yield*. Good management of populations can increase this yield.

[32] Other information may be relevant for certain species such as studies on crippling rates and impact of shotgun pellets in birds on their survival (eg see Madsen, J. and H. Noer 1996. Decreased survival of pink-footed geese *Anser brachyrhynchus* carrying shotgun pellet. Wildlife Biology 2 : 75-82.

2.4.18 This is particularly relevant in wetlands where large concentrations of wild birds, including huntable species, occur. In the Commission's Communication on the wise use and conservation of wetlands[33] sustainable wetland resource use is identified as one of the key wetland issues. Specific reference is made to bird exploitation: *"Waterfowl hunting in European wetlands is a popular leisure activity and can be an important source of income for wetland owners. Rightly, hunting associations are becoming an important driving force for wetland conservation. The principle of using the waterfowl resource in a sustainable way can substantially contribute to wetland conservation, providing it includes the use of non-toxic shot, the setting of bag limits, the creation of an adequate network of game refuges, and the adaptation of the hunting seasons to the ecological requirements of the species. These are also aspects covered by Council Directive […] on the conservation of wild birds"*.

2.4.19 The issue of the environmental pollution from lead shot arising from ammunition also needs to be considered in the context of wise use. It is increasingly recognised that the use of lead shot poses a significant threat to wild birds and their habitats, especially wetlands[34]. Whereas there is no explicit mention of lead shot in the Birds Directive any use of it in Special Protection Areas that leads to deterioration of habitats or significant disturbance to birds is incompatible with the protection requirements of these sites. The need to phase out the use of lead shot in wetlands has already been recognised in international forums such as the Ramsar Convention and the African Eurasian Waterbird Agreement.

- **Hunting and game management**

2.4.20 The notion of wise use should also incorporate the positive role that can derive from game management. This implies a set of measures such as the provision of better habitat, better nutrition, less predation, less disease or less poaching which improve the living conditions of huntable and other species. Therefore, whereas annual harvesting can remove a sizeable proportion of the population this is offset by gains due to a lower natural mortality and/or better reproduction rate. Sound management practices, in accordance with the wise use principle, should also take into account the needs of non-huntable species and the ecosystem. This can result in populations of game and other species on managed land being significantly higher than on unmanaged areas. This principle contrasts markedly with harvesting a wildlife resource in a situation where no management is undertaken. A harvested population, even when stable and being hunted sustainably, will inevitably be maintained at a lower level than an unharvested one under similar conditions. The beneficial consequences of game management are most evident with sedentary species[35].

[33] Wise use and conservation of wetlands (COM (95) 189, 29.05.1995).

[34] See for example Newsletter of the African Eurasian Waterbird Agreement, Special edition: Lead Poisoning in Waterbirds through the ingestion of spent lead shot. Special Issue 1, September 2002.

[35] However, it must be recognised that certain wetlands have been actively managed for migratory waterfowl (e.g. *Camargue* in France). There is also management of bogs directly linked to the hunting of Snipe *Gallinago gallinago.*

2.4.21 Some of the most important wildlife sites in Europe have survived the pressures of development and destruction due to the interests of game management. For example the United Kingdom has the largest areas of heather moorland anywhere in Europe largely due to its value for grouse hunting, which provided a strong basis from preventing the loss of this habitat from commercial afforestation and other threats. In Spain the remaining populations of Spanish Imperial Eagle *Aquila adalberti* mainly survived on large private game estates, where the hunting was formerly almost exclusively focussed on big game. In France, wild populations of Grey Partridge *Perdix perdix* are high in certain regions with intensive farming (e.g. *Beauce, Picardie*) as a result of management efforts, in particular the creation of thousands of hectares of 'wildlife set aside' with financial support of hunters.

2.4.22 Hunting can therefore support conservation through wise use. Steps taken to improve the condition for target species can not only enhance the sustainable yield but also benefit a range of other animals and plants that have similar requirements. Woodland managed for Pheasants *Phasianus colchicus* is more diverse than woodland managed exclusively for forestry. Field margins managed to help Partridges *Perdix perdix* also benefit wild flowers, butterflies and other invertebrates.

2.4.23 However, game management focused at artificially raising population levels of single species may be detrimental to some other species, particularly if it is linked to illegal persecution of birds of prey.

- **Wise use and conservation status of huntable species**

2.4.24 Bird species may be considered as having an unfavourable conservation status[36] when the sum of influences acting on the species concerned negatively affect the long-term distribution and abundance of its populations. This would include a situation where population dynamics data shows that the species is not maintaining itself on a long-term basis as a viable component of its natural habitats[37]. It is, of course, generally not advisable to subject such species or populations to hunting, even if hunting is not the cause of or contributing to their unfavourable conservation status. However, allowing hunting of a

[36] The term conservation status of a species is defined in Article 1 i) of Council Directive 92/43/EEC as "the sum of influences acting on the species concerned that may affect the long-term distribution and abundance of its populations …." It is considered to be favourable when "population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitat, and the natural range of the species is neither being reduced nor is likely to be reduced in the foreseeable future, and there is, and will continue to be, a sufficiently large habitat to maintain its population on a long-term basis.". Although the term is not explicitly mentioned in Directive 79/409/EEC the principles underpinning it are equally applicable in relation to the objectives of this Directive.

[37] Favourable conservation status assumes population viability: the concept of a "viable" population number that represents a threshold for survival versus extinction (Fiedler & Jain 1992, Conservation Biology). Viability of populations lies at the heart of the requirement laid down in Article 2 of the Directive, which contains the general obligation of population maintenance. Viable populations are integral to demonstrating a secure conservation status, but it encompasses more than just a stable population. Extrinsic forces, such as habitat loss, over-harvesting, and competition by introduced species, often lead to population decline. Random fluctuations that increase as populations become smaller can lead to extinction even of populations that have, on average, positive population growth when below carrying capacity.

species can provide a strong incentive to manage habitats and address other factors contributing to population decline, therefore contributing to the objective of restoring populations to favourable conservation status.

2.4.25 The issue of allowing the continuation of hunting of species with an unfavourable status was raised during the discussion on the last proposed amendment of Annex II of the Directive. In section 2.7 of the report[38] of the European Parliament's Committee on the Environment, Public Health and Consumer Protection on the Commission's 1991 proposal[39] to modify the Birds Directive, it was stated that 'Where a species is declining, hunting cannot by definition be sustainable unless it forms part of a properly running management plan that also involves habitat conservation and other measures that will slow and ultimately reverse the decline.'

2.4.26 Where such management plans are prepared, aiming at restoring the species' population levels they should apply to all populations, peripheral as well as central. Indeed, peripheral populations may play a particularly important role in the process through which species adapt to changes in the environment. In the European context, this process is fundamental. Furthermore, such plans can exist at different territorial levels (e.g. at EU, national or local levels).

2.4.27 Community management plans are being developed for Annex II species that have been identified as having an unfavourable conservation status. Those plans that have already been approved by the Member States, within the framework of the ORNIS Committee, are available on the web site of DG Environment. These framework plans do not have any separate legal status under the Directive. However, the success in their implementation and the extent to which the declines in huntable species are halted and reversed, as evidenced by appropriate monitoring, may ultimately determine if the continued hunting of these species is justified under the Directive or if other measures are required.

2.4.28 Management plans aimed at the recovery of species need to be underpinned with monitoring programmes that are able to detect changes in conservation status of the species concerned. This monitoring should include assessments of the hunting harvest and the role that this is playing in the dynamics of the population.

2.4.29 Finally, it should be noted that temporary moratoria on hunting certain species with an unfavourable conservation status, not necessarily as a result of hunting, introduced by Member States in agreement with hunter organisations represents a potentially important approach. Such an approach, if combined with a programme of conservation action for the species, can provide a strong incentive to different interests, including hunters, to work together to restore the species to a favourable conservation status. An important consideration for hunters is that such moratoria need to be seen and perceived as 'temporary' and not leading more or less automatically to a permanent hunting ban.

[38] PE 154. 220/fin
[39] COM (91) 0042 – C3 – 0180/91

- **Wise use and education, training and awareness**

2.4.30 The notion of wise use of natural resources implies also proper knowledge and skills. Hunters should be well informed about the need for correct species identification, good practices, hunting and the law, need for reporting etc. Illegal activities (shooting protected species, use of illegal trapping devices, shooting out of season or in prohibited areas, illegal use of poisons) are contrary to the 'principle of wise use' and are not in accordance with the principle of conservation through sustainable use. Furthermore, the illegal actions of a small number of hunters can also bring the entire activity of hunting into serious disrepute. As hunters are the most effective custodians of the hunted areas it is in their long-term interests to increasingly oppose such activities and to be seen to do so. There is also a need to inform people about the principle of conservation through sustainable use.

#### ECOLOGICALLY BALANCED CONTROL

2.4.31 This principle is not defined in the Directive. However, the 8th recital of the preamble of the Birds Directive suggests that it may not refer primarily to recreational utilisation but to population management aimed at species conservation: '*Whereas conservation is aimed at the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe; whereas it makes it possible to control natural resources and governs their use on the basis of the measures necessary for the maintenance and adjustment of the natural balances between species as far as is reasonably possible'*.

2.4.32 Furthermore, Article 1 refers to "protection, management and control", while pursuant to Article 2 measures shall be taken to maintain populations or to adapt populations to a level "which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements". The latter may mean that the control is not only focused on "balances between species" but could also be aimed at the protection of economic interests (e.g. damage prevention).

2.4.33 "Ecologically balanced control" implies that the measures taken should be ecologically sound and in proportion to the problem to be solved taking into account the conservation status of the species involved. Control measures may be considered necessary only for few Annex II species (e.g. crows, pigeons, gulls). This appears to be the main incentive for the listing of five species of *Corvidae* in Annex II/2 with the 1994 adaptation of the Directive.

2.4.34 On the contrary, for most other quarry species management measures are aimed at the increase or the restoration of population numbers in view of both conservation and hunting interests.

2.4.35 Application of this principle in the framework of Article 7(4) offers enhanced possibilities to the control measures for the protection of flora and fauna, that

may be taken under the derogation regime of 9 (1a). However, the extent to which populations of damage causing species can be effectively regulated during the regular hunting season alone is unclear. Other methods need to be explored such as scaring of birds, which can at least temporarily and locally solve the problem of damage.

2.4.36 Other dimensions to ecologically balanced control need consideration. These include the extent to which it should relate to ensuring demographically balanced exploitation of a species (e.g. not removing a surplus of any sex or age cohort). Also it needs to ensure that impacts on populations harvested do not result in imbalances in the ecosystem (favouring the development of another species through lack of competition).

## *2.5 Specific conditions related to fixing hunting seasons*

2.5.1 Article 7(4) of the Directive lays down a number of key principles relating to the fixing of hunting seasons, the objective of which is to ensure that hunting does not take place during the most vulnerable periods of the annual cycle of huntable species.

2.5.2 For sedentary species it requires that they are not hunted during their rearing season or during the various stages of reproduction. In the case of migratory species it requires that they be not hunted during their period of reproduction or during their return to their rearing grounds.

2.5.3 The Court has stated that 'the second and third sentences of Article 7(4) of the Directive are designed to secure a **complete system of protection** in the periods during which the survival of wild birds is particularly under threat. Consequently, protection against hunting activities cannot be confined to the majority of birds of a given species, as determined by average reproductive cycles and migratory movements."[40]

### THE KEY CONCEPTS WORK: REPRODUCTION AND PRE-NUPTIAL MIGRATION PERIODS

2.5.4 The Commission and the ORNIS Committee have recognised the need to have a clear interpretation of these concepts of Article 7(4) in the light of the 1994 Court of Justice's ruling, and how to apply them to the bird species of Annex II and have already carried out a review of information on the period of prenuptial migration and reproduction of each Annex II species for each Member State where that species occurs[41]. The ORNIS Committee has approved this review, which provides definitions for both the 'period of reproduction' and 'return to the breeding areas', which are outlined below.

[40] Judgment of 17 January 1991, Commission/Italy, Case C-157/89, ECR 1991, p.57, paragraph 14. There are also references to the concept of complete protection in the following judgements: 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67 and judgment of 7 December 2000, Commission/France, case C-38/99, ECR 2000, p.10941.

[41] Key concepts of Article 7(4) of Directive 79/409/EEC. Period of Reproduction and Prenuptial migration of Annex II Bird Species in the EU. September 2001 (document available at http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/key_concepts_en.htm).

- **Period of reproduction**[42]

2.5.5 '**Breeding season'**[43] was defined using the definition of Cramp & Simmons (1997)[44]: "*the breeding season is the period during which a species lays and incubates its eggs and rears its young to the flying stage.*" However, the '**reproduction period**' not only covers the breeding season but also includes the occupation of the breeding areas as well as the period of dependence of young birds after leaving the nest (previously recognised in the 1993 Commission report on the application of the Birds Directive[45]). A scheme, which deals with the different stages of reproduction, was agreed by the 'ORNIS committee' as an appropriate general scheme for the period of reproduction (see Figure 2). The sequence and importance of the elements of this general scheme may vary by species according to differences in breeding biology.

- **Return to the breeding areas**[46]

2.5.6 Return to the breeding areas is an annual displacement, in one of more stages, of birds from their wintering areas back to nesting grounds. The wintering period ends with departure from the wintering areas where migrant birds have been more or less stationary since the end of the post-nuptial (autumn) migration. The return to the breeding areas is commonly called 'pre-nuptial migration' or 'spring migration'.

2.5.7 In Europe, return migration movements are mostly directed North, Northeast or Northwest. This means that migrants from African winter quarters first cross the Mediterranean, then pass through central Europe on their way to their Northern European breeding areas. This migration normally takes several weeks (including breaks at resting places on the way) but individual birds can complete the journey in one or a few days. The start, end and length of the migration season in a particular country are determined by a number of biological, geographical and methodological factors.

2.5.8 Regarding the beginning of the pre-nuptial migration, all individuals of a species within a same region do not end their wintering period at the same time. Not only are there individual differences, but also within a single wintering area, birds of different populations having different annual cycles come together. Birds belonging to northern populations, for example, often start their return flight much later than birds breeding more to the south. An extreme case is the so-called 'leapfrog' migration (e.g. in the Redshank *Tringa*

---

[42] Note that Article 7(4) refers both to 'rearing season' and 'the various stages of reproduction' (cf. French version *'les différents stades de reproduction et de dépendance'*; German version *'Einzelnen Phasen der Brut - und Aufzuchtzeit'*); Dutch version '*zolang de jonge vogels het nest nog niet hebben verlaten*').

[43] This term is considered equal and better English than the term 'rearing season' used in Article 7(4).

[44] Cramp, S. & Simmons, K.E.L. (eds.). 1977. *Birds of the Western Palearctic*, Volume 1. Oxford, Oxford University Press. 722 pp.

[45] COM (93) 572 final. *Second report on the application of Council Directive 79/409/EEC on the conservation of wild birds.* Brussels, 24 November 1993.

[46] "return to breeding areas" is taken as a synonym of "return to the rearing grounds"

*totanus*): birds breeding in more northern latitudes travel greater distances and move to more southerly wintering areas than those that nest farther south.

2.5.9 The fact that birds leave a wintering area does not necessarily mean that they start their return migration. They can move to other wintering quarters because of changes in the local ecological conditions, exhaustion of food resources, disturbance or changes in climatic conditions. When migratory and sedentary birds of the same species coexist on the same wintering grounds, the situation can be even more complex. Thus, apparent discrepancies may arise among the data for large countries. Major differences between neighbouring regions can reflect ecological differences more than actual differences in migration timing. For example, although the southern parts of Spain (*Andalucía*) and Italy (*Sicilia*) are situated on the same latitude (37th) this does not necessarily imply similar arrival dates of migrants because different populations might be involved.

2.5.10 The length of the migration period does not only depend on the North-south extension of the country concerned but also on the availability and the use of resting-places. A typical example concerns the Bar-tailed Godwits *Limosa lapponica* which migrate from the African winter quarters to Siberian breeding areas. After a continuous flight from the *Banc d'Arguin* in Western Africa, they stay several weeks in the Wadden Sea. The migration period length is also determined by the quantity and the geographical range of the birds involved: a small population can pass in a few days while a numerous species with an extensive breeding range can have a prolonged migratory season encompassing several months. Moreover, the migration period can also be extended if a country is passed over by several populations with different time schedules.

- **Applying the 'key concepts' definitions to different Annex II species**

2.5.11 In general, for migratory species, the stage of reproduction identifying the start of the period of reproduction is the 'occupation of the breeding sites'. However, the occupation of the breeding sites is generally difficult to use where the species is mainly locally resident or where there is a mixing of locally resident and migratory birds. In these cases, the stage identifying the start of the period of reproduction is the 'construction of the nest'. In those situations where the stage retained is difficult to recognise in the field, a mention is made to the corresponding number of decades counted from the start of egg laying (generally well known for most species).

2.5.12 In general, the stage retained to identify the end of the period of reproduction is the 'full flight of young birds', i.e. fledging of all broods including second or third broods for some species (e.g. rails/*Rallidae*, pigeons/*Columbidae*, thrushes/*Turdidae*). Full flight means that young birds are capable of sustained, continuous flight to a similar capacity as adult birds and corresponds to the 'independence of young birds. Nonetheless, for certain species (e.g. crows/*Corvidae*) the full flight occurs before 'independence of young birds'. Young birds are independent when the loss of parental care

and/or feeding does not significantly lower survival prospects of young. In those situations where the 'full flight/independence of young' is difficult to establish in the field, a mention is made to the corresponding number of decades counted from the end of hatching.

2.5.13 The stage that is used to identify the start and end of the period of reproduction for each Annex II species has been determined in relation to their biology. On the basis of this and the available information from different Member States the pre-nuptial and reproduction periods have been determined for each species[47]. It is recognised that there are likely to be differences in quality of the data for species across the EU and that there will be a need to regularly update this review, taking into account new and better data as it becomes available. Apart from this regular review it will also be necessary to account for any changes in migration or timing of breeding that may result from climate change effects, and to account for changes in timing as a result of other environmental pressures.

## *2.6 Assuring a system of complete protection where staggered opening and closing dates are considered*

2.6.1 According to the consistent case-law of the Court *" national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering*" [48] On condition that "complete protection of the species" is guaranteed, the Court has also held that "the fixing of closing dates, which vary between the different parts of the territory of a Member State, is compatible with the Directive" [49].

2.6.2 In cases C-435/92 and C-38/99, the Court recognised two difficulties with the staggering of closing dates, which are also relevant to opening dates: disturbance of other species and the risk of confusion. These are examined below and a proposed approach to addressing them is given.

[47] As regards presentation of the data for each species a number of general principles were applied (see p.7 of key concepts report). Where there is a range of dates in timing of pre-nuptial migration or reproduction the earliest date has been chosen. Likewise, where significant between year variation occurs on a regular basis, data from the earliest periods have been taken. Where different populations migrate through a country the earliest migrating population has been used. However, extreme, outlining and erratic data were excluded due to their unpredictable nature.

[48] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 22 ; judgment of 7 December 2000, Commission/France, case C-38/99, ECR 2000, p.10941, paragraph 43.

[49] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 27.

**RISK OF CONFUSION**

2.6.3 This phenomenon depends on a series of factors, including in particular the similarity between huntable species for which there is an open hunting season, and those for which the hunting season has ended or has still to commence, the conditions under which hunting is taking place and hunter proficiency.

2.6.4 In case C-435/92[50] the Court noted that, with regard to the risk that certain species for which hunting has already been closed will be subject to indirect depletion owing to confusion with the species for which hunting is still open, it must be emphasised that the third sentence of Article 7(4) of the directive is specifically intended to prevent those species from being exposed to the risk of depletion due to hunting during the period of pre-mating migration, requiring the Member States to take all necessary measures to prevent any hunting during that period.

2.6.5 The risk of confusion between different bird species is well recognised and has already been the subject of a number of specialist identification guides[51]. On the basis of criteria such as similarity in appearance and plumage, habitat use and behaviour (including calls) it is possible to categorise huntable species into groups of 'look-alike' species for the purpose of minimising the risk of confusion. This should be under the responsibility of the competent authorities that are responsible for authorising hunting seasons. Figure 3 is presenting one possible scheme for such a categorisation.

2.6.6 If staggering of hunting dates is to be allowed the opening and closing dates must be fixed for each group of 'look-alike' species in a way that ensures that there are not overlaps with non-permissible periods under the directive.

2.6.7 Any grouping of look-alike species needs to be adapted to the circumstances of time and place in which hunting is carried out. Firstly, for a risk to be real the huntable species (or group of species) must be present and huntable in the area during the timeframe in question. Secondly, other 'confusable' huntable species, for which the hunting season is closed, should also have a predictable and significant presence.

2.6.8 Furthermore, as regards hunting in early autumn it should be noted that surface duck species are mainly in eclipse plumage at this stage (males assume plumage similar to females during moult) which makes distinguishing them at this time significantly more difficult.

2.6.9 In addition, the problem of confusion is compounded by the fact that different bird species frequently co-exist. For example ducks, waders and thrushes

[50] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 18.

[51] A good example of guides that focus on the identification of difficult groups of bird species are 'The Macmillan Guide to Bird Identification' by Alan Harris, Laurel Tucker and Keith Vinicombe. 1989. ISBN 1-85627-641-4 and the companion volume 'The Macmillan Birder's Guide to European and Middle Eastern Birds", by Alan Harris, Hadoram Shirihai and David Christie, 1996.

frequently move in flocks of mixed species. A group of ducks may be comprised of four or even five different species. Therefore, in such circumstances 'selective' shooting can become very difficult.

2.6.10 The categories of confusable species focus on different groups of the huntable species listed in Annex II of the directive. However, it should also be noted that the risk of confusion is not limited to huntable species and may represent a conservation threat to certain vulnerable or endangered species (e.g. Ferruginous Duck *Aythya nyroca*, Marbled Teal *Marmaronetta angustirostris*, Lesser White-fronted Goose *Anser erythropus* Crested Coot *Fulica cristata*) in particular areas where hunting takes place. This problem would need to be addressed in the overall context of the management of these sites.

2.6.11 The second factor that needs to be considered is the conditions under which hunting is taking place. This will depend upon factors such as the observation distance. The further a bird is from the hunter the greater is the difficulty in determining its specific characteristics (size, plumage etc.) Identification of flying birds will depend on the time that the bird is visible, which can be quite short. Therefore, the type of hunting is likely to influence the level of risk of confusion.

2.6.12 Likewise, the lighting conditions can also play an important role. Poor visibility at sunrise and sunset or at night can significantly reduce the capacity to distinguish bird species[52]. Particular weather conditions such as fog and rain can also reduce the possibility to correctly identify birds in the wild.

2.6.13 Finally, the issue of hunter proficiency also has an important influence. This will depend on the training and experience of the hunter. This applies at all times of the hunting season and is also relevant to distinguishing huntable from non-huntable species (e.g. Knots *Calidris canutus* from other small waders; Skylarks *Alauda arvensis* from other larks). Training and awareness schemes to assist hunters with species identification should be encouraged or enhanced where they already exist, as appropriate. Hunters should not shoot at a bird unless they are confident of its identity. However, many hunters specialise in particular groups of birds and rarely hunt species about which they do not have earlier experience. In this way hunters become specialists in the identification of their favourite target species.

#### RISK OF DISTURBANCE

2.6.14 This phenomenon will depend, *inter alia*, on the type of hunting, its intensity, frequency and duration, the species concerned and the habitats used, as well as on the availability of alternative refuge areas.

[52] Identification guidance has been produced by hunters on this subject (e.g. *'Reconnaître les oiseaux la nuit'* by Philippe du Cheyron for the *Association Picarde des chasseurs de gibier d'eau*).

2.6.15 In case C-435/92[53] the Court noted that hunting activity can lead to disturbance of wildlife and that it may affect the conservation status of the species concerned, independently of the extent to which it depletes numbers. The Court stated that the consequences of such activity are 'particularly serious for groups of birds, which, during the season of migration and wintering, tend to gather together in flocks and rest in areas which are often very confined or even enclosed. Disturbances caused by hunting force these animals to devote most of their energy to moving to other spots and to fleeing, to the detriment of time spent feeding and resting for the purpose of migration. These disturbances are reported to have an adverse impact on the level of energy of each individual and the mortality rate of all the populations concerned. The effects of disruption caused by hunting birds of other species are particularly significant for those species whose return migration takes place earlier'.

2.6.16 Disturbance is considered to most likely have an impact on bird populations during periods of the annual cycle when food is scarce or unavailable and birds have difficulty in meeting their energy and nutrient requirements[54]. This is most acute when birds need to build up their reserves prior to periods of high energy demand such as prior to migration or during periods, during severe adverse weather conditions or before commencing breeding[55].With regard to the severe weather conditions there are provisions in different Member States to introduce' cold weather hunting bans'.

2.6.17 A recent review of the scientific literature on energetic physiology of birds has challenged the assumption that hunting always will give rise to disturbance that will pose a significant threat to the survival of bird populations[56]. The energy balance of birds is a key factor in determining the reproductive success and survival potential of birds. This review demonstrates that under certain conditions birds can show high physiological and behavioural adaptability, through increase of food-intake rate and shift from a night-time to a day-time feeding or vice-versa, to offset the significant energetic and nutritional stresses that can result from disturbance, including hunting disturbance. As long as birds have access, even intermittently, to sufficient food resources (i.e. within acceptable levels of disturbance and food availability) then they are able to compensate to changes in their energy balance in response to disturbance

[53] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 17.

[54] Madsen, J. 1995. Impacts of disturbance on migratory waterfowl. Ibis 137, Suppl 1 : 67-74.

[55] Mainguy, J., Bety, J., Gauthier, G. and Giroux, J.-F. (2002) Are body condition and reproductive effort of laying greater snow geese affected by the spring hunt? The Condor 104: 156-161

[56] Boos, M., J-P. Arnauduc, J-P. Robin. 2002 '*Effets du dérangement sur l'énergétique chez les oiseaux et les possibilités de compensation nutritionelles'* Rapport final de convention de recherche CNRS/FNC. Centre d'Ecologie et Physiologie Energétiques, France. The assumptions underpinning the conclusions of this study included the following: that the mean disturbance frequency to which birds actively react by flying was from 1 to 2.5 disturbances an hour; that the mean flight time was between 1 to 2 minutes per disturbance; that the period of disturbance extended over 10 hours per day; that food supply was not a limiting factor; that the birds were not in an advanced stage of preparation for reproduction, especially for egg production.

sources (see example of study of diving ducks on large shallow lake)[57]. Even if there are significant behavioural changes from this disturbance the impact on the energy equilibrium is small.

2.6.18 However, behavioural responses to disturbance are complex and may be underestimated especially where hunting is intense. For example the time lost after landing before birds resume feeding may take up to one hour (and if repeated disturbance up to 2 hours). This may affect other behavioural activities (social, preening, resting, mating). Disturbance is also likely to lead to increased vigilance to the detriment of feeding. Also there are currently few studies to support the assumption that birds have free and ample access to food resources to compensate. Birds will seek alternative undisturbed sites, which may not be nearby or where there may not be an adequate food supply. Furthermore, different categories of birds vary in their level of sensitivity to disturbance in relation to their biology and behaviour and dependency on different habitats. Notwithstanding, even though feeding behaviour can be disturbed there is a general lack of studies to determine if birds over a short or long-time scale cannot efficiently feed, particularly as energy income via food intake has to be considered in both the short and the long-term.

2.6.19 In the absence of empirical studies the consequences of a lack of energy balance on the reproductive success and survival of species is still not fully understood. According to the conclusions of the above mentioned review birds are unable to compensate if, in addition to the energy loss from disturbance there is no access to food resources during consecutive days (e.g. during adverse weather conditions) or during the active period prior to and during reproduction. This latter view is supported by studies of geese (which are capital breeders – i.e. dependant on energy reserves laid down before arrival on the breeding grounds) which have shown that disturbance can significantly reduce the reproductive success[58].

2.6.20 Allowing for staggered hunting dates during prenuptial migration is likely to present a greater risk to birds than at the end of the period of reproduction possibly due to the higher energetic demands of birds at this time. Other factors may play a role (e.g. shorter day length in February than in August with less potential daylight feeding time). The energy strategy over the annual cycle is an important fact. It has been shown for different waterfowl that February corresponds to a spontaneously and endogenously programmed build down of body fuels even when food is available *ad libitum.* This regulation of body reserves is associated with the voluntary decrease of food intake[59].

[57] Evans, D.M. and K.R. Day (2001) Does shooting disturbance affect diving ducks wintering on shallow lakes? A case study on Lough Neagh, Northern Ireland. Biological Conservation 98 : 315-323. Evans, D.M. and K.R. Day (2002). Hunting disturbance on a large shallow lake: the effectiveness of waterfowl refuges. Ibis 144 : 2-8. It should be noted in this study that birds used a large offshore area of the lake as refuge area during hunting and that most species fed at night when hunting did not take place.

[58] Madsen. J. 1995. Impacts of disturbance on migratory waterfowl. Ibis. 139 : S67-S74. Mainguy, J. , J. Bêty, G. Gauthier, J-F Giroux. 2002. Are body condition and reproductive effort of laying Greater Snow Geese affected by the Spring hunt? The Condor. 104 : 156-161. It should be noted that these studies relate to high levels of disturbance in Spring.

[59] M. Boos, pers. comm.

Furthermore, the demography of the population normally differs significantly between these two periods, with a relatively high adult cohort in the population in spring, which represent potential breeders, supplemented by a large proportion of immature birds in autumn.

2.6.21 There is a lack of consistent information and research on birds at flyway level to better evaluate the effect of disturbances, such as hunting, on bird populations and their conservation status[60]. Various studies have shown that poorly managed hunting can seriously reduce the carrying capacity of wetlands to support water birds. The location of hunting in relation to feeding areas may also be relevant.

2.6.22 As regards minimising the potential impact of human disturbance on bird populations during periods of staggering of hunting dates full account must therefore be taken of the need for supplementary undisturbed refuge areas that provide for both the resting and feeding requirements of affected birds. The design of such areas needs to ensure that there are sufficient opportunities for good quality feeding and other activities within them. This needs to be determined on an area by area basis in relation to the ecological, behavioural, nutrient and energy requirements of the different huntable species affected by staggered hunting dates. In this regard there has recently been increased research and development of appropriate and more effective methods to manage existing refuge and buffer areas, especially in wetland areas[61].

### WHAT CONDITIONS NEED TO BE MET IF A MEMBER STATES WANTS TO AVAIL OF STAGGERED OPENING AND/OR CLOSING DATES FOR HUNTING UNDER ARTICLE 7(4) OF THE DIRECTIVE?

2.6.23 To ensure that this is consistent with the principle of complete protection, as interpreted by the Court of Justice, Member States must be able to demonstrate at the relevant geographic level at which staggering is intended to be applied that there are non-significant risks of confusion and disturbance.

2.6.24 As regards the risk of confusion this would require the categorisation of groups of 'look-alike' huntable species using the same habitat types at the same time and the fixing of the same opening and closing dates for hunting of these groups in a way to avoid overlapping with non-permissible periods. It also requires a determination that the conditions under which hunting takes

[60] See for example Hill, D., D. Hockin, D. Price, G. Tucker, R.Morris, J. Treeweek. 1997. Bird disturbance : improving the quality and utility of disturbance research. J. Appl.Ecol. 34, 275-288.

[61] for example the following studies: Fox, A.D. and J. Madsen (1997). Behavioural and distributional effects of hunting disturbance on waterbirds in Europe: implications for refuge design. J. Appl. Ecol. 35: 386-397. Madsen, J. 1998a. Experimental refuges for migratory waterfowl in Danish wetlands. I. Baseline of the disturbance effects of recreational activities. J. Appl. Ecol. 35 : 386-397. Madsen, J. 1998b. Experimental refuges for migratory waterfowl in Danish wetlands. II. Tests of hunting disturbance effects. J. Appl. Ecol. 35 : 398-417. Rogers, J.A. Jr, et H.T. Smith. 1997. Buffer zone distances to protect foraging and loafing waterbirds from human disturbance in Florida. Wildl. Soc. Bull. 25 : 139-145.

place do not give rise to a significant risk of confusion between different huntable species.

2.6.25 As regards the risk of disturbance there is a need to demonstrate a balance between the intensity, frequency and duration of hunting, and the availability and proximity of sufficient undisturbed areas offering adequate feeding and roosting areas.

2.6.26 There needs to be adequate enforcement measures to ensure that the above provisions are respected.

2.6.27 Finally, in areas which may be subject to staggered hunting seasons [62], integrated planning that takes full account of hunting and other potential disturbances on the birds and their use of the natural resources would appear to be a valuable management tool. Such planning should incorporate scientific monitoring to evaluate the potential impacts on the bird species concerned.

2.6.28 A suggested schema for considering the conditions that need to be fulfilled to ensure compatibility of staggered opening and closing dates is proposed (Figure 4).

## *2.7 Overlaps analysis*

2.7.1 A preliminary comparison between existing hunting season periods and the agreed pre-nuptial and reproduction periods for huntable species in each Member States reveals that there are a wide range of potential or actual overlaps[63], which vary in extent between the different species. All Member States are concerned although the majority of them only have problems for a relatively small number of species. The problem of overlaps appears to be more complex in those Member States where hunting dates are fixed at regional levels. However, it should be noted that for the majority of species in the different Member States there is no overlap.

2.7.2 Data on reproduction and pre-nuptial migration periods in the 'Key concepts' analysis report is presented in 10 day periods (decades). Consequently the degree of accuracy is 10 days. Therefore, an overlap of one decade between hunting date and the period of prenuptial migration or reproduction is categorised as 'a theoretical overlap' as during this period it is possible that there may not actually be an overlap. For periods of greater than 1 decade of overlap there is no such uncertainty as this is therefore a 'real overlap'.

2.7.3 Furthermore, as the overlap analysis at the level of the Member State there may be situations where hunting in particular regions of larger Member State is actually in conformity with the requirements of Article 7(4), because the breeding season may end or return migration may start later than in the country as a whole.

[62] The scale of such planning would need to be determined in relation to the geographic scope of application of the area subject to staggering.
[63] Overlap analysis – DG Environment, 2002.

2.7.4 This analysis reveals that there are problems of overlaps in both the reproduction and pre-nuptial migration periods. Some current hunting regulations allow hunting:
- extending into period of pre-nuptial migration (and sometimes the reproduction period at the same time)
- starting before end of reproduction period
- at other times of the reproduction period

2.7.5 The most problematic species is the Wood Pigeon *Columba palumbus* (overlap for 13 Member States with up to 15 decades in Ireland). The Mallard *Anas platyrhynchos* also appears to be a problem in eight Member States (with up to 5 decades overlap). Overlaps (or theoretical overlaps) for several Crow species *Corvidae* (up to 9 decades) occur in several of the Member States.

2.7.6 Several of these overlaps appear to be linked to species with long reproduction periods (or late reproduction) and/or early migration periods. Other possible explanations for the overlaps may be linked to the inappropriateness of hunting during the normal period or due to the unavailability of the huntable species at this time. A more detailed examination of different categories of overlap is given in Chapter 3.

2.7.7 It would also appear that there are cases of hunting of species under Article 7(4), which may be justified in the context of controlling damage-causing species under Article 9.1 of the Directive.

- **Possible solutions to overlap problem**

2.7.8 For each case of overlap there is a need for full compliance with the requirements of Article 7(4). Therefore, in all cases there will be a need to bring the national and/or regional legislation that fixes hunting dates under Article 7(4) of the Directive into conformity.

2.7.9 However, it is recognised that some limited flexibility can be exercised in interpreting data with a view to determining opening and closing dates for hunting seasons in accordance with Article 7(4) of the Directive. The 'Key concepts' document has allowed for the exclusion of erratic, outlier and extreme data in determining the pre-nuptial and migration periods for different huntable bird species. Furthermore, it is possible to exclude overlaps of one 10 day period as, based on the level of precision of the data, these can be considered as theoretical overlaps (see section 2.7.2).

2.7.10 If hunting seasons are set for the country as a whole, they should not overlap with the breeding and return migration periods as identified in the "Key concepts" document. If regional hunting seasons overlap with national reproduction or return migration periods scientific and technical data could provide evidence that such overlap does in fact not occur because breeding ends earlier or return migration starts later in the region concerned. This may be the case particularly in countries with profound climatic differences

between the southern and northern parts[64] and or with similar climatic differences between regions situated at different altitudes. In each case there would be a need to demonstrate clearly distinguishable regions, where on the basis of clear scientific evidence on pre-nuptial migration and/or reproduction periods, such differential opening and closing dates could be justified. In the absence of regional data the overlap analysis has to be based on national data (or if not available reference should be made to data from neighbouring parts of Europe, cf. Conclusion C-157/89, para. 16). It should be noted however, that large distance within a country is not in itself evidence for regional variation in migration patterns because migratory birds can easily cover hundreds of kilometres in one day.

2.7.11 Likewise, where the breeding range of a species with a prolonged reproduction period is clearly geographically restricted in a Member State, with late localised breeding of this species, it may be permissible to allow for earlier opening dates for hunting seasons of the species outside of these areas. In such circumstances there would be a need for the geographic areas to be at the appropriate scale to ensure that territories with late breeders are not subject to hunting seasons until the reproduction period has ended.

2.7.12 The situation regarding the Mallard *Anas platyrhynchos*, which has a prolonged combined pre-nuptial and reproduction period in some Member States deserves particular mention (see also section 3.4.33 and figure 7). In some countries a large proportion of the population is comprised of captive bred specimens[65]. Captive bred specimens as such are not covered by the terms of the directive (as confirmed by the decision of the Court of Justice in Case C-149/94[66]). In application of the directive account needs to be taken of the mixing of captive bred and wild stocks. Introducing a high level of captive bred birds into the population may result in abnormal population behaviour, including that relating to pre-nuptial migration and reproduction periods. This would appear to be particularly the case in relation to the prolonged breeding seasons of this species[67]. In light of the fact that highly artificial human-derived factors are superimposed on the biological pattern, it would seem to be appropriate in those countries containing a high percentage of an artificial population to make allowance for any distortion in the pre-nuptial migration and breeding data when fixing the hunting season of this species under Article 7 to bring it into alignment with that for other similar surface duck species. This would also have the added value of reducing hunting pressure during this period on these other species which are less plentiful than the Mallard.

2.7.13 One other most obvious solution to avoid overlap under Article 7(4) is shortening or shifting the hunting season, which, if necessary, could be

[64] For example in Sweden the time of breaking up of the ice on lakes varies from 15 March in the south to 15 June in the mountainous parts in the north. This difference corresponds to up to 9 decades and has profound phenological consequences.

[65] For example, whereas the French breeding population of the Mallard is estimated at 30000-60000 pairs, game breeders produce 1.4 million Mallard each year (source: Y.Ferrand, Office National de la Chasse et de la Faune Sauvage).

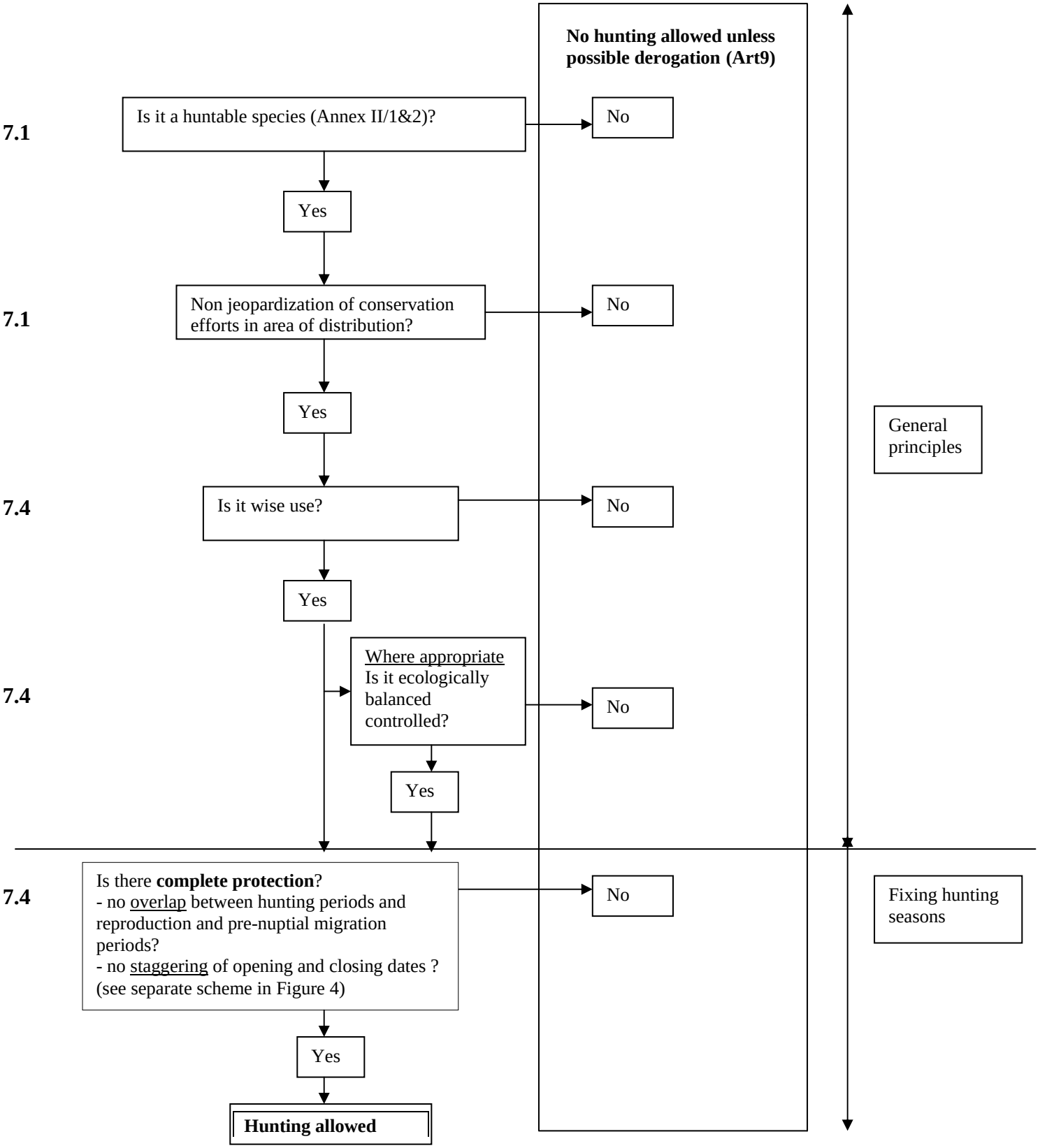
[66] Judgment of 8 February 1996, Criminal proceedings v Didier Vergy, case C-149/94, ECR 1996, p.299.

[67] Cramp and Simmons KEL, Birds of the Western Palearctic, 1977, p.516 Oxford University Press).

combined with a proportional increase in hunting days (if hunting is restricted to certain days in the week).

2.7.14 In any case such solutions have to be examined if an Article 9 derogation is considered necessary. The next chapter of this guide examines the possibility for allowing for some hunting under the derogation system of Article 9 of the Directive. Several damage-causing species for which overlapping hunting dates exist at present may be more appropriately treated under Article 9(1)(a) of the Directive. The possibility for limited hunting of certain species outside the normal hunting period, as a form of 'judicious use' under Article 9(1)(c), is also explored in the next chapter of the guide.

Summary issues to consider to allow for hunting and fixing hunting seasons under Article 7



# 3 PROVISIONS OF ARTICLE 9



Grey Lag Geese - Acrylic painting by Pieter Verstappen

Photos_chapitres_FR.indd 9 6/01/2009 17:06:26

# 3 PROVISIONS OF ARTICLE 9

## Text of Article 9

*"1. Member states may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution , for the following reasons :*

*( a ) - in the interests of public health and safety,*
*- in the interests of air safety,*
*- to prevent serious damage to crops , livestock , forests , fisheries and water,*
*- for the protection of flora and fauna;*

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

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

*2. The derogations must specify:*
*- the species which are subject to the derogations,*
*- the means, arrangements or methods authorized for capture or killing,*
*- the conditions of risk and the circumstances of time and place under which such derogations may be granted,*
*- the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,*
*- the controls which will be carried out.*

*3. Each year the member states shall send a report to the Commission on the implementation of this Article.*

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

### *3.1 Introduction*

3.1.1 Derogations are 'exceptions' which allow for some flexibility in the application of a law. A limited number of activities normally prohibited under the Birds Directive (Articles 5-8) are permissible by way of such derogations, where particular problems or situations exist or may arise. The possibilities for use of these derogations are constrained. They must be justified in relation to the overall objectives of the Directive and comply with the specific conditions for derogations described in Article 9. Member States do not need to consult the Commission before applying derogations but are obliged to report all derogations to the European Commission in annual derogation reports.

3.1.2 In this chapter major considerations relating to the use of derogations, particularly with regard to hunting, are reviewed. Firstly, formal legal considerations are examined. Secondly, the need to ensure that conditions for derogations are satisfied is explained. Then the three major conditions for use of derogations are explored. These are the issue of 'no other satisfactory solutions', the need to demonstrate one of the reasons allowed under Article 9(1)(a) to (c), which is followed by a section dealing with the need to satisfy the formal conditions set out in Article 9.2. Finally, reference is made to the reporting of derogations by Member States under Article 9.3 and the role of the Commission under Article 9.4 in ensuring that these are compatible with the requirements of the directive.

## *3.2 Formal legal considerations*

3.2.1 Certain basic formal considerations must be taken into account in any use of derogations.

3.2.2 The national legislation on which derogations are based needs to fully and accurately mirror the provisions of Article 9. According to the established case-law[68] related to transposition of the Directive, the Court of Justice stated that *"the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories."* In Case C-159/99, *Commission v Italy*, which also related to the Directive's transposition, the Court observed that "*the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty"*[69].

3.2.3 In Case C-339/87, the Court also confirmed that observance of the requirements of Article 9 in practice was not a substitute for proper formal transposition. It noted that "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty."*[70]

3.2.4 Derogations should not be compromised by non-compliance with the provisions from which they derogate. In particular, the prohibitions and other requirements from which derogations are made should be properly transposed into national law. Furthermore, in accordance with general legal principles, the

[68] For instance: Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851, paragraph 28; judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 24.
[69] Judgment of 17 May 2001, Commission/Italy, case C-159/99, ECR 2001, p.4007, paragraph 32.
[70] Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851. This position reflects the Court's earlier decision in its judgment of 23 February 1988, Commission/Italy, case 429/85, ECR 1988, p.843.

grounds justifying derogations need to be strictly interpreted to avoid undermining the main provisions of the Directive.

3.2.5 The Court confirmed[71] that Article 9 is to be interpreted as meaning that it authorizes the Member States to derogate from the general prohibition on hunting protected species laid down by Articles 5 and 7 of the directive only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). In exercising their powers concerning the granting of derogations, in accordance with Article 9 of the Directive the authorities of the Member States must take account of various criteria relating to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes[72]. A licence or other instrument embodying a derogation should therefore be complete and explicit in referring to the conditions that a derogation must satisfy.

3.2.6 This enables the Commission, the Court[73] and, mainly, the national authorities to supervise the derogations granted. It should be recalled that, according to Articles 242 and 243 of the EC Treaty, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended and may in any cases before it prescribe any necessary interim measures. In a recent case[74], the Court ordered Italy to suspend the application of a regional law granting hunting derogations.

3.2.7 When granting derogations, the national authorities bear the burden of proof[75] and must motivate their decisions in a clear and sufficient manner. According to the Court, "*the relevant national legislation applicable must specify the criteria for the derogation in a clear and precise manner and require the authorities responsible for applying them to take account of those criteria. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Directive*"[76].

[71] Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21 and judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 10.

[72] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 25.

[73] For instance, in the case of the hunting using limed twigs in the Community of Valencia (Spain) (method known as 'parany'), the Court refers to the preamble of the contested decree granting the derogation (judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619).

[74] Order of 19 décembre 2006, Commission/Italy, case C-503/06R, ECR 2006, p.141.

[75] See for instance the case of spring hunting in Finland (judgment of 15 December 2005, Commission/Finland, ECR 2005, p.11033), where the Finnish Government has not provided evidence to support its assertions (e.g. paragraphs 35, 39 and 41).

[76] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 34.

3.2.8 In addition, the Court has provided useful clarification with regard to the effectiveness of the national control mechanisms of the decisions granting derogations. In Case C-60/05[77], the Court stressed that "*the relevant national procedural framework applicable must guarantee not only that the lawfulness of decisions granting authorisations derogating from the system of protection laid down by the Directive may be verified in a timely manner but also that the conditions attached to those decisions are complied with"*. Based on the need to ensure the power of the competent national authorities to intervene in a timely and effective manner, the Court ruled that *"the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner"*.

### *3.3 Ensuring that Overall Conditions for Derogations are Satisfied*

3.3.1 Before a valid derogation can be given under Article 9, the competent national authority needs to consider and properly address several conditions concerning the derogation's prior justification and subsequent application.

3.3.2 In Case C-118/94, *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto*, the Court noted[78] that the use of Article 9 is subject to three conditions: *"It is important also to bear in mind that the Court has stated that the possibility provided for in Article 9 of derogating from the restrictions on hunting, as well as from the other restrictions and prohibitions contained in Articles 5, 6 and 8 of the Directive, is subject to three conditions. First, the Member State must restrict the derogation to cases in which there is no other satisfactory solution. Secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c). Thirdly, the derogation must comply with the precise formal conditions set out in Article 9.2, which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations (judgements in Case 247/85 Commission v Belgium [1987] ECR 3029, paragraph 7, and Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 7)."*

3.3.3 Non-respect of any one of these conditions may render a derogation invalid. It is therefore necessary for the Member State authorities to carefully examine the applicability of all three conditions, irrespective of the number and identity of the authorities within their territory responsible for applying that provision[79]. As noted in paragraph 3.2.5 above, any derogation should also be

[77] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, mainly paragraphs 42-47.
[78] See paragraph 21 of the judgment.
[79] See in particular the judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraphs 41.

explicit in its references to these conditions. In terms of the structure of the present guide, Sections 3.4, 3.5 and 3.6 deal with each of the three conditions in turn.

### *3.4 First Condition for Derogations: Showing there is 'No other Satisfactory Solution'*

3.4.1 As has been noted at paragraph 3.3.2 above, derogations are only possible in cases where there is no other satisfactory solution. This is an overarching condition that all derogations must satisfy.

#### GENERAL CONSIDERATIONS

3.4.2 An analysis of whether there is "no other satisfactory solution" can be considered as having three parts: What is the problem or specific situation[80] that needs to be addressed? Are there other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? Before answers are sought to the second and third parts, it should be clear that the problem or specific situation is capable of being covered by Article 9(1)(a) to (c).

3.4.3 This approach is illustrated by Case C-10/96, *Ligue Royale Belge pour la Protection des Oiseaux ASBL, Société d'Etudes Ornithologiques AVES ASBL v. Région Wallonne*[81] - the most extensive decision of the Court of Justice to date on "no other satisfactory solution". Although this case involved very specific circumstances, it is of considerable assistance in any general analysis of how this condition should be addressed. It is therefore worth looking at in some detail.

3.4.4 The background was a challenge made in the Belgian Court against two orders of the Walloon Region, which, *inter alia*, authorised the capture, under specified conditions, of certain species of birds protected by the Directive. The aim of the purported derogation was to supply bird fanciers with wild specimens to enable more successful captive-breeding to be carried out. Contesting the validity of the orders, the *Ligue Royale* and AVES argued that the capture of wild birds was in principle prohibited by the Directive and that derogations from that prohibition could, according to Article 9, be permitted only if there was no other satisfactory solution, such as breeding in captivity. They contended that there were extensive and adequate opportunities for breeding the species whose capture was authorised by the contested orders.

3.4.5 Two lines of argument were advanced by the Belgian authorities as to why there was no satisfactory alternative to allowing the capture of wild birds. The first related to the difficulties of immediately obliging bird fanciers to make the changes necessary to ensure more successful breeding using only captive-bred birds. The second related to the risk to successful captive breeding posed

[80] The recitals to the Directive relate the possibility of derogations to " certain specific situations".
[81] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.

by a lack of genetic diversity in captive breeding stocks. These two rationales are reflected in the questions referred by the Belgian *Conseil d'État* to the Court of Justice for interpretation[82].

3.4.6 In essence, the Court rejected the first line of argument, but, with several qualifications, accepted the possibility of derogations to deal with problems of consanguinity[83].

3.4.7 In analysing the issue of other solutions, the Court noted that the actions to be permitted under the derogation (in this case capture of wild birds for recreational purposes) were an example of "judicious use" and thus came within the exhaustive reasons that constitute the second condition referred to in Case C-118/94, (see paragraph 3.3.2 above), i.e. a derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c)[84]. This underlines the inter-relationship between the issue of other satisfactory solutions and the reasons for the derogation. In practical terms, there is little point in examining the issue of other solutions if the actions concerned by the derogation do not come within the scope of Article 9(1)(a) to (c).

3.4.8 The Court observed that, in the specific circumstances of the case, there was another solution to capturing wild birds under the derogation, namely breeding exclusively using captive specimens.

---

[82] The questions referred to the Court were the following:
"1. Do Articles 5, 9 and 18 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds allow a Member State to take account, on a decreasing basis and over a specified period, of the fact that the prohibition of capturing birds for recreational purposes would compel numerous fanciers to alter their installations and to abandon certain habits where that State recognizes that breeding is possible but is not yet feasible on a large scale for that reason?
2. Do Articles 5, 9 and 18 of Directive 79/409/EEC allow Member States, and if so to what extent, to authorize the capture of birds living naturally in the wild state within European territory with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings?'

[83] The Court responded to the questions posed as follows:
*"1. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.*
*2. National authorities are authorized under Directive 79/409, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of `small numbers' referred to in that provision.".*

[84] The Court's reasoning includes the following: "*15 It should first be pointed out that the Court has held, at paragraph 38 of its judgment in Case 262/85 Commission v Italy [1987] ECR 3073, that the capture and sale of wild birds with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized bArticle 9(1)(c) of the Directive. 16 It cannot therefore be ruled out that the capture of certain protected species for recreational purposes, such as that intended to enable fanciers to stock their aviaries, may also constitute judicious use within the meaning of Article 9(1)(c)."*

3.4.9 The Court then examined whether this other solution could be considered satisfactory, noting:

"*20 In those circumstances, breeding and reproduction in captivity could be regarded as not constituting an `other satisfactory solution' only if it were established that, were it not for the capture of birds in the wild, those activities could not prosper.*

*21 Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the inveterate habits of bird fanciers, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild.*"

3.4.10 It is evident from this passage as well as remarks of the Advocate General that, where another solution exists, any arguments that it is not "satisfactory" will need to be strong and robust. As the Advocate General observes: *"The essential unifying characteristic of paragraphs (a), (b) and (c) of Article 9.1 is that a prohibition laid down in the Directive in the interests of bird protection may have to yield to other requirements; a derogation under this provision can therefore only be a last resort. In this context the term `satisfactory' may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted."*

3.4.11 It is therefore clear that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation. The Advocate General remarks: *" It is in the nature of environmental protection that certain categories of persons may be required to amend their behaviour in pursuit of a general good; in this case, the abolition, as a consequence of the Directive, of `tenderie' or `the capture of birds for recreational purposes', which Belgium sought so stoutly to defend in ratifying the Bern Convention, is one example. That such activities may be `ancestral' or partake of an `historical and cultural tradition' does not suffice to justify a derogation from the Directive."*

3.4.12 On the other hand, the cautious[85] admission by the Court of the possibility of a derogation based on the risk of consanguinity demonstrates that, under certain circumstances, the condition as to no other satisfactory alternative may be satisfied. The Advocate General observes[86]: *"The determination of whether*

[85] The caution of the Court is evident in the following passage: *"25 It must next be borne in mind that, as already indicated in paragraph 17 of this judgment, a derogation from Article 5(a) of the Directive may be accorded only if there is no other satisfactory solution. In particular, that condition would not be met if it were possible to obviate the problems of consanguinity by cooperation and exchanges of specimens between breeding establishments."*

[86] Opinion of Mr Advocate General Fennelly delivered on 7 November 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, paragraph 39.

*another satisfactory solution exists in a given factual situation is, of course, a matter for the national court. Such a determination must, in my view, be founded on objectively verifiable factors, such as the scientific and technical considerations suggested by the Commission."* Against this background, it seems reasonable to state as a general proposition that any determination that another solution is unsatisfactory should be based on objectively verifiable factors, and that close attention needs to be paid to the scientific and technical evaluation of these. In Case C-79/03[87], the Court focused on those factors in order to assess the compatibility of the derogations granted hunting using limed twigs in the Spanish Community of Valencia. It seems that the arguments based on the *"deeply rooted tradition"* of hunting practices are not sufficient in order to justify the need for derogations[88]. In addition, in its judgement of 16 October 2003, the Court took a rigorous view with regard to the "need" and the "purpose" of a derogation[89]. A final point is worth noting from the decision in Case C-10/96[90] - the need to limit a derogation to the extent necessary to resolve the problem addressed. Thus, while there might be no other satisfactory solution to the risk of consanguinity than capture of a supplementary stock of wild birds, the number of specimens involved must be "*fixed at the level of what proves to be objectively necessary to provide a solution for those problems"*. This limitation is distinct from the limitation of "small numbers" in Article 9(1)(c), although the limitation for small numbers must be observed as an overall "cap".

### "NO OTHER SATISFACTORY SOLUTION" IN RELATION TO HUNTING

3.4.13 A basic question arises as to whether, as a matter of law and fact, this condition can ever be satisfied in relation to hunting, especially proposed extensions of hunting seasons. In the case of recreational hunting, this question is inextricably linked to the question of whether such hunting can be considered a "judicious use" for purposes of Article 9(1)(c). Clarification has been provided by the Court of Justice in its judgment in Case C-182/02 *Ligue pour la protection des oiseaux and others*[91], which arose out of a preliminary reference from the French *Conseil d'État* Having confirmed that recreational hunting may constitute a "judicious use" (see section 3.5 below), the Court declared that a derogation under Article 9(1)(c) could only be given where there is no other satisfactory solution.

3.4.14 The Court did not describe at length under what circumstances recreational hunting would meet the condition as to "no other satisfactory solution".

[87] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619.
[88] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraph 27.
[89] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 16. The Court confirmed this approach in the following rulings: judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraph 19 and judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 33.
[90] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.
[91] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

However, in paragraph 16 of the judgement, the Court provides important clarification, noting that this condition

*"cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, Commission v Italy, paragraph 39). There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."*

3.4.15 The reference to "need" and "purpose" of a derogation underlines, as does the judgement in Case C-10/96[92], the importance of demonstrating that there are compelling reasons to justify a derogation. This approach has been confirmed by the following rulings of the Court with regard to the hunting of woodpigeons in the Spanish province of Guipúzco[93] and the spring hunting in Finland[94].

3.4.16 Furthermore, the second sentence quoted explicitly rules out the possibility of a derogation where the sole purpose is to extend a hunting season for wild birds that are available to be hunted during a normal open season. The Court has shown itself ready to carry out an "opportunity" check (*contrôle d'opportunité*)[95] for granting derogations.

3.4.17 In Case C-344/03, the Court also ruled that hunting in the autumn, or in the spring, of other species birds present "*by way of replacement"* cannot be regarded as another satisfactory solution within the meaning of Article 9(1)(c) of the Directive. According to the Court, *"such a solution would risk rendering that provision nugatory, at least partially, because it would allow in certain territories for prohibitions on hunting certain species of birds, even though hunting in small numbers might, in theory, not jeopardise the maintenance of their populations at a satisfactory level and, therefore, constitute judicious use of those species (see, to that effect, Ligue pour la protection des oiseaux and Others, paragraph 17). Moreover, unless all bird species are considered to be equivalent for the purposes of hunting, that solution would, in any event, be a source of legal uncertainty, because the basis on which it may be considered that the hunting of a given species can replace the hunting of another species is not clear from the applicable legislation"*[96].

[92] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.
[93] Judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraph 19.
[94] Judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 33.
[95] An examination of whether, in a specific set of circumstances, a derogation is justified.
[96] Judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 44.

**POSSIBLE OBJECTIVELY VERIFIABLE FACTORS AND SCIENTIFIC AND TECHNICAL CONSIDERATIONS**

3.4.18 In the light of the decision of the Court in Case C-182/02[97], it requires to be examined whether there are needs - or, to use expressions found in the Advocate General's Opinion in Case C-10/96, objectively verifiable factors and scientific and technical considerations[98] - that would justify derogations for hunting on the basis that there is no other satisfactory solution to a specific situation.

- **Hunting with a non-recreational justification**

3.4.19 It is generally accepted that some huntable bird species can jeopardise the interests referred to in Article 9(1)(a) outside of the hunting season allowed under Article 7. It is also generally accepted that, in order to safeguard these interests, there may sometimes be no satisfactory solution other than destruction of birds. In this context, it would seem reasonable that the use of hunting is a legitimate means of safeguarding the interests mentioned in Article 9(1)(a). Of course, in this instance, hunting serves a non-recreational objective (i.e. damage prevention).

3.4.20 The species for which Article 9(1)(a) are invoked are sometimes referred to as 'pest species'. The justifications for their control include 'to prevent serious damage to crops, livestock, forests, fisheries and water' as well as 'for the protection of flora and fauna'. The first justification in particular relates to a wide range of species, including members of the *Corvidae*, *Columbidae*, *Sturnidae*, *Laridae* and *Anseridae*[99]. Several of the species concerned are widespread and relatively abundant and are considered to have a favourable conservation status (see Figure 5 for consideration).

- **Hunting for recreational purposes**

3.4.21 As regards hunting for recreation, it would seem reasonable to consider that, in terms of objectively verifiable factors and scientific and technical considerations, the findings of the Overlap Analysis (see Chapter 2) are pertinent.

3.4.22 It has already been noted from the Overlap Analysis that, to a significant extent, hunting is permitted in some Member States during periods precluded under Article 7(4), thus requiring steps to ensure alignment of hunting seasons with the requirements of the Directive.

---

[97] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

[98] Opinion of Mr Advocate General Fennelly delivered on 7 November 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, paragraph 39.

[99] This category also applies to species not listed in Annex II such as the Cormorant *Phalacrocorax carbo*

3.4.23 The first and primary reaction should, of course, be to ensure compliance with Article 7(4). This would be consistent with the second sentence of paragraph 16 of the judgement in Case C-182/02[100].

3.4.24 The question that then arises is whether there are factors which merit consideration of the scope for derogations in relation to the overlaps. It would appear that, in some cases, the overlaps may be correlated to a number of biological and conservation factors and there may be arguments as to why these may merit being looked at as possible objectively verifiable factors. Whereas these factors need to be examined on a species by species basis, several broad categories of overlap emerge, which need to be considered. For individual species or populations several of the different categories may simultaneously apply.

3.4.25 It should be stressed that in considering these factors for the purpose of derogation possibilities of Article 9(1) it will always be necessary to carry out an in-depth examination of the populations of the species and to have particular regard to the circumstances. Furthermore, it again needs to be emphasised that derogations are intended to address exceptional situations and that the factors mentioned should not be seen as justifying a general, systematic extension of hunting periods for general convenience. Before any derogations is granted, an assessment on a case by case basis and based on clear scientific evidence should take place. This approach is in line with the relevant case-law of the Court[101].

To assist reflection on the matter, a number of possible situations are outlined below. It should be stressed that the presentation of these situations does not imply that the Commission accepts that they constitute grounds for derogation.

- *Species for which hunting may be impractical or inappropriate during significant parts of normal period*

3.4.26 For example, for some species, which exist in cold climates, it may not be practical or appropriate to allow for hunting during cold periods of prolonged physiological stress. Examples may include species of the Grouse family *Tetraonidae* in mountainous environments. From a conservation point of view it may be less damaging to these species to allow some limited hunting during

[100] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02. In order to assess if France had restricted the derogation to cases in which there was no other satisfactory solution, the Court examined whether it was necessary that the hunting period under a derogation coincides, without need, with periods in which the Birds Directive aims to provide particular protection. According to the Court, "there would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

[101] See in particular the following judgments of: Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21; judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraphs 13-19.

closed periods than during the normal hunting season[102]. However, any consideration given to this matter should take full account of the needs of species during the short summer to ensure successful reproduction, moulting and preparations for winter and be based on clear scientific evidence. Furthermore, the judgement in Case C-182/02 makes it clear that an extension for the sole purpose of extending the hunting season would be unlawful.

- *Species which may be unavailable in parts of range during most of normal hunting period*

3.4.27 The absence of species in particular regions during normal hunting periods due to migration patterns may also be a factor for consideration. In its judgement in Case C-182/02[103] the Court has not excluded the possibility of hunting under derogation outside normal periods fixed in accordance with Article 7. Such hunting would be permissible in "territories" not used by birds during the normal hunting period.

3.4.28 The identification of territories to which such derogations may be applied should be done on a scale which is related to the movement and distribution of the species concerned. It should also include consideration of the opportunities for hunting the particular species within a given region. The granting of derogations on the basis of the absence of the species from 'local' territories within a region where such species are present during the normal hunting period would not be appropriate. This line has also been confirmed by the Court in Case C-135/04, related to the hunting of woodpigeons in the Spanish province of Guipúzcoa[104].

3.4.29 Any such derogation would need to be assessed on a case by case basis. For some migratory species that do not spend the winter in a Member State there may be consistently good opportunities for a hunting season in such territories, while the species is on post reproduction migration. This is an important factor in any consideration of allowing hunting seasons outside normal permissible periods.

3.4.30 In Case C-344/03, the Court ruled on the issue of the permissibility of hunting birds on pre-nuptial migration and conditions that should apply[105]. The case concerned the following species: eider *(Somateria mollissima),* golden-eye *(Bucephala clangula),* red-breasted merganser *(Mergus serrator),* goosander *(Mergus merganser),* velvet scoter *(Melanitta fusca)* and tufted duck *(Aythya fuligula)*. The Court assessed the situation species by species with a view to verifying whether the sole purpose of the derogation was to extend the hunting seasons for those species in territories which they already frequent during the hunting seasons fixed in accordance with Article 7 of the Directive. On the

[102] In some Member States hunting there is a statutory suspension of hunting during periods of prolonged cold weather.
[103] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 16.
[104] Judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraphs 20-22.
[105] Judgement of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraphs 29-46.

basis of the scientific evidence available, the Court concluded that those species could also be hunted in autumn and ruled that the derogation had not complied with the condition that there be no other satisfactory solution.

- *Species with prolonged (pre-nuptial and) reproduction periods*

3.4.31 This category refers to a relatively small number of species with prolonged breeding periods during which several clutches are produced. This may also be combined with a pre-nuptial migration period although the duration of the breeding period is the most significant factor. Examples include *Anas platyrhynchos, Aythya fuligula*, *Columba palumbus*, *Streptopelia decaocto*. This category applies in particular to the latter two species. Despite the fact that the Wood Pigeon *Columba palumbus* and Collared Dove *Streptopelia decaocto* have breeding seasons spread over 6-8 months the peak of breeding activity is over two months[106]. Several of these species are very plentiful and have a favourable conservation status (see Figure 5 for consideration).

3.4.32 For the majority of these species, the very late clutches are second or even third ones, or even replacement clutches. In general, the viability of late born chicks is probably very low because of climatic conditions in autumn and a lack of time to develop properly and accumulate enough food before winter. In such circumstances, they may provide a low contribution to the overall recruitment of the population. However, the production of late clutches may also be linked to availability of abundant food supply at this time and therefore represent a significant contribution to the population. For example, the breeding success of Collared Doves in eastern Germany increased throughout the season from 32% in March to 70% in August-October. It would therefore appear necessary to determine the significance of early and late breeding to overall population success.

3.4.33 Some prolonged breeding periods can also be linked to human influences (e.g. availability of cereals as late food for *Columbus palumbus* in the UK and Netherlands[107]). The prolonged breeding season of the Mallard, *Anas platyrhynchos*, in some areas may be related to the presence of domestic strains selected for long breeding seasons[108]. This illustrates the fact that human-derived, artificial factors may superimpose on the biological pattern and distort it through prolongation of reproduction periods.

[106] According to a study by R.K. Murton (Bird Study, 5, 157-183. 1958) breeding peaked from late July till the end of September. A Dutch study showed a clear peak of nests with eggs at the turn of August to September (Bijlsma 1980). Birds of the Western Palearctic (1985, 325): "Considerable variation even within countries, with urban birds in Britain nesting significantly earlier (starting second half of February) than rural (starting second half of March to second half of April); peak laying period for urban birds second half of April and first half of May, and for rural first half of July to first half of September; differences dictated by food availability (Murton 1958, Cramp, S 1972. Ibis 114, 163-171)." For Collared Dove BWP (1985, 350) states merely "Prolonged throughout range."

[107] Murton (1958), Bijlsma (1980).

[108] (Cramp, S and Simmons K.E.L, Birds of the Western Palearctic 1977, 516).

3.4.34 The situation for *Anas platyrhynchos*[109] and *Columba palumbus*, which are the most problematic species in many Member States, is indicated in Figures 6 and 7. This shows that restricting the hunting season to normal periods under Article 7(4) would result in it being excluded for up to 25 of the 35 decades (i.e. periods of ten days) in the annual cycle of these species. The biological factors result in a hunting season that is 5 decades shorter than is the case for many other quarry species. There would not appear to be conservation needs requiring such a constraint, given their prolific numbers and conservation status. These species are key quarry species in many parts of the EU and central to the whole recreational hunting activity there. Furthermore, the presence of domestic strains of Mallard *Anas platyrhynchos* in different parts of its wintering range may contribute to this different behaviour as regards both pre-nuptial migration and reproduction periods, although this factor merits further scientific study and it is therefore proposed that where this highly artificial situation exists it may be partly accommodated within the framework of Article 7 of the directive (see section 2.7.11-2.7.12).

- *Species with reproduction period with prolonged parental care*

3.4.35 For several groups of birds (e.g. *Tetraonidae*, *Phasianidae*, *Laridae*, *Anseridae*) the period of dependence of the young from hatching to full fledging can be very prolonged. In fact, for young of the *Anseridae*, the period of offspring parental care can continue through to spring migration (for these species the fledging of young is considered to be the end of dependency for the purposes of Article 7(4)). For the *Tetraonidae*, an extremely precautionary approach has been taken in defining the period of dependence of the young birds, which may last for 6-9 decades after hatching. This phenomenon of a prolonged period of dependency when combined with late (replacement) clutches can result in the reproduction period extending up to the end of September for several species. Because of this late date, the viability of chicks born of these late clutches of *Tetraonidae* is uncertain owing to meteorological conditions in the mountains in autumn.

3.4.36 In considering whether objectively verifiable factors exist it may also be appropriate for the scientific and technical considerations to take some account of the beneficial consequences for the conservation of bird species that may accrue from game management linked to a contemplated exercise of the derogation. For example, hunters may take care of game habitats on a voluntary basis, nest boxes may be offered in large quantities, and supplementary food offered at proper occasions. Upland heather management and lawful predator control as a consequence of game management not only benefits Red Grouse *Lagopus lagopus* but also has wider environmental benefits[110].

[109] The prolonged breeding season of the Mallard in some areas may be related to the presence of domestic strains selected for long breeding seasons (Cramp, S and Simmons K.E.L. 1977. Birds of the Western Palearctic p. 516. Oxford University Press).

[110] Report of the UK raptor working group. 2000. Peterborough. Department of the Environment, Transport and the Regions / Joint Nature Conservation Committee. ISBN 1 85397 078 6.

### *3.5 Second Condition for Derogations: Demonstrating One of the Reasons Allowed Under Article 9(1)(a) (b) and (c)*

3.5.1 As has been noted at paragraph 3.3.2, a derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c).

#### ARTICLE 9(1)(A) DEROGATIONS

3.5.2 Article 9(1)(a) of the Directive lists a number of reasons, which may justify the use of derogations. They are:

- In the interests of public health and safety
- In the interests of air safety
- To prevent serious damage to crops, livestock, forests, fisheries and water
- For the protection of flora and fauna

3.5.3 These provisions are not restricted to huntable bird species (listed in Annex II of the Directive) but apply to all bird species for which there is justification for use of the derogation. However, many of the species that are considered to pose problems under Article 9(1)(a) (so-called pest species) are listed in Annex II of the Directive and therefore can be controlled during the normal hunting period in accordance with the provisions of Article 7 of the Directive[111].

3.5.4 Therefore, Article 9(1)(a) would mainly apply for huntable species in situations where control measures are to be exercised during the pre-nuptial and reproduction periods. The possibilities for its use are considered below.

*"In the interests of public health and safety and in the interests of air safety"*

3.5.5 The first and second reason under subsection (a) concern "interests of public health and safety" and "interests of air safety" respectively. Public health and safety may be locally affected where the presence or the feeding of birds causes a demonstrable risk to human health or increases risk of accidents. In many cases habitat alterations or exclusion of birds will be appropriate solutions. For example, at many airports, management measures are taken to prevent bird strikes with aeroplanes.

3.5.6 Such solutions involve in particular habitat management (to reduce the attractiveness to birds and in particular flocks of birds) and various scaring techniques including sometimes shooting. In most cases other satisfactory solutions are available which are more effective and durable than hunting, with the exception of falconry. Therefore under Article 9 these must be used instead.

[111] Council Directive 94/24/EC amended Annex II of Directive 79/409/EEC to include five species of *Corvidae*, which can cause damage to crops, livestock and fauna and for which control measures were formerly only possible under Article 9 derogation. Their listing in Annex II facilitated balanced regulation of their populations.

*'To prevent serious damage to crops, livestock, forests, fisheries and water'*

3.5.7 The third reason for derogation under subsection (a) concerns the prevention of serious damage to crops, livestock, forests, fisheries and water. This derogation, which is intended to regulate 'damage-causing birds', has a number of dimensions. Firstly, it clearly relates to economic interest. Secondly, it is intended to prevent damage; therefore it is not a response to already proven damage but of the strong likelihood that this will take place in the absence of action. Thirdly, there must be a basis for concluding that damage will be serious in the absence of action.

3.5.8 Bird damage is usually caused by feeding (crops, livestock, fisheries), destruction (crops, forests), and pollution (water).

3.5.9 Such bird damage concerns a wide spectrum of species, including the *Corvidae, Columbidae, Sturnus vulgaris, Laridae* and *Anseridae*. Of those Annex II species many are also the subject of long overlaps (over 40 days) between hunting seasons and the periods of breeding and return migration.

3.5.10 Damage to interests other than those mentioned, e.g. other forms of property or other damaging situations, is not covered.

3.5.11 The damage concerned must be serious. In this regard the European Court has noted that "*the aim of this provision of the Directive is not to prevent the threat of minor damage*."[112] Two aspects may be noted: the likelihood and extent of damage. The chance of the occurrence of damage does not suffice. If damage is not yet apparent, past experience should demonstrate a high probability of the occurrence of damage. Furthermore, it should concern serious damage to an economic interest, indicating that this does not cover mere nuisance and normal business risk.

3.5.12 As always with derogations, it is necessary to consider the available solutions. Hunting will not always be an effective solution. Any control method is vulnerable to the removed birds being replaced from elsewhere and shot birds will, after some time, be replaced by other birds.

3.5.13 In Case C-79/03, which related to the hunting by means of limed twigs aiming to avoid serious damages to crops in the Spanish Community of Valencia, the Court ruled on the existence of alternatives and on the relevance of this type of hunting to avoid damages[113]. According to the Commission, there were other satisfactory solutions for preventing the alleged serious damage caused by the thrushes to vineyards and olive groves (e.g. hunting with guns and the use of bird scarers which were successfully carried out in other autonomous communities in Spain). The Spanish authorities claimed that the hunting by means of limed twigs provided a satisfactory solution for preventing damages, as the use of bird scarers was too expensive in relation to the cost of the

[112] "*The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.*" (judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029paragraph 56).
[113] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619.

damage caused and their use can cause fires, while the use of guns would have entailed an increase in the number of hunting permits and an extension of the hunting season.

3.5.14 The Court observed that in other regions of Spain facing the same problems (where there was large-scale cultivation of olives and grapes and where there was also large populations of thrushes), hunting using limed twigs was not permitted, but thrushes could be shot, as a selective method of culling. The Court also noted that 80% of the limed twigs were to be found in one province for which 69.5% were in areas without olive groves or vineyards; thus, the justification based on prevention of serious damage to those crops did not appear to be consistent with such a situation. Consequently, the Court considered that hunting by means of the limed twigs was not justified under Article 9(1)(a) of the Directive[114].

3.5.15 However, there will be cases where hunting of birds to control damage is justified. In order to maximise damage prevention, control measures for a species that causes damage are most likely to be effective when the population is at its seasonal minimum and when there is the least availability of replacement birds – typically this is the breeding or pre-breeding period. When devising pest control strategies, logic suggests that the first approach should be to make the control local in time and place to where the damage is occurring. However, widespread species that can cause damage over large areas, such as the Wood Pigeon *Columba palumbus*, may justify derogations that are more generalised in their territorial scope[115].

*"for the protection of flora and fauna"*

3.5.16 The fourth reason for derogation under subsection (a) concerns the protection of flora and fauna. The types of fauna or flora are not specified but would appear to be different from the flora and fauna of economic interest covered by other provisions of Article 9(1)(a). The case for using the derogation is likely to be strongest where it is linked to the maintenance of populations of species that are rare or threatened but is not limited to such species. Furthermore, there appears not to be a need in this case to demonstrate a likelihood of serious effect before applying the derogation.

3.5.17 Birds may affect flora and fauna by predation, grazing, demolition, trampling, accumulation of droppings etc. A relatively small number of species is allegedly blamed for this: e.g. Herring Gull *Larus argentatus*, Crow *Corvus corone*, Magpie *Pica pica*[116]. A long-term impact on other populations of flora and fauna is only likely when localised occurrences are involved. Each case should be considered thoroughly and decided on advice from the conservation

[114] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraphs 25 and 28.
[115] As regards the use of general authorisations to deal with such situations, this is discussed in more detail sections 3.6.10 to 12 in relation to Article 9(2).
[116] Certain species not listed in Annex II of the directive are also involved (e.g. Cormorant *Phalacrocorax carbo).*

authorities. Decisions should be made on best available scientific information available. The following questions might be answered:

- Does it concern threatened, rare or other populations of naturally occurring species with an unfavourable conservation status?
- Are the 'flora and fauna' in question in a poorer conservation status than the species for which the derogation is sought?
- Does it concern other important biodiversity considerations?
- Is good scientific evidence available on the long-term impact on the affected population(s)?
- Are "other satisfactory solutions" not available, thus is population control necessary to effectively reduce or prevent the "ecological damage"?

3.5.18 With regard to "other satisfactory solutions", the extent to which predation is directly related to habitat loss, habitat deterioration or modification (e.g. loss of vegetation cover) or other environmental factors should be considered. Where such a direct relationship exists, it may be appropriate to consider predator control in combination with habitat restoration or better management of human activities. For example, predation of colonies of tern (*Sterna)* species by gull (*Larus)* species may be related to an overall increase in gull populations linked to increased food provided by poorly managed waste disposal sites.

3.5.19 Where the case for protection is supported by compelling elements, control (which may include hunting) could be considered. It would therefore appear that only in specific situations, to be determined by the conservation authorities or their agencies, could control of birds be an appropriate management measure, at the relevant geographical level, to effectively reduce the negative impact of certain bird species on vulnerable flora and fauna.

### ARTICLE 9(1)(B) DEROGATIONS

3.5.20 Article 9(1)(b) allows the possibility for use of derogations for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these populations. The links between these possibilities and hunting are likely to be very limited, although it may be relevant in cases where there are breeding programmes for game species with a view to their re-population or re-introduction. There may also be cases where other hunting research projects may justify the use of this type of derogation.

### ARTICLE 9(1)(C) DEROGATIONS

3.5.21 Article 9(1)(c) allows for the use of derogations for the capture, keeping or other judicious use of certain birds. Apart from general conditions, there are four specific conditions, which must be respected in order to apply a derogation under Article 9(1)(c). It must represent 'judicious use'. It must relate to 'small numbers'. It is only permissible if carried out under 'supervised conditions'. Finally it must be on a 'selective basis'. The Court ruling in Case C-60/05 clarifies several issues with regard to the conditions of

Article 9(1)(c) and the type of national administrative framework required for the effective implementation of this provision[117].

- **"Certain Birds"**

3.5.22 Whereas it is mentioned that this derogation can apply to "certain birds", these are not specified in the Directive. In negotiations leading to the adoption of the Directive, there was reference to the need to provide for a derogation to allow the taking of birds of prey for falconry[118]. However, it may be concluded that this derogation can also apply to other bird species for which judicious use is justified. In Case C-182/02, the Court stated[119] that the condition as to "certain birds in small numbers"*"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."* It is therefore difficult to conceive of circumstances where an Article 9(1)(c) derogation would be justified for a species that has an unfavourable conservation status,

- **Judicious Use**

3.5.23 9(1)(c)A fundamental question arises as to whether hunting can constitute a "judicious use" for the purposes of Article 9(1)(c). This question has now been answered by the Court in Case C-182/02 *Ligue pour la protection des oiseaux and others.* Based on previous case-law[120], the Court stated that:

*"It is clear from the foregoing that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Directive may constitute a judicious use authorised by Article 9(1)(c) of that directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets"* [121].

3.5.24 It is evident from the same judgment that recreational hunting does not automatically constitute a judicious use. Having noted the need for a hunting derogation to ensure the maintenance of the population concerned at a satisfactory level, the Court observed that:

---

[117] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

[118] The Economic and Social Committee in its opinion on the proposal for a Council Directive on bird conservation of 25 May 1977 (O.J. N° C 152/3 of 29.6.77) stated "*2.8.1. The absence of a possibility of derogating in order to take birds of prey for falconry was noted. It was pointed out to the Commission that this was a legitimate and ancient sport, which if properly controlled, harmed neither birds of prey populations nor the populations of birds pursued in the course of falconry. Some provisions should be made therefore to allow the continuation of this on a controlled basis"*

[119] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.

[120] See in particular judgment of 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, paragraph 38, but also judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 7 and judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21.

[121] See paragraph 11 of the judgment. This has been recently confirmed in the judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 32.

*"If that condition is not fulfilled, the use of birds for recreational hunting cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital in the preamble to the Directive." 32 60/05*

3.5.25 Judicious use is not defined in the Directive, although it is clear from Article 9(1)(c) that it can include the capture and keeping of certain birds. It is also worth noting that, while, in the English version of the Directive, the word "use" is repeated in the phrase "wise use" in Article 7 and the phrase "judicious use" in Article 9.1(c ), other language versions employ different terms in these two phrases. In many of these versions, the equivalent word for "use" in the phrase "judicious use" has an exploitative connotation[122]. The Commission has previously stated: '*This concept is to include activities which make a vital contribution to improving the efficiency of the general system for the protection of wild birds established by the Directive. It may also include other use provided that this does not jeopardise the general objectives of the Directive and it may include hunting using birds of prey in the context of falconry'*[123]. However, any exploitative connotation carried by the term "use" needs to be balanced by the connotations of responsibility, restraint and good judgement imparted by "judicious". This is confirmed by the observation of the Court in Case C-182/02 referred to in paragraph 3.5.22 above.

3.5.26 Falconry provides an illustration of circumstances which amount to a non-respect of Articles 5 (prohibition on killing or capture of wild birds) and 7 (huntable species) but which, in the Commission's view, nonetheless represent a "judicious use". Although falconry is explicitly mentioned in Article 7(4) of the Directive, the practice is limited to huntable species listed in Annex II/1 and Annex II/2 of the Directive for the Member States concerned. In the United Kingdom, the skylark *Alauda arvensis* constitutes one of the main quarry species for the Merlin *Falco columbarius.* Falconry using merlins is practised, but the skylark is not amongst the species listed in Annex II/2 for this Member State. For this reason, the United Kingdom authorises, by way of derogation, the hunting of small numbers of skylarks by merlin. The Commission considers that this is justifiable as a "judicious use" under Article 9(1)(c) by reason of the fact that the merlin has a natural propensity to hunt skylarks. It should be noted that this is not the only instance in which hunting might be the subject of a derogation pursuant to Article 9(1)(c).

- **Small Numbers**

3.5.27 In order to meet the requirements of Article 9(1)(c) the derogations must only relate to "small numbers". Therefore it would be appropriate to be able to determine a quantity to fix a threshold below which the derogation is automatically considered as meeting the requirements of the notion of "small numbers".

[122] Other languages: "utilisation raisonnée " as against "exploitation judicieuse" (FR); "fornuftig udnyttelse" ,fornuftig anvendelse (DK); "saggia utilizzazione" , impieghi misurati (IT); "utilización razonable" , "explotación prudente" (ES); "förnuftigt utnyttjande",. förnuftig användning (SE); "ορθολογική χρησιμοποίηση", "ορθολογική εκμετάλευση" (GR).

[123] From Second Report on Birds Directive (pp 9-10)

3.5.28 In Case 252/85, *Commission v France*[124], the Court considered the issue of small numbers in the following passage: "*In this respect, it is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned."* As noted earlier, in Case C-182/02, the Court stated[125] that the condition as to "certain birds in small numbers"*"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."*

3.5.29 The Commission considers that the notion of "small numbers" is therefore necessarily relative. A size cannot be small or large except in relation to another size. It must also not be detrimental to maintenance of the population level and take full account of the conservation status of the species concerned.

In its recent judgements the Court has confirmed the Commission's approach and provided further legal clarification on the issue of small numbers[126].

Determining the size

3.5.30 The question arises as to the size to which "small numbers" are to be compared. Since all the cases of derogations concern the taking of birds i.e. an annual loss for the population affected, the most appropriate solution is to compare the numbers involved in this taking to the overall annual mortality, defined as the sum of deaths due to natural causes and to the taking of birds under Article 7 if applicable.

3.5.31 It is therefore proposed that the threshold of "small quantities" should be fixed as a given percentage of the total annual mortality of the population(s) concerned by the derogation.

3.5.32 For sedentary species, "population concerned" means the population of the geographical region in which the derogation is sought to be applied. For species on migration, it means the population of the regions from which the largest numbers of migratory birds come before passing through the region where the derogation is sought be applied during the period the latter is in force. During the winter period, it means the minimum wintering population present in the region where the derogation is sought to be applied. In cases where the population is shared by different Member States, there may be use of derogations on migratory birds of the same population in the different countries. In such circumstances it would be necessary to restrict the

[124] Judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243.
[125] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.
[126] See the following judgements: judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraphs 36 and 41; judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraphs 53-54; judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraphs 25-27.

population concerned to that occurring in the territory to which the derogation applies at the time when the taking takes place, so as to minimise cumulative effects.

3.5.33 There is also a temporal dimension to determining the reference population at the time of application of the derogation. For example, the taking of Wood Pigeons *Columba palumbus* in autumn, when there is a surplus of young birds will be very different from the taking of sea ducks on spring migration, when the impacts will proportionately be higher on the adult population of pre-breeders. There may also be cases where a species undergoes differential migration (e.g. Ruff *Philomachus pugnax*) and this needs to be taken into consideration in determining the reference population.

3.5.34 In order to determine an exact figure for the threshold, two approaches are possible:
- the figure must be much lower, by at least an order of size, than those figures characteristic of the taking of birds under Article 7. A figure of 1% meets this condition.
- the taking must have a negligible effect on the population dynamics of the species concerned. A figure of 1% or less meets this condition as the parameters of population dynamics are seldom known to within less than one percentage point and bird taking amounting to less than 1% can be ignored from a mathematical point of view in model studies.

3.5.35 Hunting bag statistics exist for only a few Member States and species and the data is of variable quality. Whereas hunting bags may generally be proportional to population size, hunting pressures do not necessarily provide an appropriate approach as they focus on determining a threshold for derogation on the basis of hunting take and not in terms of population size. The implication that the greater the hunting take in a region the more birds that could be hunted under derogation may also not be considered as good conservation practice. Such an approach would also discriminate against regions that may have limited hunting possibilities under normal hunting seasons.

3.5.36 The overall annual mortality is an appropriate parameter to quantify small numbers because it takes population size, status and population dynamics into account. Within this framework “small numbers” should be considered as being any taking of around 1% of the annual mortality for species which may be hunted, it being understood that conformity with Article 9 of the Directive depends in any event on compliance with the other provisions of the Article.

The Court follows the same approach as regards the application of Article 9, which is summarized in the paragraphs 25-27 of Case C-60/05[127]:

*25 "It is also important to note that, in exercising their powers concerning the grant of derogations, in accordance with Article 9 of the Directive the authorities of the Member States must take account of various criteria which*

[127] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

*relate to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes.*

*26 As to those criteria, the Court pointed out in Case C-79/03 Commission v Spain [2004] ECR I-11619, paragraph 36, and Case C-344/03 Commission v Finland [2005] ECR I-0000, paragraph 53, that, according to the document entitled 'Second report [of the Commission] on the application of Directive 79/409/EEC on the conservation of wild birds' of 24 November 1993 (COM(93) 572 final), 'small numbers' are any sample of less than 1% of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted. The Court stated in that regard that those quantities are based on the work of the ORNIS Committee for the Adaptation to Technical and Scientific Progress under the Directive, instituted under Article 16 of the latter and consisting of representatives of the Member States.*

*27 It is also clear from the judgments cited above in Commission v Spain, paragraph 41, and Commission v Finland, paragraph 54, that although the percentages referred to above are not legally binding, they can none the less constitute, by reason of the scientific value of the work of the ORNIS Committee and the absence before the Court of any element of scientific proof to the contrary, a basis of reference for assessing whether a derogation granted under Article 9(1)(c) of the Directive complies with that provision (see by analogy, in respect of the relevance of scientific data in the field of ornithology, Case C-3/96 Commission v Netherlands [1998] ECR I-3031, paragraphs 69 and 70, and Case C-374/98 Commission v France [2000] ECR I-10799, paragraph 25)."*

<u>Calculating annual mortality rates</u>

3.5.37 One of the perceived difficulties in applying the annual mortality for estimating small numbers is the fact that mortality rates are described for a limited number of species and usually for only part of their populations. Whereas estimates of annual mortality vary in availability and quality, they do exist for most huntable species (see Figure 8) which summarises published mortality rates for these species in two key scientific reference sources; 'Birds of the Western Palaearctic' and the'Kompendium der Vögel Mitteleuropas').

3.5.38 Furthermore, it is possible to calculate, on the basis of the available scientific literature for biologically similar species estimates for species for which no data is available at present (see worked example for *Rallus aquaticus* in Figure 9).

3.5.39 There will be a need to refine and improve the data on annual mortality of different species and populations, including developing the use of ringing

data[128]. The availability of good quality scientific information on population size and natural mortality is a prerequisite of reliable calculations. In cases where such data is lacking or incomplete there would be a need to use minimum estimates of population size and mortality rates, based on best available data. Furthermore, any application of derogations for a species must be underpinned by robust monitoring systems for the populations concerned to ensure that the taking is not detrimental to their conservation status.

Small numbers and conservation status of species

3.5.40 Derogations should not be granted for species or populations with an unfavourable conservation status, which are declining within the European Union (or in a Member State considering exercising such derogations), whose area of distribution (breeding or wintering) is contracting, or with very low population levels, unless it can be clearly demonstrated that use of such derogations are beneficial to the conservation status of the species/population concerned. Any consideration of use of derogations for such species should only be in the framework of a conservation management plan for them, aimed at their recovery to favourable conservation status. The Commission is of the view that this conclusion is consistent with the Court judgement in case C-182/02 (paragraph 17). In that case, the Court confirmed in paragraph 17 of its judgement that a hunting derogation will not be justified if it does not ensure the maintenance of the population of the species at a satisfactory level. The need to ensure the maintenance of the species population at a satisfactory level is not explicitly mentioned in Article 9. It seems that the Court took into account the general orientation of the Birds Directive set out in Article 2 and the 11th recital. Moreover, there is an obvious analogy with Article 16 of Directive 92/43/EEC, which states that the derogation must not be "detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range". Therefore, the need to ensure the maintenance of the population of the species at a satisfactory level becomes a pre-condition for granting derogations. It should also be noted that Article 9(4) of directive 79/409/EEC also implies that the use of derogations must not be incompatible with the objectives of the directive.

3.5.41 A list of huntable migratory species that are considered at present to have an unfavourable conservation status at the European Union level is given in Figure 10.
Member States should also take into consideration the conservation status of sedentary species within their territory. Figure 11 provides an overview for different grouse and pheasant species.

3.5.42 For abundant species with a favourable conservation status, taking in excess of the 1% threshold (up to 5% of annual mortality) may be considered following an in-depth scientific analysis by the competent authority which authorises the derogation. This would be in order to verify that the derogation is not incompatible with the objectives of the Directive.

[128] Annex V of the directive, which lists areas of research that require particular attention, includes 'listing of data on the population levels of migratory species as shown by ringing'.

Need to ensure a consistent application of derogations in small numbers

3.5.43 In the framework of a reference for a preliminary ruling from the *Tribunale amministrativo regionale per la Lombardia*[129], the Court provided clarification as regards the interpretation of Article 9(1)(c) of the Directive concerning the conditions for the exercise by the Member States of the derogations. The Court replied to the four questions as follows:

3.5.44 As regards the transposition requirements and the need to govern all the situations subject to the derogation system, the Court ruled that Article 9(1)(c) of Directive 79/409/EEC *"requires the Member States, irrespective of the internal allocation of powers prescribed by the national legal system, upon adoption of measures implementing that provision to ensure that, in all cases of application of the derogation provided for therein and for all the protected species, authorised hunting does not exceed a ceiling consistent with the restriction on that hunting to small numbers imposed by that provision, and that ceiling must be determined on the basis of strict scientific data".*

3.5.45 With regard to the level of precision which must characterise national implementing provisions in respect of the technical criteria on the basis of which a quota corresponding to 'small numbers' of birds may be fixed, the Court considered that *"national implementing provisions concerning the 'small numbers' referred to in Article 9(1)(c) of Directive 79/409 must enable the authorities responsible for authorising hunting derogations in respect of birds of a given species to rely on criteria which are sufficiently precise as to the quantitative ceilings to be complied with".*

3.5.46 The third question related to how the competent national authorities are to ensure that the maximum number of birds of a given species which may be hunted is not exceeded in the entire national territory. The Court replied that *"upon implementation of Article 9(1)(c) of Directive 79/409, the Member States are required to ensure that, irrespective of the number and identity of the authorities within their territory responsible for applying that provision, the amount of authorised hunting derogations in respect of each protected species by each of those authorities does not exceed the ceiling compatible with the restriction on that hunting to 'small numbers', fixed for that species for the entire national territory".*

3.5.47 Finally, as regards the control of hunting derogations, the Court ruled that *"the obligation on the Member States to ensure that hunting of birds is carried out only in 'small numbers', in accordance with Article 9(1)(c) of Directive 79/409, requires that the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner".*

[129] Judgement of 8 June 2006, Commission/Italy, case C-60/05, ECR 2006, p.5083.

- **Strictly Supervised and Selective Basis**

3.5.48 Having regard to the fact that all derogations must in any case comply with the precise formal conditions of Article 9.2, the express reference in Article 9(1)(c) to "*under strictly supervised conditions and on a selective basis"* might be argued to be redundant. However, the context suggests that, by this express reference, the legislator intended a greater level of constraint than might otherwise arise.

3.5.49 The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that must be related to particular individuals, places, times and quantities. It also implies the need for a strong element of enforcement of such derogations to ensure compliance.

3.5.50 The principle of 'selectivity' is also essential. It means that the activity in question must be highly specific in its effect, targeting one species (or group of closely related species), or even one gender or age class of that species (e.g. mature males only), with the exception of all others.

3.5.51 It also implies that certain technical aspects of the method used can verifiably demonstrate selectivity. There is a need to come to a view on methods which of themselves are not entirely selective (e.g. use of certain nets) unless combined with the skills and experience of the operator, or by a combination of both. In case the method of taking results in specimens being killed, the selectivity method should be at a very high level. When birds are taken alive and may then be released unharmed, there is a need to ensure that fully verifiable safeguards apply. Furthermore, this type of derogation would also relate to Article 8 of the Directive, which refers to the need to avoid large-scale and non-selective capture and killing of bird species, particularly those involving the proscribed methods in Annex IV of the Birds Directive. In this regard Case C-79/03 is a good example[130].

3.5.52 The issue of selectivity also implies that full regard is given to minimising the risk of confusion and risk of disturbance to species that are not the subject of the derogation[131]. Taking these considerations into account is consistent with the requirement to strictly interpret the grounds invoked to justify derogations. It can be argued that such an approach has already been endorsed by the Court. On several occasions[132], the Court has stated that Article 9 derogations from the general system of protection must be applied appropriately in order to deal with precise requirements and specific situations. In addition, with regard to derogations aiming at the prevention of serious damage, which constitutes the third reason for derogation under 9(1)(a), the Court stated that "t*he fact that a*

[130] See in particular paragraphs 25-26 of the judgment of 9 December 2004 (Commission/Spain, case C-79/03, ECR 2004, p.11619). The Court compares the hunting by means of limed twigs to the hunting with guns.
[131] See section 2.6 of the guide.
[132] See judgments of: 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 7; 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, paragraph 7; judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21.

*certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive"*[133].

3.5.53 Case 252/85[134] is of assistance in examining the scope of the requirement concerning strictly supervised conditions and selectivity. The Court satisfied itself that the requirements had been met by France, which had stressed that the use of the limes and nets in question involved individual authorisations[135] and that there were strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture.

3.5.54 Against this background, it would seem reasonable to propose that the phrases *"under strictly supervised conditions and on a selective basis"* should be understood to imply a system of individual authorisations (or narrow-category authorisations involving a high degree of accountability), and should imply strict territorial, temporal and personal controls.

### *3.6 Third Condition for Derogations: Satisfying Precise Formal Conditions Set Out in Article 9(2)*

3.6.1 As has been noted at paragraph 3.3.2 above, the third condition that derogations must satisfy relates to compliance with the precise formal conditions set out in Article 9(2). In the words of the Court in Case C-118/94[136], these formal conditions "*are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them."*

#### TAKING ACCOUNT OF EACH OF THE FORMAL CONDITIONS

3.6.2 The case-law confirms the importance of taking account of each of the formal conditions in Article 9(2). This is illustrated by Case C-247/85, *Commission v Belgium*[137]. In that case, the Commission, in its fourth ground of complaint, had objected to Belgian legislation authorising certain persons to capture, kill, destroy or drive away house sparrows, tree sparrows and starlings and to destroy their eggs, nests and broods. The Court rejected a Belgian defence that the legislation complied with Article 9 *inter alia* noting: *"Furthermore, the derogations do not comply with the criteria and conditions of Article 9(2) in so far as they mention neither the circumstances of time and place in which they may be granted nor the controls which will be carried out."*

3.6.3 In relation to the derogations the following formal conditions need to be respected and specified in any licence granting derogations

[133] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 56.
[134] Judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243.
[135] See judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243, paragraph 26.
[136] Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223.
[137] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029.

*The species, which are the subject to the derogations*

3.6.4 The species concerned need to be clearly indicated. This generally implies identification at individual species level. However, there may be circumstances, which might provide for several similar species being covered by the same derogation.

*The means, arrangements or methods authorised for capture or killing*

3.6.5 These must clearly be specified and applications of the derogation restricted to them.

*The conditions of risk and the circumstances of time and place under which such derogations may be granted*

3.6.6 This should include details of the level of risk attached to the use of the method, (including how often it will be inspected etc.) as well as precise details on the timing and location of the derogation. Precautions to restrict the risk for other species may also be appropriate.

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

3.6.7 Within each Member State certain designated authorities are responsible for issuing derogations. The exact terms should be set out in the relevant legislation for each country (or region thereof). For example, in the absence of alternative solutions, an airport authority may apply for a derogation to take several species of bird that are attempting to nest on the airfield because they are in danger of interfering with aircraft safety. The application is made to a derogation authority which then issues a derogation to the airport authority permitting specific activities and specifying the methods by which they can be carried out and the species involved.

3.6.8 Where the authority to grant derogations is given at sub-national levels (e.g. by regional administration) there is a need for a co-ordinating overview of the granting of derogations at Member State level to avoid the risk that the sum of the derogations may exceed permissible levels.

*The controls which will be carried out*

3.6.9 A derogation authorises acts that would otherwise be an offence under the legislation transposing the Birds Directive. Therefore, there needs to be compliance with certain specified conditions that are set out in the derogation. This must be underpinned by appropriate enforcement.

### AUTHORISATIONS TO A GENERAL CATEGORY OF PERSON

3.6.10 A question which arises is whether, in relation to pest control derogations under Article 9(1)(a), it is possible to satisfy the formal conditions of Article

9(2) by way of general authorisations, i.e. authorisations not given to specific individuals but rather to a general category of authorised person such as landowners and their agents. While the reference to "strictly supervised conditions" in Article 9(1)(c) suggests that this is not possible for derogations based on that provision, the wording of Article 9(2) does not appear to preclude such general authorisations for derogations based on Article 9(1)(a).

3.6.11 Case 247/85, *Commission v Belgium*[138] is pertinent, again in relation to the Commission's fourth ground of complaint. The Court recalled that the wording of the Belgian legislation provided that: "*Occupants and hunting-right owners, their attorneys or sworn wardens and officials and servants of the water and forestry authorities shall be permitted to at any time to capture, kill, destroy or drive away the birds, as well as their eggs and broods, mentioned in Annex I to this decree.*" In rejecting the Belgian defence that the legislation complied with Article 9, the Court was critical of the lack of justification for a general authorisation. The Court commented:
*"If the three species specified in Annex I to the royal decrees cause serious damage to crops and orchards or are responsible for pollution and noise in towns or certain regions, Belgium is in principle authorised to provide for a derogation from the general system of protection provided for in Articles 5, 6 and 7.34. However, as was stated above, a derogation under Article 9 must, according to Article 9 (1), cover specific situations and, according to Article 9(2), comply with the requirements stated therein. The general derogations provided for in Articles 4 and 6 of the royal decrees do not comply with those criteria and conditions. The Belgian rules do not indicate the reasons regarding the protection of public health or the prevention of serious damage to crops or other fields mentioned in Article 9 (1) (a) of the Directive which might necessitate the granting to such a wide category of persons of a permanent derogation, applying throughout Belgium, from the protection provided for by the Directive ".*

3.6.12 Assuming of course that the derogation covers all the aspects referred to in Article 9(2), the above passage from the judgement in Case 247/85 suggests that the reasons justifying the grant of a derogation to a wide category of person should be compelling and clearly specified in the derogation. With regard to derogations under Article 9(1) c it is also important to note the specific conditions that are mentioned in it.

### *3.7 Article 9.3 and 4*

3.7.1 The reporting obligations on the use of derogations are laid down in Article 9.3 of the directive. This requires Member States to provide an annual report to the Commission on the implementation of Article 9. The Commission and the Member States, within the framework of the ORNIS Committee, have agreed a reporting period that covers the period from January to December. In order to allow a reasonable time for compiling national reports and it has also

[138] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029.

been agreed with Member States that reports are forwarded to the Commission by September of the following year at the latest[139].

3.7.2 Article 9.3 does not define the precise content of the national reports. It is clear that the information must be factual and relate to cover the details of Article 9(1) and (2). A scheme has been agreed between the Commission and the Member States to provide information under the following headings:

- the reasons (9.1 a to c),
- the species concerned,
- in case of 9.1.c, the numbers of individuals concerned
- the means, arrangements or method authorised for capture or killing
- the conditions of risk and the circumstances of time and place under which such derogations may be granted
- the authority empowered and number of authorisations delivered
- the controls carried out.

3.7.3 Also relevant is information on the region(s) concerned, as well as the period for which the licence is granted[140]. Where pertinent it should also indicate the number of individuals taken under a derogation. This is especially important in the context of derogations granted in the context of Article 9(1)c.

3.7.4 A derogation information system has been developed by the Joint Nature Conservation Committee in the United Kingdom to facilitate data entry for derogations in a standard format by different Member States.

3.7.5 On the basis of the information provided in the derogation reports, especially that relating to Article 9(3), the Commission is required under Article 9(4) to ensure that the use of derogations does not result in consequences that are incompatible with the Directive

3.7.6 The Commission evaluates the derogations reported in order to verify their compatibility with the directive. This involves an examination of the reported use of derogations under each of the different categories of derogations. This includes a determination for derogations granted under Article 9.1.c if the threshold of 'small numbers' is being exceeded, in cases where there may be concerns that this requirement is not being met.

3.7.7 In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the directive it retains the right to take legal action against the Member State concerned.

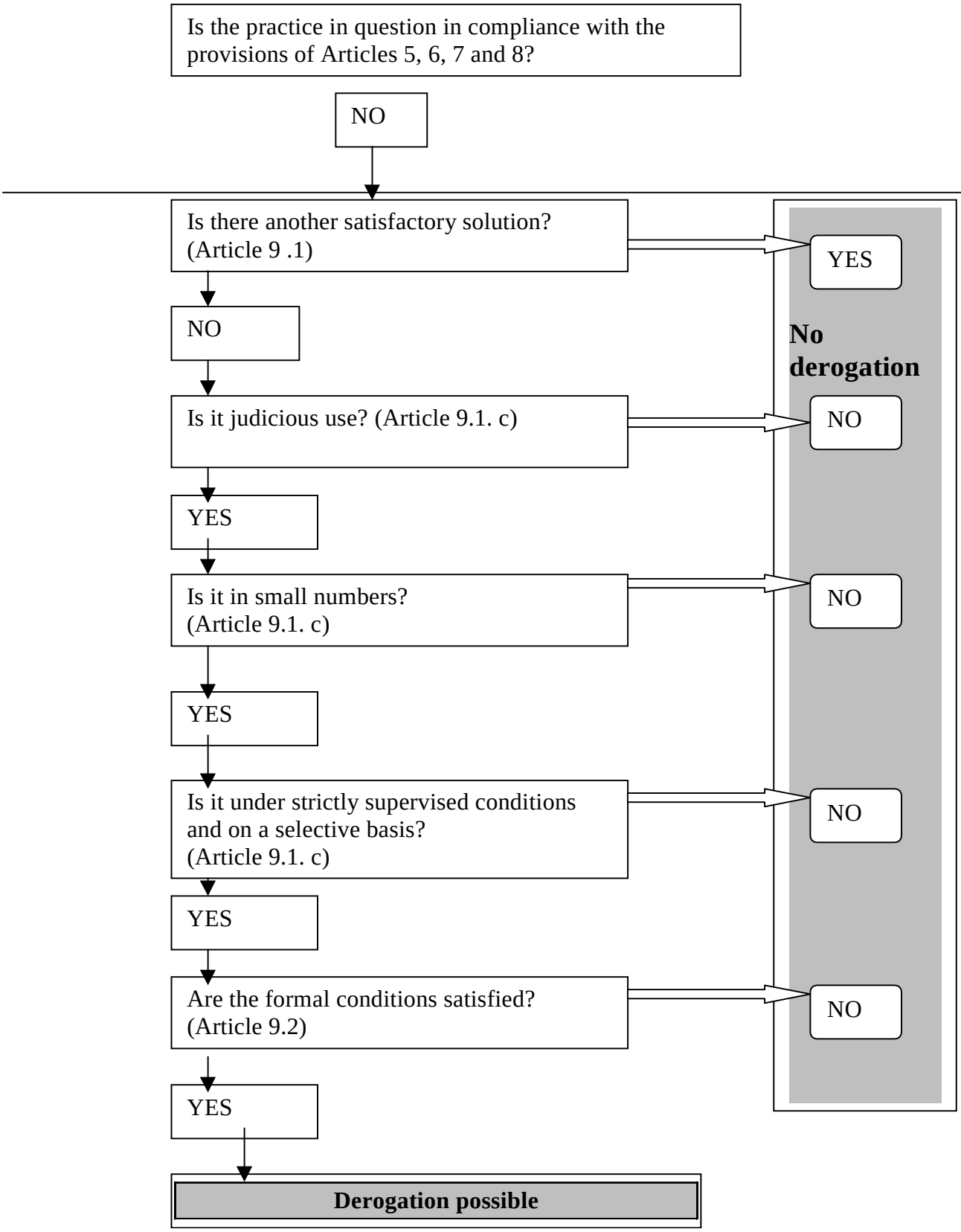
3.7.8 In accordance with its obligations under Article 9.2 of the Convention on the Conservation of European Wildlife and natural Habitats (Berne Convention) the Commission compiles a bi-annual report on the application of derogations

[139] In cases where there are serious delays of Member States in providing these annual reports the Commission can take legal action against the countries concerned under Article 226 of the Treaty.

[140] A derogation information system has been developed for the Commission by the Joint Nature Conservation Committee in the United Kingdom to facilitate data entry for derogations in a standard format by different Member States. This system is presently under revision/adaptation.

by Member States, on the basis of the national reports, which it sends to the Standing Committee of the Convention.

Summary of conditions to be fulfilled for a derogation to be granted under Article 9§1 under c) of the "Birds Directive"



# 4 FIGURES



Common Pheasants - Acrylic painting by Pieter Verstappen

Photos_chapitres_FR.indd 11 6/01/2009 17:06:27

# 4 FIGURES

Figure 1 – Actual and potential number of huntable species in each Member State

Figure 2– Different stages of reproduction

Figure 3 – One possible scheme for categorisation of ‘look-alike’ huntable species

Figure 4 – Questionnaire for assessing compatibility of staggered hunting seasons for Annex II species with Article 7(4) of the Directive

Figure 5 – List of huntable species with a very favourable conservation status

Figure 6 – *Columba palumbus* – WOOD PIGEON

Figure 7 – *Anas platyrhynchos* MALLARD

Figure 8 – Some published mortality rates for Annex II.1 species

Figure 9 – Example of calculation of small number for the Water Rail (*Rallus aquaticus* ), species for which no mortality data is published.

Figure 10 – Huntable species (Annex II) with unfavourable conservation status

Figure 11 – Overview of different grouses and pheasant species

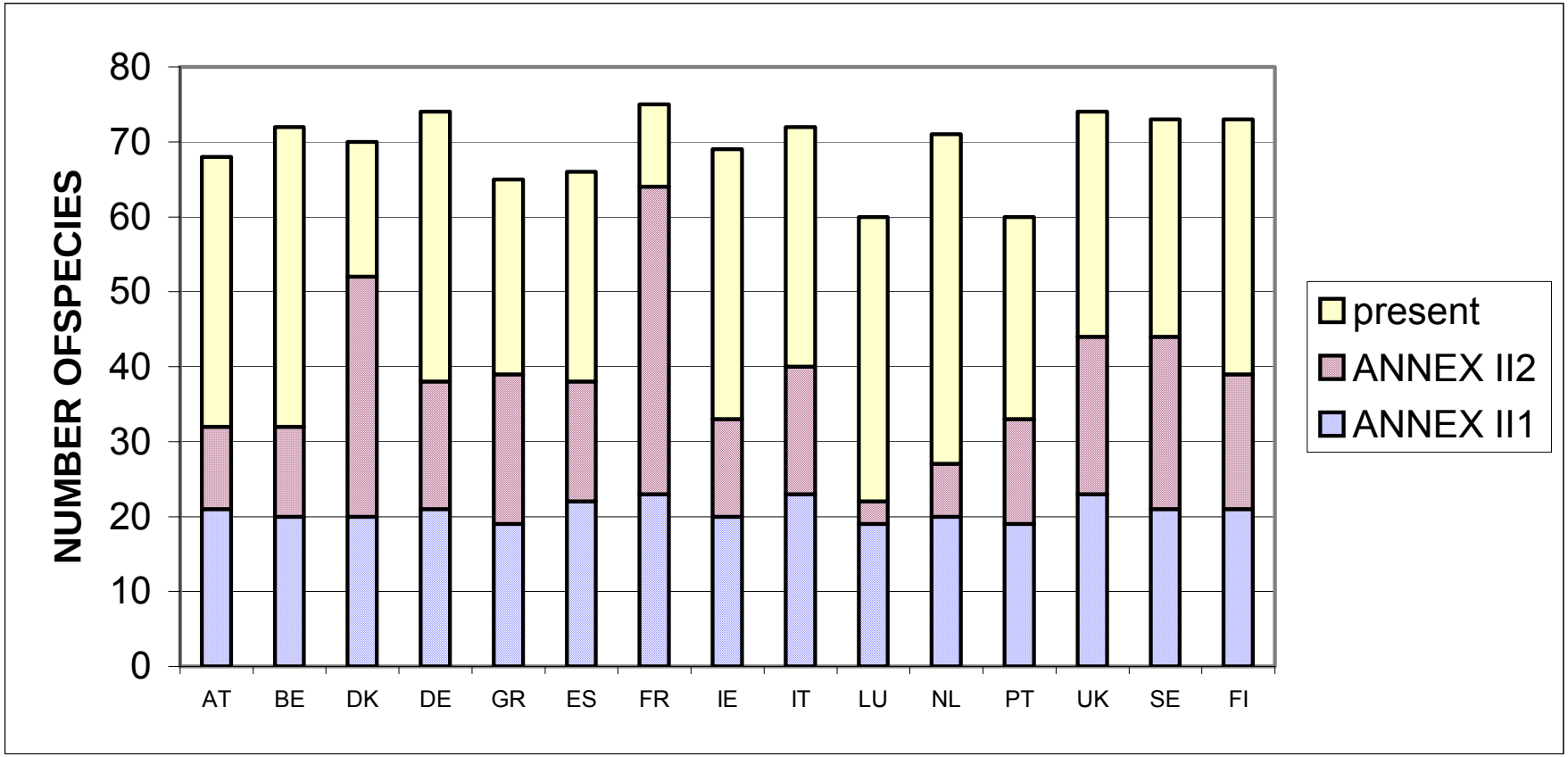


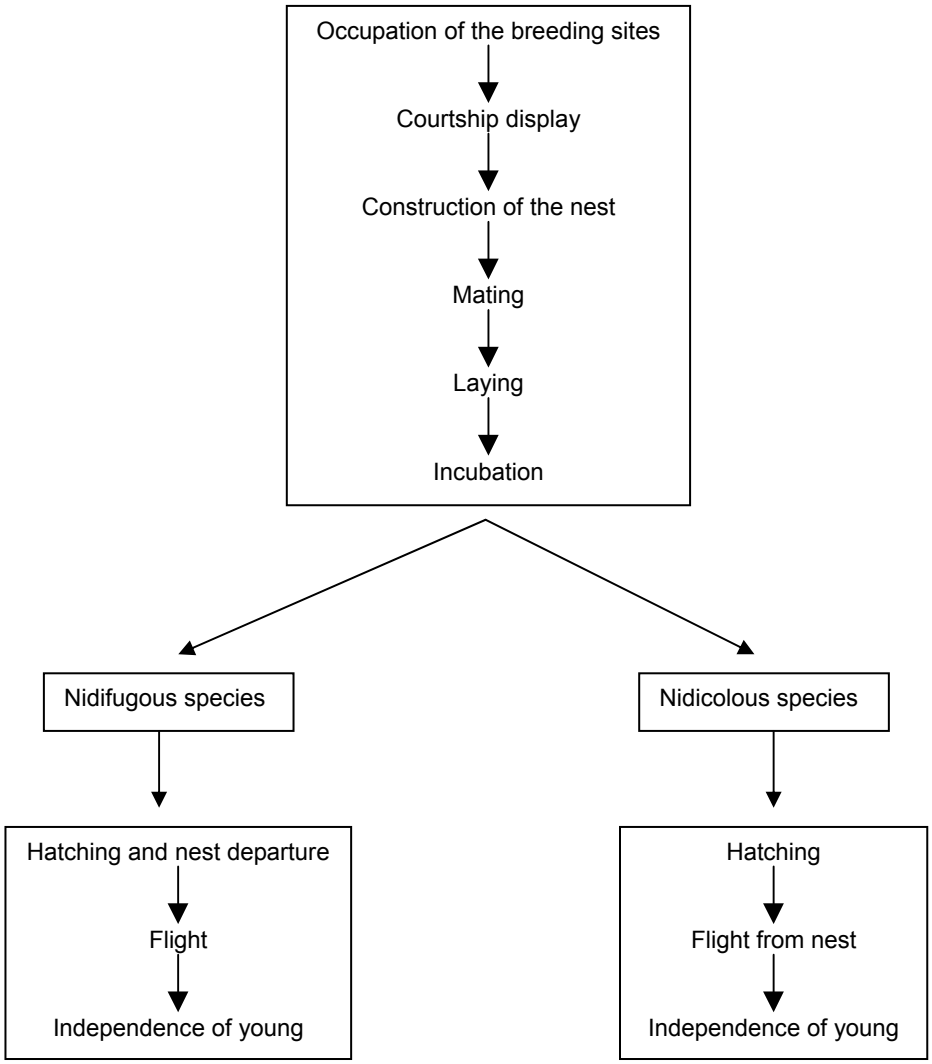

Figure 1: Number of actual and potentially huntable species present in each Member State including those:

a) listed in **Annex II.1** (hunting allowed in all Member States)

b) listed in **Annex II.2** (hunting only for Member States for which indicated)

c) listed in Annex II.2 (but not for Member State in question, even though **present**)

**Figure 2: Different stages of reproduction.**



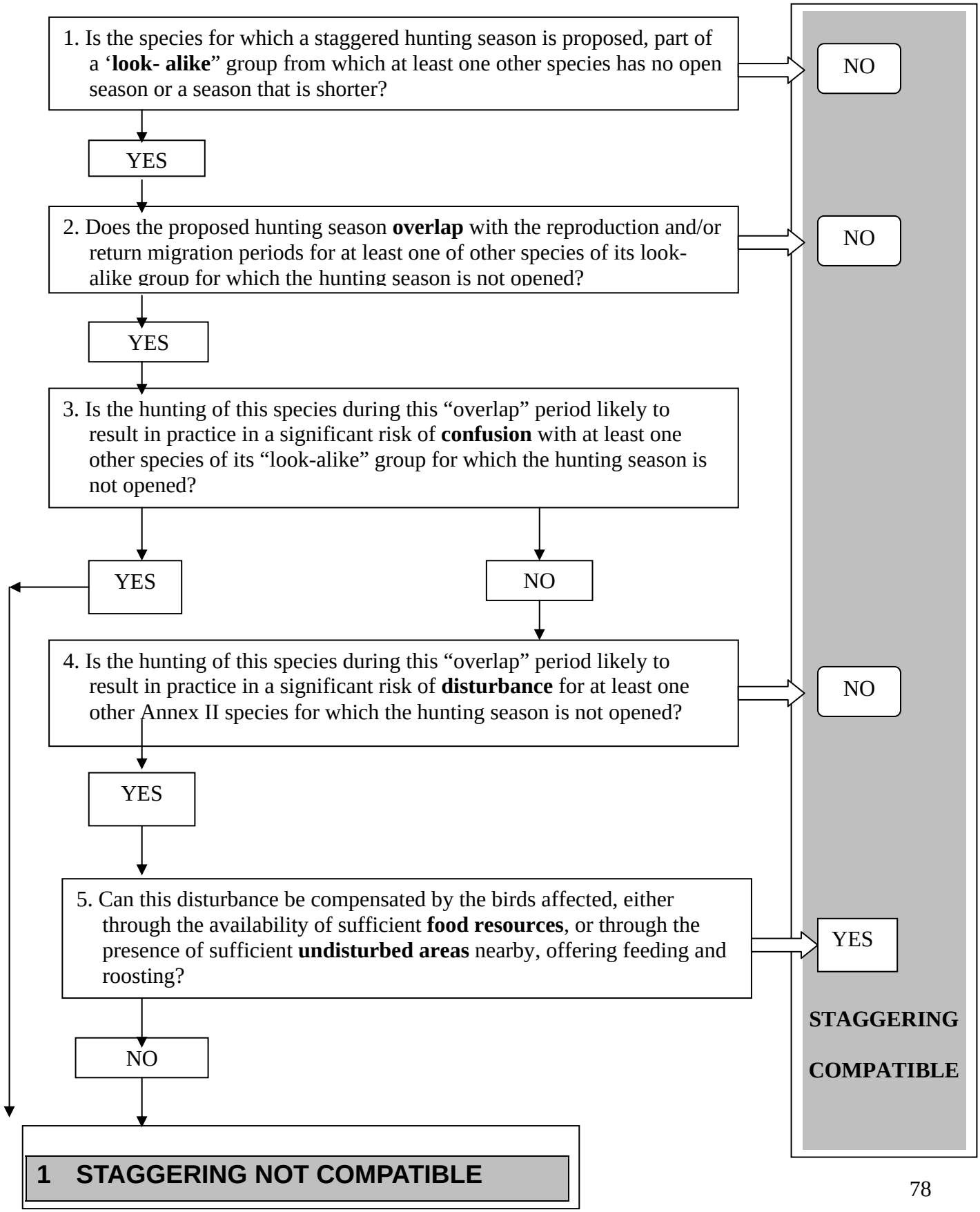
## Figure 3: One possible scheme for categorisation of 'look-alike' huntable species

| Groups of "look-alikes" | Confusable species in groups | Habitats types and others criteria to be considered | Countries for which species are listed in annex II | When problems most likely to occur if staggered opening or closing dates are used to extend hunting seasons |
|---|---|---|---|---|
| Grey geese | *Anser anser*<br>*Anser fabalis*<br>*Anser brachyrhynchus*<br>*Anser albifrons* | In winter grasslands and arable lands<br><br>Calls distinctive | All Member States except Greece, Ireland, Luxembourg, Netherlands and Portugal | End of the hunting period |
| Eclipse male Female and immature dabbling ducks | *Anas penelope*<br>*Anas strepera*<br>*Anas crecca*<br>*Anas platyrhynchos*<br>*Anas acuta*<br>*Anas querquedula*<br>*Anas clypeata* | Wetlands<br><br>Calls often distinctive | All Member States | Beginning of the hunting period<br>Mostly between July and September, when the males are in eclipse and immatures have not moulted yet |
| Eclipse male Female and immature diving ducks | *Aythya ferina*<br>*Aythya fuligula*<br>*Aythya marila*<br>*(Netta rufina)*<br>*(Bucephala clangula)* | Wetlands including Marine | All Member States<br><br>At Sea, mostly Baltic Sea (Dk, SW, SF) | Beginning of the hunting period<br>Mostly between July and September, when the males are in eclipse and immatures have not moulted yet<br><br>End of the hunting period |
| Scoters (females and immatures) | *Melanitta nigra*<br>*Melanitta fusca*<br>*(Imature Somateria)*<br>*(Immature Aythya marila)* | mainly marine | At Sea, mostly Baltic Sea (Dk, SW, SF) | Beginning and end of the hunting period |
| Female and imm. Mergus ducks | *Mergus merganser*<br>*Mergus serrator* | Wetlands, including coastal areas | Fennoscandia (DK, SW, SF) | End of the hunting period |
| Female and immature *Lagopus* Grouse | *Lagopus lagopus scoticus*<br>*Lagopus mutus* | Heathlands, uplands<br><br>Species normally segregated altitudinally | United-Kingdom | Beginning and end of the hunting period |
| Female and immature *Tetrao* Grouse | *Tetrao urogallus*<br>*Tetrao tetrix* | Woods, clearings, heathlands<br><br>Pronounced size difference should normally facilitate identification | Tetrao in the Alps (AT, It) and Fennoscandia (SW, SF) | Beginning and end of the hunting period |
| *Alectoris* partridges | *Alectoris rufa*<br>*Alectoris graeca*<br>*Alectoris chuckar*<br>*Alectoris barbara* | For A. graeca, A. barbara and A. cchukar dry rocky slopes For A. rufa and A. chukar (where introduced) arable lands, heaths, other farmlands and open lowland. . | Where overlaps in the distribution occur (South eastern France for rufa and graeca; Thraki for graeca and chuckar, southern Andalucia for barbara and rufa) | Beginning and end of the hunting period |
| Quail and young gamebirds | *Coturnix coturnix*<br>Young *Perdix* or *Alectoris*<br>(Young *Phasianus colchicus)* | Arable lands, farmlands. | Gr, Es, Fr, It, Pt | Beginning of the hunting period |
| Large plovers and Ruff | *Pluvialis squatarola*<br>*Pluvialis apricaria*<br>*Philomachus pugnax* | In autumn and winter P. squatarola mostly on mudflats or sea shores; P. apricaria mostly on arable land or meadows Calls and underwings are distinctive | Fr, Ie, UK, Pt | End of the hunting period for Pluvialis<br>Beginning of the hunting period, August |
| Snipes | *Gallinago gallinago*<br>*Lymnocryptes minimus* | Marshes and wet meadows | All Member States except Be, De, Lu, Nl, SF | Beginning and end of the hunting period |
| Godwits Curlews and Whimbrel | *Limosa limosa*<br>*Limosa lapponica*<br>*Numenius arquata*<br>*Numenius phaeopus* | In autumn and winter on mudflats and seashores<br>Heaths, open lowlands, wet meadows, mudflats<br>Calls are distinctive | FR, UK, IE | Beginning and end of the hunting period |
| Large *Tringa* sandpipers | *Tringa erythropus*<br>*Tringa totanus*<br>*Tringa nebularia* | Seashores, mudflats<br><br>Calls are distinctive | Fr | Beginning and end of the hunting period |
| Small gulls in immature and winter plumage | *Larus ridibundus*<br>*Larus canus* | | AT, FR, ES, SW, FI | Beginning and end of the hunting period |
| Large gulls immature plumages | *Larus fuscus*<br>*Larus argentatus*<br>*Larus cachinnans*<br>*Larus marinus* | Nearly everywhere, except high mountains and wooded areas | Dk, De, Es, Sw, SF | Beginning and end of the hunting period |
| Columba pigeons and doves | *Columba livia*<br>*Columba palumbus*<br>*Columba oenas* | Wild C. livia in rocky habitats, domesticated form near human habitations | Where wild and feral C. livia occur together (Sp, Corsica, Pt,…) | Beginning and end of the hunting period |

| **Groups of "look-alikes"** | **Confusable species in groups** | **Habitats types and others criteria to be considered** | **Countries for which species are listed in annex II** | **When problems most likely to occur if staggered opening or closing dates are used to extend hunting seasons** |
|---|---|---|---|---|
| *Streptopelia* doves | *Streptopelia turtur*<br>*Streptopelia decaocto* | Collared Dove is more prone to live in town and villages | At, De, Fr, It, Gr, Pt… | Beginning of the hunting period |
| Thrushes | *Turdus merula, female*<br>*Turdus philomelos*<br>*Turdus iliacus*<br>*Turdus viscivorus*<br>*Turdus pilaris* | Wide range of habitats<br><br>Calls distinctive | Gr, Es, Fr, It, Pt<br>Opening and closing dates are usually the same for all the species in the group, exept in Italy where T. viscivorus is protected | Beginning and end of the hunting period |
| Crows | *Corvus corone*<br>*Corvus frugilegus*<br>*(Corvus monedula)* | Wide range of habitats<br><br>Calls often distinctive | DK, De, Gr, Es, Fr, Lu, Pt | Beginning and end of the hunting period |

**Figure 4: Questionnaire For Assessing Compatibility Of Staggered Hunting Seasons For Annex II Bird Species With Article 7§4 Of Directive 79/409/EEC**

---



## Figure 5: List of huntable species with a very favourable conservation status

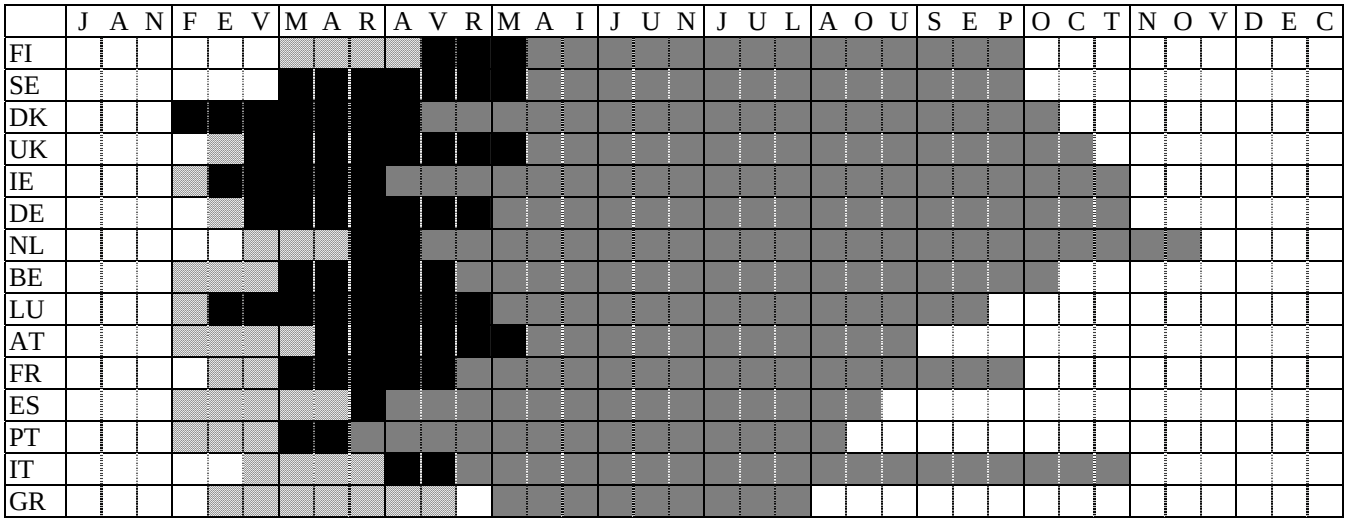
Criteria used to determine "very favourable status":

- SPEC 4 (Species whose global populations are concentrated in Europe - i.e. species with more than 50% of their global population or range in Europe – but which have a favourable conservation status in Europe) or NON SPEC species and Secure European Threat Status (SPEC = species of European conservation concern) [141],
- no important declines in the breeding or wintering populations (less than 10% of the national breeding populations declining more than 20% in size; less than 2% of the national breeding populations declining more than 50% in size; less than 10% of the national breeding populations declining more than 20% in range; less than 2% of the national breeding populations declining more than 50% in range; or less than 10% of the national wintering populations declining more than 20% in size; less than 2% of the national wintering populations declining more than 50% in size)
- very large population (> 1000000 pairs),

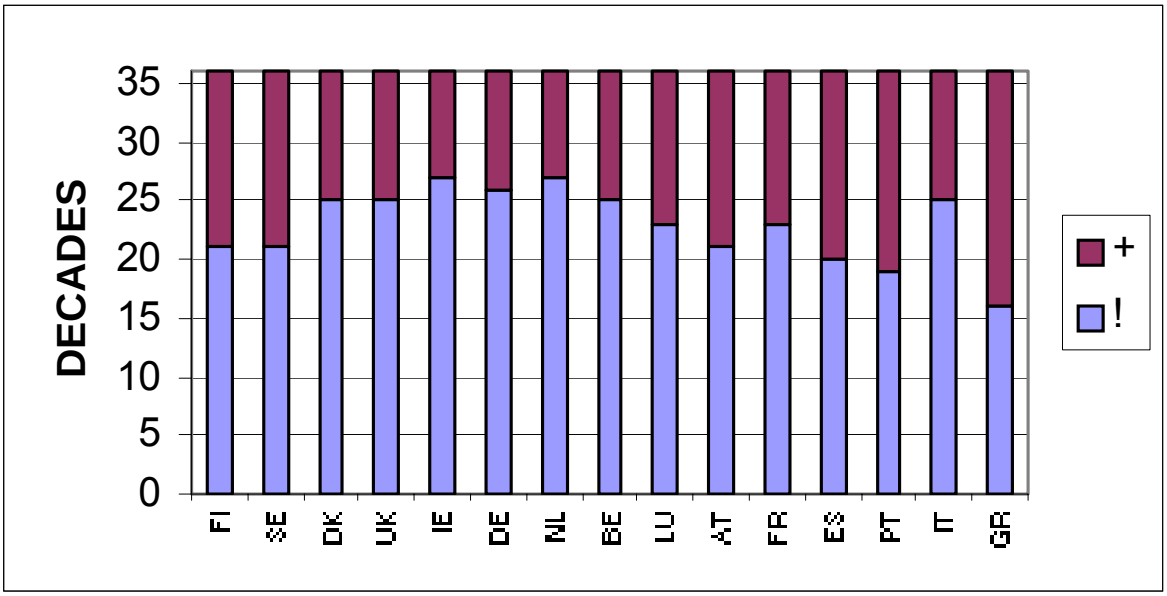
| Species | Spec status | % of breeding population size declined by >20% | >50% | range declined by >20% | >50% | % of winter. pop. size declined by >20% | >50% |
|---|---|---|---|---|---|---|---|
| Anas platyrhynchos | Non Spec ; | 9 | 0 | 7 | 0 | 1 | 1 |
| Columba livia | Non Spec ; | 1 | 0 | 0 | 0 | | |
| Columba palumbus | Spec 4 | 0 | 0 | 0 | 0 | | |
| Turdus pilaris | Spec 4 | 1 | 0 | 0 | 0 | | |
| Turdus iliacus | Spec 4 | 0 | 0 | 0 | 0 | | |
| Turdus viscivorus | Spec 4 | 5 | 0 | 4 | 0 | | |
| Garrulus glandarius | non Spec | 0 | 0 | 0 | 0 | | |
| Pica pica | non Spec | 0 | 0 | 0 | 0 | | |
| Corvus monedula | Spec 4 | 2 | 0 | 2 | 0 | | |
| Corvus frugilegus | Non Spec | 1 | 0 | 0 | 0 | | |
| Corvus corone | Non Spec | 0 | 0 | 0 | 0 | | |

[141] Birds in Europe Their conservation status, BirdLife Conservation Series N°3, 1994.

**Figure 6: Columba palumbus - WOODPIGEON**

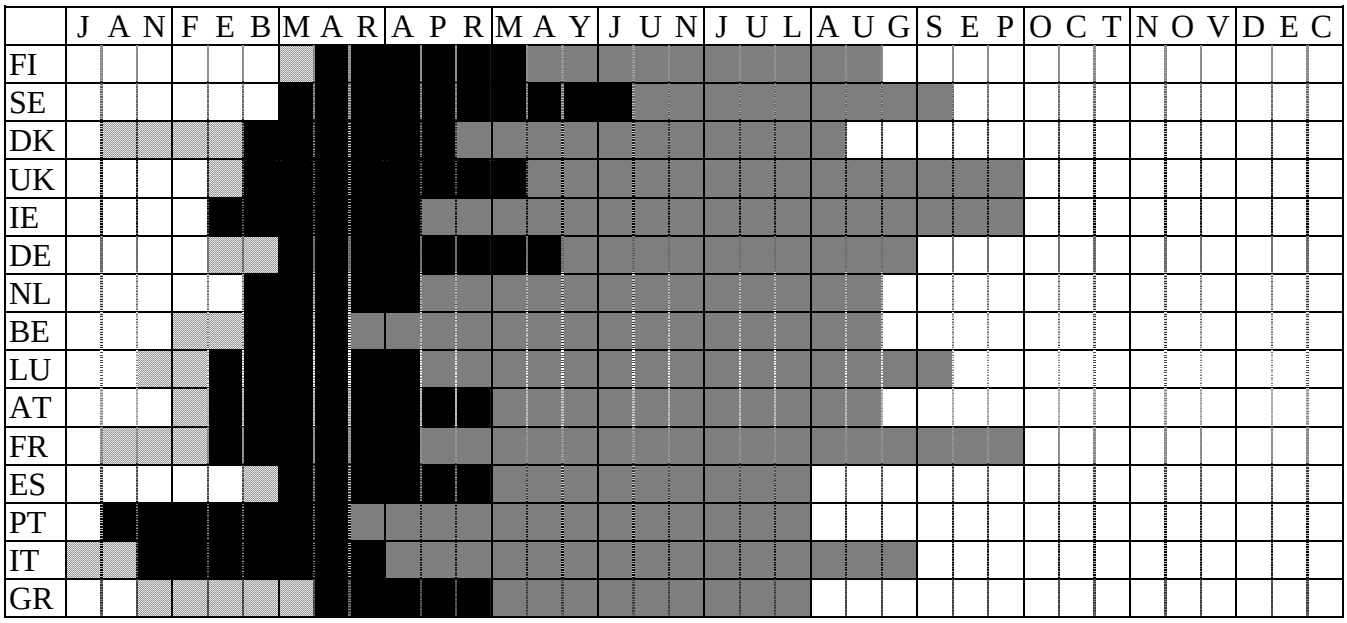



| | |
|---|---|
| | period of reproduction |
| | migration + reproduction |
| | pre-nuptial migration |

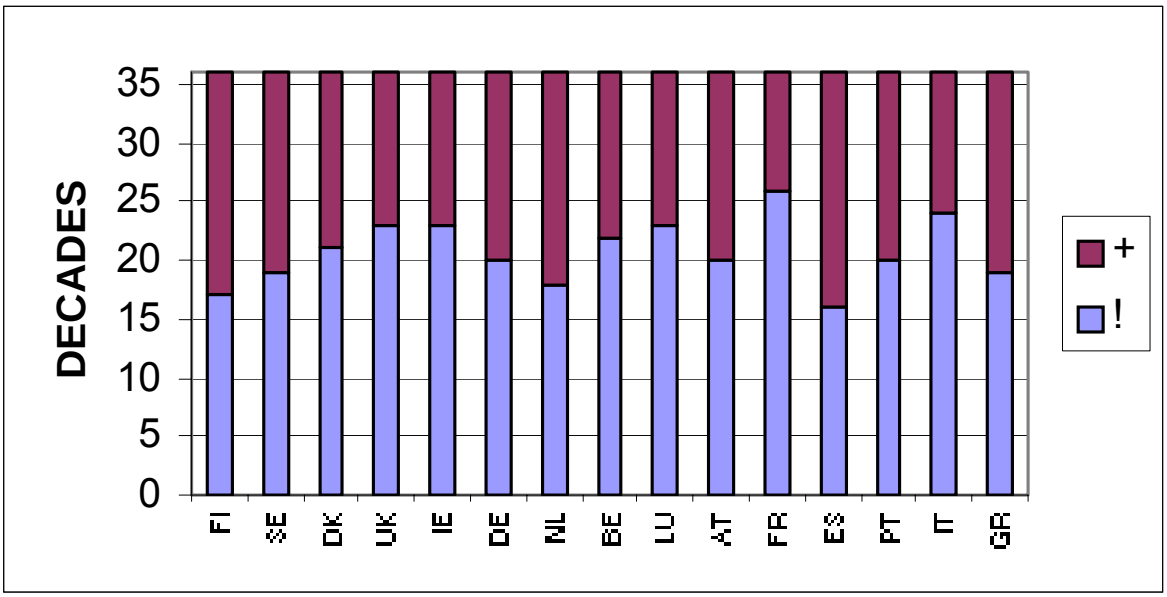



+ = potential huntable period under Article 7(4)
! = breeding + pre-nuptial migration period

**Figure 7: Anas platyrhynchos MALLARD**




| | |
|---|---|
| | period of reproduction |
| | migration + reproduction |
| | pre-nuptial migration |




+ = potential huntable period under Article 7(4)
! = breeding + pre-nuptial migration period

**Figure 8: Some published mortality rates**

*Part 1: Annexe II.1 species*

| Species | **Mortality rate** |
|---|---|
| *Anser fabalis* | KVM No data (Anser brachyrhynchus: ad 26%; from 4 to 16 months 42% ; total of individuals >4 months old 21.5%)<br>BWP No data |
| *Anser anser* | KVM Ad (Breeding IS) 23% ; Ad (Breeding DK) ca 33%<br>BWP Icelandic population: mean annual mortality adults 23% (ringing), over 4 months old 22% (censuses), perhaps declining from 1960 to 1971; adult life expectancy 3.8 years (Boyd and Ogilvie 1972). Mean annual mortality of birds ringed Denmark as young and adults 33%; further life expectancy of full-grown young 2.3 years and of adults 2.6 years (Paludan 1973). |
| *Branta canadensis* | KVM Ad GB 22%<br>BWP England: mean annual mortality of adults 22%; life expectancy 3.9 years (Boyd 1962) |
| *Anas penelope* | KVM Adults ringed birds: 47%<br>BWP Mean annual mortality adults ringed north-west Europe 47%; life expectancy 1.6 years (Boyd 1962). |
| *Anas strepera* | KVM No data BWP No data |
| *Anas crecca* | KVM Ad from 47 to 60%; birds from first year with mortality rate higher than adults<br>BWP Annual mortality. Britain 1949–55, male 49%, female 57%; Pembrokeshire, Wales, both sexes, 64% in 1934–8, 49% in 1945–8, 65% in 1949–53, but in war years 1941–5 only 39%; about three-fifths of male losses and half of female probably attributable to man (Boyd 1957a). For both sexes, 55% France, 58% Italy and Spain; in both areas, mortality of 1st-year birds higher than that for 1–2 year olds; for 1–2 year olds, mortality Europe 47%, USSR 51% (Tamisier 1972c). |
| *Anas plathyrhynchos* | KVM CH, recoveries of adult ringed birds: 58% captive bred, 52% wild birds;<br>DK captive bred 1st year 90.6%, following years 55% (with high hunting pressure)<br>NW Eur Ad: 48%<br>SF first year 64%, following years 55%<br>S 76% to 64%<br>BWP From ringing in north-west Europe, mean annual mortality adults 48%, life expectancy 1.6 years (Boyd 1962). Finland: mortality 64% first year, 55% in succeeding years (Grenquist 1970). Sweden: mortality 76% juveniles, 64%. adults (Curry-Lindahl et al. 1970). |
| *Anas acuta* | KVM No data<br>BWP Mean annual adult mortality, based on USSR recoveries, 48% (Boyd 1962). |
| *Anas querquedula* | KVM No data BWP No data |
| *Anas clypeata* | KVM GB Ad 44%<br>BWP Mean annual mortality adults ringed Britain 44%; life expectancy 1.8 years (Boyd 1962). |
| *Aythya ferina* | KVM No data BWP No data |
| *Aythya fuligula* | KVM Ad varies between 20-25% and 46%<br>BWP Mean annual mortality adults ringed northwest Europe 46%, life expectancy 1.7 years (Boyd 1962). |
| *Lagopus l. scoticus* | BWP Scotland: annual mortality c. 65% (Jenkins et al. 1967; A Watson). |
| *Lagopus mutus* | KVM No data BWP No data |
| *Alectoris graeca* | KVM No data BWP No data |
| *Alectoris rufa* | KVM No data BWP No data |
| *Perdix perdix* | KVM Dk 84%; CS 80-82%<br>BWP Surveys of data from many areas show mean population levels determined by density dependent factors, above all nest predation. Proportion of September population shot closely related to density where shooting formalized, now varying from 20 to 30% annually. Winter losses in Britain, excluding shooting, currently c. 45%, with little annual variation; not related to density and considerable evidence that weather conditions not important. Winter losses and spring dispersal of pairs contribute little to variation in mean breeding densities (G R Potts). Annual mortality rates of reared and released Danish birds after 1 April of 2nd calendar year 84.0 ± 2.8%, compared with 80.2 ± 3.8% for birds released Italy and 82.1 ± 7.2% for birds released Czechoslovakia (Paludan 1963). In Poland, mortality in 12 months after 1 September of year of birth 77.6% and 56% in following years (Olech 1971) |

| Species | **Mortality rate** |
|---|---|
| *Phasianus colchicus* | KVM Dk first year 84%, following years 58% (high pressure of hunting)<br>BWP No information on wild populations. Many studies on managed populations in Europe and North America show high mortality, especially in males and 1st year birds e.g. in Denmark mean annual mortality of males 78.1%, of females 62.3%, and for all birds mortality 81.4% in 1st year of life and 58.4% in succeeding years (Paludan 1959a). |
| *Fulica atra* | KVM First year 76-87%; 2nd year 48-72%; NL First year 79%; following years 25%; found dead 1st year 32%; following years 22%<br>BWP Mortality in 1st year of life in various samples from north-west Europe between 76% and 87%, and in 2nd year between 48% and 72%; probably lower limits nearer true position (Glutz et al. 1973). Recoveries of 686 birds ringed Switzerland in winter: 371 in calendar year of ringing, 125 in 2nd year, 83 in 3rd, 51 in 4th, 19 in 5th, and 36 in 6th year and after (Glutz 1964). Annual survival mortality rates of pulli ringed Netherlands, 1934–73: shot birds (sample 93) ¾2179% 1st year, 7525% later years; found dead (sample 138)¾68) 32% 1st year, 7822% later years (Cavé 1977). |
| *Lymnocryptes minimus* | KVM No data<br>BWP Limited data suggested annual mortality of 76%, but almost certainly too high (Boyd 1962). |
| *Gallinago gallinago* | KVM B 52-57%; Dk 47%; GB 52%;<br>BWP Annual mortality from weighted mean of various samples 51.9 ± 5.43%, no detectable differences between rates in 1st year after fledging and later years (Boyd 1962). Belgium: mean annual mortality for birds shot 56.7% compared with 52.0% for those found dead; hunting mortality declined after 1st year (Dhondt and Van Hecke 1977). West Germany: mortality in 1st year 65 % (Glutz von Blotzheim *et al*. 1977). Denmark: mean annual adult mortality 47.1 ± 2.80 (Fog 1978). Finland: mean annual mortality 46.9% (Pertunnen 1980c). |
| *Scolopax rusticola* | KVM 1st year 55-65%; following years 40-50%.higher for fennoscandinavian populations.<br>BWP Britain: annual mortality 54% in 1st year, 39% in succeeding years, 1 August–31 July (Kalchreuter 1975); earlier estimates (Lack 1943, Boyd 1962) gave 56% and 55% for 1st years, and 37% and 40.7% respectivelyin succeeding years, with annual adult mortality markedly higher in 1931–40 than in 1921–30, reasons unknown (Boyd 1962). Norway and Sweden; annual mortality 67% in 1st year, 52% in succeeding years (Kalchreuter 1979); Finland and Baltic 72% and 54% respectively (Kalchreuter 1975). Finland: mortality in 1st year 61.7%, 48.4% in succeeding years (Pertunnen 1980a). Fenno-Scandia: 65.6% in 1st year, 50.6% in succeeding years (Clausager 1974). Netherlands: annual adult mortality 50.0% (Clausager 1974). |
| *Columba livia (1)* | KVM No data<br>BWP England (Salford): mortality in 1st year of life 43 ± 7.3%, annual adult mortality 33.5 ± 4.9% (Murton et al. 1972b). England (Flamborough Head): annual adult mortality from shot sample c. 30% (Murton and Clarke 1968). |
| *Columba palumbus* | KVM GB 35-41%, juv 60-70%; Dk juv 54.3%; Ad 41.3%; NL ca 46%<br>BWP Britain: juvenile mortality c. 74%, annual adult mortality c. 36% (Murton 1965b). Netherlands: 1911–53 (when no bounty paid for shooting) 1st-year mortality 49%, annual adult mortality 50%; 1959–62 (bounty) 1st-year 55%, adult 61% (Doude van Troostwijk 1964a); 1911–81 1st-year and adult both 46% (Glutz and Bauer 1980). Denmark: 1st-year mortality 54.7%, adult mortality 41.3% (Søndergaard 1983). Finland: 1st-year mortality 41.7%, 2nd-year mortality 47.6%, mortality in later years 30.5% (Saari 1979b) |

(1) the populations quoted here are wild populations of *Columba livia* and not the populations from domestic pigeons.

*Part 2: Annexe II.2 species*

| Species | Mortality rate |
|---|---|
| *Cygnus olor* | KVM GB 1st year: 58%; 2nd and 3rd years: 30%; 4th and 5th years 22% (Coleman & Minton 1980); ca 30% after 1 year; 30% 2nd year; 25% 3rd and 4th year (Bacon 1980).<br>BWP Britain: annual mortality 3–12 months 32.1%, 1–2 years 35.4%, 2–3 years and 3–4 years 25.0%, breeders over 4 years 18–20%; life expectancy at 4 years 4•8 years (Beer and Ogilvie 1972).<br>Denmark: annual mortality 26% (Bloch 1971).<br>Sweden: annual mortality 1965–70, 28.5%, but only 21.0% at most if severe winter of 1969–70 excluded (Mathiasson 1973a). |
| *Anser brachyrhynchus* | KVM ad 26%; from 4 to 16 months 42% ; total of individuals > 4 months old 21.5%<br>BWP Mean annual mortality of adults 26%, and of 4–16 months old 42% (from ringing). Mean annual mortality of all over 4 months 21.5% (from censuses), with evidence of decline in rate 1950–72 (Boyd and Ogilvie 1969). |
| *Anser albifrons*[142] | KVM KVM *A. a. albifrons* : > 1an 30.9%; *Anser a. flavirostris*: 34%<br>BWP A. a. albifrons: mean annual mortality (birds wintering Britain) 28%<br>birds wintering Netherlands, 30.9% (Doude van Troostwijk 1974)<br>A. a. flavirostris: mean annual mortality 34%; |
| *Branta bernicla* | KVM Ad GB 17%, positively correlated with reproduction<br>BWP Mean adult annual mortality of B. b. bernicla wintering Britain 14%, and B. b. hrota from Spitsbergen 17% (Boyd 1962). |
| *Netta rufina* | KVM No data BWP No data |
| *Aythya marila* | KVM No data<br>BWP Mean annual mortality adults ringed Iceland 52% (Boyd 1962). |
| *Somateria mollisima* | KVM Ad 20-40%<br>BWP Netherlands: annual mortality of birds ringed as fledglings 1965–70 averaged 17%; femelle annual mortality ranged from 15%–61% in 1964—68 reflecting poisoning by chlorinated hydrocarbons, and 2%–8% from 1969–71 after control measures (Swennen 1972). Denmark: annual mortality 20% (Paludan 1962). Adults ringed north-west Europe: mean annual mortality 39%, life expectancy 2.1 years (Boyd 1962) |
| *Clangula hyemalis* | KVM No data<br>BWP Mean annual mortality of adults ringed Iceland 28%; life expectancy 3.1 years (Boyd 1962). |
| *Melanitta nigra* | KVM No data<br>BWP Birds ringed Iceland: mean annual mortality of adults 23%; life expectancy 3.8 years (Boyd 1962) |
| *Melanitta fusca* | KVM No data BWP No data |
| *Bucephala clangula* | KVM Nesting female: 37%<br>BWP Annual mortality (breeding femelle) Sweden: c. 37%; life expectancy ca 3 years (adult life expectancy ca 2 years, Nilsson 1971). |
| *Mergus serrator* | KVM No data BWP No data |
| *Mergus merganser* | KVM No data<br>BWP Adult mean annual mortality 40%, life expectancy 2.0 years (Boyd 1962). |
| *Bonasa bonasia* | KVM No data BWP No data |
| *Lagopus l . lagopus* | KVM No data BWP USSR: 60–86% for adults and 90–95% for 1st-year birds (in years 1971–5 when lemming *Lemmus lemmus* scarce on Bolshezemolsk tundra, predatory pressures led to high mortality of (Vorgnin 1976)). (for *Lagopus lagopus scoticus* in Scotland : annual mortality ca 65% (Jenkins *et al*. 1967).No data for EU |
| *Tetrao tetrix*[143] | KVM SF imm. first winter 64% ; Ad population stable 47%<br>BWP In Finland, mean annual adult mortality probably varies from 40% to 60%, with annual and local fluctuations (Helminen 1963). |

[142] These mortality rates are considered too high for *Anser albifrons flavirostris*. Most recent analyses for this sub-species give first year mortality of 32.2% and adult mortality of 21.5% (Fox, A.D. & Stroud, D.A. 2002. *Anser albifrons flavirostris* Greenland White Fronted Goose. BWP Update. In press).

[143] According to long term data the first winter mortality rate (September to the following spring) of Capercaillie *Tetrao urogallus* is 76% and of Black Grouse *Tetrao tetrix* is 64%. In stable populations the annual mortality rates of adult Capercaillie and Black Grouse are 29% and 47% respectively. Both species present sex-related differences in juvenile mortality. Linden, H. 1981 Estimation of juvenile mortality in the Capercaillie *Tetrao urogallus* and the Black Grouse *Tetrao tetrix*, from indirect evidence. Finnish Game Research 39 : 35-51.

| Species | Mortality rate |
|---|---|
| *Tetrao urogallus* | KVM USSR Ad ca 54-59%; SF 30%<br>BWP USSR: in 2 areas survival mortality from hatching to 1 September 48 52 % for males and 59 41 % for females; in following year rates 46 54 % and 33 67 % and in subsequent years 59 41 % and 54 46 % respectively (Semenov-Tyan-Schanskii 1959). |
| *Alectoris barbara* | KVM No data BWP No data |
| *Alectoris chukar* | KVM No data BWP No data |
| *Coturnix coturnix* | KVM No data BWP No data |
| *Meleagris gallopavo* | KVM No data BWP No data |
| *Rallus aquaticus* | KVM No data BWP No data |
| *Gallinula chloropus* | KVM Data from ringing (recoveries) 1st year 69%<br>BWP Of 90 ringed West Germany, 69% died in 1st year of life and 23% in 2nd year (Glutz et al. 1973). |
| *Haematopus ostralegus* | KVM GB from fledging to sexual maturity total mortality rate of 74-80%; imm 40%;<br>BWP Netherlands: mean mortality in first year after fledging 36 %; from 1 to 15 years old 15.9% annually (Boyd 1962). Mortality from hatching to I month after fledging, Wales, 84 % (Harris 1969). Mortality from fledging to sexual maturity 74 % and 80 % calculated from Harris (Harris 1969, Harris 1970 respectively) (Glutz et al. 1975); mean annual mortality of immatures c. 40 % (Harris 1967). West Germany: mean mortality from fledging to average age (5–6 years) when first caught breeding c. 62 %; survival mortality rate of breeding birds 1949–63 constant for all age-groups at c. 94 6 % (Schnakenwinkel 1970); in Wales, 1963–8, survival mortality rate of breeding birds 872-13–98 % (Harris 1970b). |
| *Pluvialis apricaria* | KVM GB 1st winter 41%, following winters 22% (Parr 1980); NL recoveries of rings 1st year 53%; following years 39%.<br>BWP Netherlands: 123 recoveries of autumn-ringed full-grown birds showed 53% died in 1st year after ringing, thereafter 39.0 ± 5.42% annually. Iceland: 31 recoveries of nestlings and juveniles indicated mortality 66% in 1st calendar year and 46.5 ± 10.3% annually thereafter (Boyd 1962). Scotland: adult mortality c. 22% (Parr 1980). |
| *Pluvialis squatarola* | KVM No data BWP No data |
| *Vanellus vanellus* | KVM 1st year (from 1 August to 31 March) GB 38%; Central Europe 40%; Scandinavia 40%, Dk 44%; following years GB 32%; Central Europe 29%; Scandinavia 33%, Dk 33%; varies from 30 to 36% between 2nd and 11th year, after that ca 43%.<br>BWP Europe. Mortality of young from 31 August to following 31 March (thus excluding high mortality in early weeks) 39.7%, varying from 30.4% to 57.5% for birds ringed in different countries, with 37.5% in Britain and Ireland, 40.1% in central Europe, and 40.4% in Scandinavia. Thereafter, annual mortality 32.2% (33.9% Britain and Ireland, 29.4% central Europe, 33.1% Scandinavia). For further details and discussion, see Glutz et al. (Glutz et al. 1975). |
| *Calidris canutus* | KVM No data<br>BWP Average annual adult mortality 32.4±3.18% (Boyd 1962) |
| *Philomachus pugnax* | KVM various sources (ring) 47%<br>BWP Annual mortality 47.6 ± 3.61%, with little difference between 1st and later years; possibly sex difference not significant (Boyd 1962) |
| *Limosa limosa* | KVM NL 1st year 38%; 2nd year 32%; 3rd and following years 37%<br>BWP Netherlands: annual mortality in 1st year (to 15 May) 37.6%, in 2nd year 32%, and in later years average 36.9% (Glutz et al. 1977). |
| *Limosa lapponica* | KVM No data<br>BWP Annual mortality rate 29.5 ± 7.9%, but apparently c. 79% in ‚1st calendar year after ringing' (Boyd 1962). |
| *Numenius phaeopus* | KVM No data<br>BWP According to small sample (13) annual mortality 30.8 ± 9.1% (Boyd 1962). |
| *Numenius arquata* | KVM GB 1st year (after fledging) 53%; 2nd year 37% following years 26%<br>NL 1st year (ringed as pulli) 66%; 2st to 4th year 28%; SF 64% up to 31.12 of first year; 55% following years<br>BWP Britain: mean annual mortality (n = 287) 53.0% in 1st year from fledging, 37.0% in 2nd year and 26.4%, subsequently (Bainbridge and Minton 1978). Netherlands: mean annual mortality (n = 137) in 1st year after ringing as pulli 66.4% and c. 28% for 2nd-4th years (Glutz et al. 1977). Finland: mean annual mortality (n = 245) 64% up to 31 December after ringing as pulli, and 55% in later years (Grenquist 1965). |
| *Tringa erythropus* | KVM No data BWP No data |

| Species | Mortality rate |
|---|---|
| *Tringa totanus* | KVM im 1st year >50%; following years 20-30%<br>BWP Mortality in 1st year after fledging 55%; calculated adult mortality varied widely in various samples from 17.7% to 56.9%, probably affected by ring loss, with best estimate probably from Swedish sample (55) at 31.5% (Boyd 1962). In German colony, calculated adult mortality 28.7% in 1st year after ringing, decreasing with age in successive years (30%, 20%, and 18%), but this based on return of adults to colony, so perhaps due to increasing nest-site loyalty with age (Grosskopf 1959; Boyd 1962). |
| *Tringa nebularia* | KVM No data BWP No data |
| *Larus ridibundus* | KVM juveniles mortality 56% (surviving after fledging at the end of 1st year: 44%)<br>Adult ca 15 to 40 %<br>BWP Britain and Ireland: mean mortality 1945–72, 38.3% in first 6 months, 27.5% in 2nd calendar year, and c. 24% thereafter; in north-west England 1908–24 mortality much higher (c. 60% in first 6 months) due to shooting (Flegg and Cox 1975). Camargue (France): mean annual adult mortality decreased to 16% during period of expansion, largely due to exploitation of new food sources in winter (Lebreton and Isenmann 1976). |
| *Larus cachinnans* | KVM No data BWP No data |
| *Larus canus* | KVM Estonia 1st year 54%; 2nd year 25%, following years 26%; SF 29%; Former Eastern Germany 16%; NW 15%; Dk 26% and GB 34%<br>BWP Average annual mortality of 347 birds over 2 years old ringed Denmark, 26.0% (Sørensen 1977). Average annual adult mortality, Estonia, c. 15% (Onno 1968b). |
| *Larus fuscus* | KVM No data BWP No data |
| *Larus argentatus* | KVM Ad ca 10%<br>BWP Considerable variations in published estimates for Europe and North America. Mortality in 1st year of life: Britain 17% (Chabrzyk and Coulson 1978), 30% (Brown 1967b), 18% (Harris 1970a); Denmark 22% (Paludan 1951); North America 38–62% (Paynter 1966), 27-32% (Kadlec and Drury 1968). Mortality in 2nd year of life: Britain 7.3% (Chabrzyk and Coulson 1978). Adult mortality: Britain 6.5% (Chabrzyk and Coulson 1978), 10% (Parsons 1971a), 10% (Harris 1970a); West Germany 10% (Drost et al. 1961); Denmark 15% (Paludan 1951); North America 4–9% (Kadlec and Drury 1968), but 15–20% suggested by subsequent studies (Kadlec 1976). |
| *Larus marinus* | KVM No data BWP No data |
| *Columba oenas* | KVM 50% ; GB 44-61%<br>BWP Britain: 1st-year mortality ca 60%, adult mortality ca 46.3%, but lower in late 1950s and early 1960s (R J O'Connor and C J Mead). Finland: 1st-year mortality 57.5%, adult mortality 44.5% (Saari 1979b) |
| *Streptopelia decaocto* | KVM GB 1st year ca 69%; following years 39%; D 50-75% and 35-55%<br>BWP England: juvenile mortality 69% annual adult mortality 39% (Coombs et al. 1981). Sweden: annual mortality 29% (Bentz 1982). Central Europe: mortality in 1st year of life 50–75%, annual adult mortality 35–55% (Glutz and Bauer 1980). |
| *Streptopelia turtur* | KVM GB juv 64%; adult ca 50%<br>BWP Britain: estimated 1st-year mortality c. 64%, annual adult mortality c. 50% (Murton 1968). |
| *Alauda arvensis* | KVM Ad. 30-35%, majority in winter<br>BWP England: average annual adult mortality 33.5%; average mortality of young during 1st year after independence 38% (Delius 1965). |

| Species | Mortality rate |
|---|---|
| *Turdus merula* | KVM from ringed birds: 1st year 69%; following years 40-52%<br>BWP Britain: annual mortality 58% in 1st year (from 1 August), 38% in 2nd, 50% in 3rd, 40% in 4th and 5th (Lack 1943); annual mortality 54% in 1st year of life (from 1 August), 40% in 2nd (Lack 1946b); annual mortality after end of 1st calendar year 44±1.5%, irrespective of age, with no significant sex difference; possibly lower in north; varied annually from 34% in 1933–4 to 69% in 1928–9 (Coulson 1961); at Oxford, annual juvenile mortality 59% (Snow 1958b); annual mortality decreased from c. 50% in 1951–2 to c. 32% in 1960–1, apparently not due to weather (Snow 1966b); annual adult mortality in London 41.8±1.0%, in rural southern England 34.9±0.5% (Batten 1973); mortality highest March–June; traffic and predation by cats have played progressively bigger role in mortality (Batten 1978); annual adult mortality 41% in males, 60% in females (Naylor 1978). Belgium: annual adult mortality 69% (Verheyen 1958); annual adult mortality 52.2±2.3%, or 45.8±2.5% excluding those shot or otherwise killed by man; annual juvenile mortality 12.4±1.9% (Van Steenbergen 1971). France: annual urban mortality 25% in males, 33% in females (Ribaut 1964). West Germany: annual mortality 49%, for urban birds 28% (Erz 1964). Finland: annual overall mortality 58–59% (Haukioja 1969). Czechoslovakia: mortality in 1st year of life 68.4%, in 2nd year 56.3%, in 3rd year 30% (Beklová 1972); mortality in 1st year 72% (Havlín 1961). |
| *Turdus pilaris* | KVM N ca 53% (higherr for birds of the first year); SF ca 65%; CH ca 69%<br>BWP Switzerland: annual mortality 60–70%, independent of age (Furrer 1977). Finland: annual overall mortality 61–65% (Haukioja 1969). |
| *Turdus philomelos* | KVM CS 1st year 58%; following years 44%; F respectively 59% and 46%;<br>BWP Britain: mortality in 1st year of life (from 1 August) 53%, in 2nd year 40% (Lack 1946b). Finland: annual overall mortality 54% (Haukioja 1969). |
| *Turdus iliacus* | KVM adult ca 50%<br>BWP Finland: annual overall mortality 57–58% (Haukioja 1969). |
| *Turdus viscivorus* | KVM GB Ad 48%<br>BWP Britain: annual adult mortality 48%; mortality of fledged young to end of 1st calendar year 62% (Snow 1969a). |
| *Sturnus vulgaris* | KVM recoveries of rings in Europe 1st year 60-73%; following years 50-68%<br>BWP Britain: mortality in 1st year of life (from 1 August) 48%, in 2nd year 48% (Lack 1946); annual mortality 52.8% ±1•0% (Coulson 1960). Finland: annual mortality 46% ± 4.4% (Haukioja 1969). Czechoslovakia: mortality in 1st year 68.1%, in 9th year, 22.2%, in 10th year 14.2% (Beklová 1972). |
| *Garrulus glandarius* | KVM from recoveries of rings 1st year 61%<br>BWP Britain: mortality in 1st calendar year 40%, in 2nd year 55%, and in 3rd–5th years 41% (Holyoak 1971). Europe: mortality in 1st year of life 60.7% (Busse 1969). |
| *Pica pica* | KVM Eur from recoveries of rings 1st year 69% GB male adult 25%, female adult 40%...<br>BWP Britain and Finland: mortality in 1st calendar year 46%, in 2nd year 58%, in 3rd–5th years 55% (Holyoak 1971). Urban population, Britain: mortality in 1st year after leaving nest 44%, in successive years 30%, 24%, 32%, 46%, and 86% (Tatner 1986). Finland: annual mortality based on all recoveries 61 ± 4.3%, probably too high; for breeding birds 47 ±7.9% probably a good estimate (Haukioja 1969). Europe: mortality in 1st year of life 69.0% (Busse 1969). |
| *Corvus monedula* | KVM from recoveries of rings 1st year 46%<br>BWP Britain: mortality in 1st calendar year 38%, in 2nd year 36%, in 3rd–5th years 43% (Holyoak 1971). Finland: annual mortality 35 ± SE 3•2% (Haukioja 1969). Europe: mortality in 1st year of life 45.5% (Busse 1969). |
| *Corvus frugilegus* | KVM from recoveries of rings 1st year 54%<br>BWP Britain: mortality in 1st calendar year 59%, in 2nd year 51%, in 3rd–5th years 25% (Holyoak 1971). Europe: mortality in 1st year 54% (Busse 1969). |
| *Corvus corone* | KVM from recoveries of rings 1st year 62%<br>BWP Britain and Finland: mortality in 1st calendar year 61%, 2nd year 45%, 3rd-5th years 48% (Holyoak 1971). Finland: annual mortality 47 ±2.3% (Haukioja 1969). Europe: mortality in 1st year of life 62.4% (Busse 1969) |

Legend:

KVM = Kompendium der Vögel Mitteleuropas (Bezzel E. 1985. Kompendium der Vögel Mitteleuropas - Nonpasseriformes Nichtsingvögel. AULA-Verlag Gmbh, Wiesbaden & Bezzel E.

1993. Kompendium der Vögel Mitteleuropas - Passeres Singvögel. AULA-Verlag Gmbh, Wiesbaden
BWP = Birds of the Western Palearctic (Cramp S. & C M Perrins (eds). 1973-1994. Handbook of the birds of the Western Palearctic Vol 1, 2, 3, 4, 5 & 8. Oxford University Press, Oxford.)

**Figure 9: Example of calculation of small number for the Water Rail (*Rallus aquaticus* ), species for which no mortality data is published.**

European population of *Rallus aquaticus* 130,000 pairs = 260,000 birds (from The EBCC ATLAS of European Breeding Birds)

a) adult mortality rate 25% [144]➔survival rate = 75% survival of the adults = 195,000 birds after one year

- necessary recruitment (in the hypothesis of population stability) = 65,000 birds
- young birds mortality 50% [145]➔there must be 130,000 young birds in autumn ➔on average 1 young by pair/female
- uptake is carried out therefore on (260,000 + 130,000) 390,000 birds, the mortality of which is of ca 33.33%
- 130,000 birds die, 1% of that = 1,300 birds
- 1,300 birds can be regarded as a small number (at the level of the continent)

b) if the adult mortality rate 60% [146]➔average survival rate = 40% = 104,000 birds after one year

- necessary recruitment (in the hypothesis of population stability) = 156,000 birds
- young birds mortality 6050% ➔there must be 312,000 youngs in autumn ➔on average 2.4 young by pair/female
- uptake is carried out therefore on (260,000 + 312,000) 572,000 birds, the average mortality of which is ca 60%
- 343,200 birds die, 1% of that = 3,432 birds
- 3,500 birds can be regarded as a small number (at the level of the continent)

[144] According to the data of literature 25% corresponds to the lowest mortality rate met for birds of more than one year of a Rallidae.
[145] According to the data of literature 50% corresponds to a low mortality rate for birds of first year of a Rallidae.
[146] According to the data of literature 60% corresponds to a high average mortality rate for one species of a Rallidae.

## Figure 10: Huntable species (Annex II) with unfavourable conservation status

| | | |
|---|---|---|
| SPEC CAT 2 Vulnerable Large decl. | | |
| *Limosa limosa* | **98 NERI** | (Black-tailed Godwit / Barge à queue noir) |
| SPEC CAT 2 Declining Moderate decl. | | |
| *Tringa totanus* | **98 NERI** | (Redshank / Chevalier gambette) |
| *Larus canus* | | (Common Gull / Goéland cendré) |
| SPEC CAT 3 Vulnerable Large decl. | | |
| *Anas strepera* | **00 WI** | (Gadwall / Canard chipeau) |
| *Anas acuta* | **98 NERI** | (Pintail / Canard pilet) |
| *Anas querquedula* | **98 ONC** | (Gargany / Sarcelle d'été) |
| *Coturnix coturnix* | **99 ONC** | (Quail / Caille des blés |
| *Lymnocryptes minimus* | **98 NERI** | (Jack snipe / Bécassine sourde) |
| *[Scolopax rusticola*, winter | **98 ONC** | (Woodcock / Bécasse des bois)][147] |
| *Limosa lapponica*, winter | | (Bar-tailed Godwit / Barge rousse) |
| *Alauda arvensis* | **98 ONC** | (Skylark Alouette des champs) |
| SPEC CAT 3 Vulnerable <2 500 p, Localized, winter | | |
| *Branta bernicla* | | (Brent goose / Bernache cravant) |
| SPEC CAT 3 Declining Moderate decl. | | |
| *Netta rufina* | **99 ONC** | (Red-crested Pochard / Nette rousse) |
| *Numenius arquata*, winter | **98 NERI** | (Curlew / Courlis cendré) |
| *Streptopelia turtur* | **98 ONC** | (Turtle Dove / Tourterelle des bois) |
| SPEC CAT 3, w Localized Localized | | |
| *Aythya ferina* | **99 ONC** | (Pohcard / Fuligule milouinan) |
| *Melanitta fusca* | **00 WI** | (Velvet Scoter / Macreuse brune) |
| *Calidris canutus* | | (Knot / Bécasse maubèche) |
| *Gallinago gallinago* | | (Snipe / Bécassine des marais) |
| *Pluvialis apricaria* | | (Golden Plover / Pluvier doré) |
| *Vanellus vanellus* | **99 ONC** | (Lapwing / Vanneau huppé) |
| *Philomachus pugnax* | | (Ruff / Chevalier combattant) |

**NERI** = Danish National Environmental Research Unit
**ONC** = Office Nationale de la Chasse
**WI** = Wetlands International

**SPEC Category 2** - species whose global populations are concentrated in Europe (>50% of their global breeding or wintering populations occurs in Europe) and which have an Unfavourable Conservation Status in Europe.

**SPEC Category 3** - species whose global populations are not concentrated in Europe(<50% of their global breeding or wintering populations occurs in Europe), but which have an Unfavourable Conservation Status in Europe.

[147] The listing of *Scolopax rusticola* as having unfavourable conservation status in the EU has been challenged on the basis of more recent data. According to the EU draft management plan (Ferrand, Y. and F. Gossmann (2001) Elements for a Woodcock Management plan. Game and Wildlife Science, vol. 18(1), March 2001, p. 115-139) the numbers of breeding Woodcock are considered stable or increasing in Member States, with the exception of the United Kingdom. The UK population is geographically restricted and its dynamics can be separated from the other European populations. The status of wintering birds for most European countries is not known.

**Figure 11 Overview of conservation status of different grouse and pheasant species, listed in Annex II of the Birds Directive, at EU and Member State levels.**

| Species | Annex II | Annex I | Status | EU | SE | FI | DK | UK | IE | NL | BE | LU | DE | AT | FR | ES | PT | IT | GR |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Alectoris barbara** | 2 | **yes** | **3 (E)** | (-1) | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | 0 | --- | (-1) | --- |
| **Alectoris chukar** | 2 | no | **3 V** | **—** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | (-1) |
| Alectoris graeca graeca | 1 | no | **2 (V)** | (-1) | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | (-1) |
| **Alectoris graeca saxatilis** | 1 | **yes** | | **—** | --- | --- | --- | --- | -- | --- | --- | --- | --- | **-1** | F | --- | --- | **-1** | --- |
| **Alectoris graeca whitakeri** | 1 | **yes** | | **—** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | **—**[1] | --- |
| **Alectoris rufa** | 1 | no | **2 V** | **—** | --- | --- | --- | 0 | --- | --- | --- | --- | --- | --- | **—**[2] | **-1** | --- | (0) | --- |
| **Bonasa bonasia** | 2 | **yes** | S | **—** | **-1** | **-1** | --- | --- | --- | --- | **-1** | **-1** | **-2** | **-1** | **-1** | --- | --- | **-1** | 0 |
| Lagopus l . lagopus | 2 | no | S | **?** | ? | **-1** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Lagopus l. scoticus** | 1 | no | | **—** | --- | --- | --- | **-1** | **-1** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Lagopus mutus helveticus | 1 | **yes** | S | ? | --- | --- | --- | --- | --- | --- | --- | --- | 0 | 0 | 0 | --- | --- | **-1** | --- |
| Lagopus mutus mutus | 1 | no | | 0 | 0 | F | --- | 0 | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Lagopus mutus pyrenaicus | 1 | **yes** | | **?** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | ? | **-1** | --- | --- | --- |
| **P. perdix hispaniensis** | 1 | **yes** | **3 V** | **—** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | **-1** | --- | --- | --- |
| **P. perdix italica** | 1 | **yes** | | **—** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | **-1** | --- |
| **Perdix perdix perdix** | 1 | no | | **—** | **-1** | **-2** | **-1** | **-1** | **-2** | **-1** | **-2** | **-1** | **-2** | **-1** | **-1** | --- | --- | --- | (-1) |
| Phasianus colchicus | 1 | no | S | 0 | -2 | 0 | +1 | +1 | 0 | --- | F | -1 | 0 | F | 0 | +1 | --- | 0 | 0 |
| **Tetrao tetrix britannicus** | 2 | no | **3 V** | **—** | --- | --- | --- | **-1** | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Tetrao tetrix tetrix** | 2 | **yes** | | **—** | **-1** | **-1** | **-1** | --- | --- | **-2** | **-2** | --- | **-2** | **-1** | **-1** | --- | --- | F | --- |
| **Tetrao urogallus** | 2 | **yes** | S | **—** | 0 | **-1** | --- | **-2** | --- | --- | --- | --- | **-2** | **-1** | **-1** | 0 | --- | **-1** | 0 |

Status:
2= SPEC 2 (see figure 10)
3= SPEC 3
E= endangered
V= vulnerable
S= secure

Population trend
+1 = small increase (20-49%)
0 = stable (with overall change <20%)
-1 = small decrease (20-49%)
-2 = large decrease (>= 50%)
F= fluctuating (with changes at least 20% but no clear trend)
?= unknown

*Additional sources*

(1) Iapichino & Massa (1989), The Birds of Sicily (BOU checklist 11)

(2) Rocamora & Yeatman-Berthelot (1999), Oiseaux menacés et à surveiller en France

(3) Berg, H.-M. (1997): Rote Listen ausgewählter Tiergruppen Niederösterreichs; Vögel (Aves), 1. Fassung 1995. N Landesregierung, Abt. Naturschutz, 184pp (with further references therein).
Sackl, P. & O.Samwald (1997): Atlas der Brutvögel der Steiermark. BirdLife Österreich Landesgruppe Steiermark und Steiermärkisches Landesmuseum Joanneum, Graz.
Zuna-Kratky, T., E.Kalivodova, A.Krthy, D.Horal & P.Horak (2000): Die Vögel der March.-Thaya-Auen im Österreichisch-slowakisch-tschechischen Grenzraum. Distelverein, Deutsch-Wagram.
(4) Asbirk, S. et al 1997. Population sizes and trends of birds in the Nordic countries 1978-1994

# 5 ANNEX

**Court case references pertinent to the guide. The details can be found on the Internet web site of the Court of Justice of the European Communities (http://curia.europa.eu/en/content/juris/index.htm)**

1) Commission of the European Communities v Italian Republic.
Failure to comply with a Directive - Conservation of wild birds.
17 January 1991, C-157/ 89

2) Commission of the European Communities v Federal Republic of Germany. Judgement of the Court of 17 September 1987. C-412/85.

3) Commission of the European Communities v Kingdom of the Netherlands. Judgement of the Court of 15 March 1990. Case C-339/87.

4) Commission of the European Communities v Italian Republic. Judgement of the Court of 8 July 1987. C-262/85

5) Commission of the European Communities v French Republic. Failure to comply with a Directive - Conservation of wild birds. C-252/85

6) Commission v. Belgium, 8 July 1987, Commission of the European Communities v Kingdom of Belgium. C-247/85

7) Commission of the European Communities v Kingdom of the Netherlands. Judgement of the Court of 13 October 1987. C-236/85.

8) Association Pour la Protection des Animaux Sauvages and Others v. Préfet de Maine-et-Loire and Préfet de la Loire-Atlantique, Judgement of the Court of 19 January 1994. C-435/ 92.

9) Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto, Judgement of the Court (Fifth Chamber) of 7 March 1996. C-118/ 94

10) Commission of the European Communities v French Republic. Judgement of the Court of 7 December 2000, C-38/99

11) Commission of the European Communities v Italian Republic Judgement of the Court of 17 May 2001. Case C-159/99.

12) Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, intervener: Fédération royale ornithologique belge ASBL. Reference for a preliminary ruling: Conseil d'Etat - Belgium. Judgement of the Court of 12 December 1996. C-10/96

13) Criminal proceedings against Gourmetterie Van den Burg. Reference for a preliminary ruling: Hoge Raad - Netherlands.

Free movement of goods - Prohibition on the importation of birds. C-169/89. Judgment of the Court (Sixth Chamber) of 23 May 1990.

14) Ligue pour la protection des oiseaux et autres v. République française, judgement of 16/10/2003, C-182/02, not yet published.

15) C-429/85 : Arrêt du 23/02/1988, Commission / Italie (Rec.1988, p.843)

16) C-149-94. Judgment of 08/02/1996, Criminal proceedings against Vergy (Rec.1996, p.I-299)

17) Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619.

18) Judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033.

19) Judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261.

20) Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

21) Order of 19 December 2006, Commission/Italy, case C-503/06R, ECR 2006, p.141.

© European Commission, 2008

**Guidance document on hunting under**
**Council Directive 79/409/EEC on the conservation of wild birds**
**"The Birds Directive"**

Reproduction is authorised provided the source is acknowledged.

Birds_directive_final.indd 14 5/01/2009 16:33:53

European Commission

# MANAGING NATURA 2000 SITES

## The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC



© M. O'Briain



# MANAGING NATURA 2000 SITES

## The provisions of Article 6 of the 'Habitats' Directive 92/43/CEE



A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server (http://europa.eu.int).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2000

ISBN 92-828-9048-1

© European Communities, 2000
Reproduction is authorised provided the source is acknowledged.

*Printed in Belgium*

PRINTED ON WHITE CHLORINE-FREE PAPER



Biodiversity is increasingly recognised as an inestimable element of our common heritage. The last Eurobarometer shows that European citizens take a great interest in the protection of rare and endangered species and habitats. This is the purpose of the Natura 2000 ecological network established by the 'Habitats' directive, which was adopted in 1992. The network, which also embraces areas established under the 'Birds' directive, will provide a strong protection for Europe's finest wildlife areas.



The management of the Natura 2000 sites is essential for their conservation. But to be successful it requires, in the first instance, the active involvement of the people who live in and depend upon these areas. The measures for managing Natura 2000 sites are given in Article 6 of the 'Habitats' directive. However, as this is a concise legal text, many of the key concepts are not easy to understand.

I consider it important that we have a clear and accessible understanding of these key provisions of the directive as this will provide the basis for it to be applied throughout the Community on an equal footing.

This document is therefore intended to facilitate the interpretation of Article 6 by competent authorities in the Member States. I hope it assists them in fully applying it and I would encourage them to further develop guidelines for the different actors concerned.

This important document, which aims at a better understanding of Community legislation by the citizens, should also be seen as part of the openness and transparency policy of the European Commission.

Margot Wallström
Commissioner for the Environment

# CONTENTS

**Foreword**

**1. Introduction** . . . . . 8

1.1. Placed within the overall scheme of Directives 92/43/EEC and 79/409/EEC as well as within a wider context . . . . . 9
1.2. Relation with protection of species chapter . . . . . 10
1.3. Putting Article 6 into national law: the duty of transposition . . . . . 11
1.4. Time of application of Article 6: from which date do the obligations of Article 6 apply? . . . . . 11
*1.4.1. Special protection areas* . . . . . 12
*1.4.2. Sites based on Directive 92/43/EEC* . . . . . 12

**2. Article 6(1)** . . . . . 16

2.1. The text . . . . . 16
2.2. Scope . . . . . 17
2.3. What should be the content of the 'necessary conservation measures'? . . . . . 17
*2.3.1. The conservation concept* . . . . . 17
*2.3.2. The conservation status* . . . . . 18
*2.3.3. The ecological requirements* . . . . . 19
2.4. What form can the necessary conservation measures take? . . . . . 20
*2.4.1. Management plans* . . . . . 20
*2.4.2. Statutory, administrative or contractual measures* . . . . . 21

**3. Article 6(2)** . . . . . 24

3.1. The text . . . . . 24
3.2. Scope . . . . . 25
3.3. Does implementation differ for deterioration and disturbance? . . . . . 26
3.4. Which conditions should trigger measures by the Member States? . . . . . 26
3.5. When should measures in relation to disturbance and deterioration be taken? . . . 27
3.6. Indicators of disturbance and deterioration . . . . . 28
*3.6.1. Deterioration of habitats* . . . . . 28
*3.6.2. Disturbance of species* . . . . . 29

**4. Article 6(3)** . . . . . 30

4.1. The text . . . . . 30
4.2. Scope . . . . . 31
4.3. What is meant by 'plan or project not directly connected with or necessary to the management of the site'? . . . . . 31
*4.3.1. Project* . . . . . 32
*4.3.2. Plan* . . . . . 32
*4.3.3. Not directly connected with or necessary to the management …* . . . . . 33
4.4. How to determine whether a plan or project is 'likely to have a significant effect thereon, either individually or in combination with other plans or projects'? . . . . 33

*4.4.1. Significant effect* . . . 34
*4.4.2. Likely to have …* . . . 34
*4.4.3. … either individually or in combination with other plans or projects* . . . 35
4.5. What is meant by 'appropriate assessment of its implications for the site in view of the site's conservation objectives'? . . . 36
*4.5.1. Form of the assessment* . . . 36
*4.5.2. Content of the assessment* . . . 37
*4.5.3. How are 'the site's conservation objectives' established?* . . . 38
4.6. Decision-making . . . 39
*4.6.1. The 'competent national authorities'* . . . 39
*4.6.2. When is it appropriate to obtain the opinion of the general public?* . . . 39
*4.6.3. The concept of the 'integrity of the site'* . . . 40

**5. Article 6(4)** . . . 42

5.1. The text . . . 42
5.2. Scope . . . 43
5.3. Initial considerations . . . 43
*5.3.1. Examining alternative solutions* . . . 43
*5.3.2. Examining imperative reasons of overriding public interest* . . . 44
5.4. Adopting compensatory measures . . . 45
*5.4.1. What is meant by 'compensatory measures' and when should they be considered?* . . . 45
*5.4.2. Content of compensatory measures* . . . 46
*5.4.3. 'Overall coherence' of the Natura 2000 network* . . . 46
*5.4.4. Who bears the cost of the compensation measures?* . . . 47
*5.4.5. Communication to the Commission of the compensatory measures* . . . 48
5.5. What happens with sites hosting priority habitats and/or species? . . . 48
*5.5.1. The sites concerned* . . . 49
*5.5.2. The concepts of 'human health', 'public safety' and 'primary beneficial consequences for the environment'* . . . 49
*5.5.3. Adoption of the Commission's opinion — its consequences* . . . 50

**Annex I — Court case references** . . . 53

**Annex II — Considerations on management plans** . . . 54

**Annex IIA — Examples of LIFE-Nature projects that have involved management plans or statutory, administrative or contractual measures** . . . 56

**Annex III — Consideration of plans and projects affecting Natura 2000 sites** . . . 60

**Annex IV — Form for submission of information to the European Commission according to Article 6(4)** . . . 61

**Annex V — Member State nature protection authorities** . . . 67

# Foreword

## Why an interpretation guide for Article 6?

Article 6 of the 'Habitats' Directive (92/43/EEC) plays a crucial role in the management of the sites that make up the Natura 2000 network. With the spirit of integration in mind, it indicates the various tasks involved so that the nature conservation interests of the sites can be safeguarded.

Many questions have been raised about the significance of this article by Member States and operators. At first glance it seems to be broad and not well defined, but a thorough analysis, linking it with the other articles of the directive, makes it easier to understand and apply. Nevertheless, Article 6 should not be seen in isolation. In particular, if its application leads to specific requirements, it should be remembered that Article 8 envisages the co-financing of some of the measures necessary to meet the objectives of the directive.

## Purpose and target of this document

This document aims at providing guidelines to the Member States on the interpretation of certain key concepts used in Article 6 of the 'Habitats' directive.

The primary targets of the document are Member State authorities and not individuals. It is however expected that it will also facilitate the understanding of the mechanics of the 'Habitats' directive by the various bodies and groups concerned, especially if it is complemented with more detailed guidance which should be drawn up by the Member States themselves.

## Nature and limitations of the document

The document has been drafted by the services of the Environment Directorate-General of the European Commission, following relevant informal discussions held with the nature protection authorities of the Member States (see Annex V for a list). As such, the document reflects only the views of Commission services and is not of a binding nature. It should be stressed that in the last resort it rests with the European Court of Justice to interpret a directive.

The interpretations provided by the Commission services cannot go beyond the directive. This is particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures related to the various sites of the Natura 2000 network. In any case, the Member States are free to choose the appropriate way they wish to implement the practical measures, provided the latter serve the general purpose of the directive.

However interpretative, this document is not intended to give absolute answers to site-specific questions. As a matter of fact, such matters should be dealt with on a case-by-case basis, while bearing in mind the orientations provided by the document.

The present version is not meant to be a definitive one; indeed, the document may be revised in the future, according to experience that will arise from the implementation of Article 6 in the Member States and from any future case law. Furthermore, the Commission services have arranged for the prepa-

ration of more specific, methodological guidance on the assessment of plans and projects under Article 6(3) and 6(4); such guidance, once ready, is intended to be complementary to this document.

## Structure of the document

After an introductory note on the overall content and logic of Article 6, there follows a detailed presentation of each paragraph (6(1), 6(2), 6(3), 6(4)) according to the same general scheme. This involves an introduction to the article and its scope, and then discussion of the main concepts and issues raised, on the basis of the Commission's knowledge, existing jurisprudence of the European Court of Justice, and other relevant directives.

The key points arising from the Commission's analyses are summarised (in bold characters) at the end of each section, in order to facilitate a quick reading of the relevant conclusions. Full references of Court cases quoted throughout the text are provided as an annex at the end of the document.

# 1. Introduction

## Article 6 in context



## 1.1. Placed within the overall scheme of Directives 92/43/EEC and 79/409/EEC as well as within a wider context

Before addressing Article 6 in detail, it is worth recalling its place within the overall scheme of Directive 92/43/EEC as well as that of Directive 79/409/EEC ([1]) and its relationship with a wider legal context.

The first chapter of Directive 92/43/EEC, comprising Articles 1 and 2, is entitled 'Definitions'. This chapter sets out the aim of the directive which is to '*contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies*' ([2]). It also provides a general orientation, referring to the need for measures taken pursuant to the directive to be designed to maintain or restore certain habitats and species '*at favourable conservation status*' ([3]), while, at the same time, referring to the need for measures taken pursuant to the directive to '*take account of economic, social and cultural requirements and regional and local characteristics*' ([4]).

The main specific requirements of Directive 92/43/EEC are grouped under the two subsequent chapters. The first is entitled 'Conservation of natural habitats and habitats of species' and comprises Articles 3 to 11 inclusive. The second is entitled 'Protection of species' and comprises Articles 12 to 16 inclusive.

The 'Conservation of natural habitats and habitats of species' chapter addresses the most ambitious and far-reaching challenge of the directive — the establishment and conservation of the network of sites known as Natura 2000. Within this chapter, Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. Seen in this context, Article 6 is one of the most important of the 24 articles of the directive, being the one which most determines the relationship between conservation and land use.



The article has three main sets of provisions. Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventive. Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site. Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

Considered globally, the provisions of Article 6 reflect the general orientation expressed in the recitals of the directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at 'favourable conservation status' within the context of Natura 2000 sites, while taking into account economic, social, cultural and regional requirements, as a means to achieve sustainable development.

Apart from the place of Article 6 within the overall scheme of Directive 92/43/EEC, it is also relevant to mention its *relationship with the scheme of Directive 79/409/EEC* on the conservation of wild birds.

([1]) OJ L 206, 22.7.1992, p. 7 and OJ L 103, 25.4.1979, p. 1 respectively.

([2]) Article 2(1).

([3]) Article 2(2).

([4]) Article 2(3).

- In the first place, the scheme of the earlier directive is broadly comparable with that of the latter. In particular, the 'Conservation of natural habitats and habitats of species' chapter of Directive 92/43/EEC has its parallel in Articles 3 and 4 of Directive 79/409/EEC.
- In the second place, there has been an important degree of merger or fusion between the schemes of both directives. First, special protection areas (SPAs) classified under the earlier directive are now an integral part of the Natura 2000 network ([5]). Second, the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC have been made applicable to SPAs ([6]). In this document, most comments on Article 6 are framed by reference to sites proposed under Directive 92/43/EEC. Generally speaking, these comments will apply, *mutatis mutandis*, to sites classified under Directive 79/409/EEC.

Seen in a wider context — that of the Treaty establishing the European Community — Article 6 can be regarded as a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances.

Seen in an **international context**, Article 6 helps achieve the aims of relevant international nature conservation conventions such as the Berne Convention ([7]) and the Biodiversity Convention ([8]), while at the same time creating a more detailed framework for site conservation and protection than these conventions themselves do.

**Article 6 is a key part of the chapter of Directive 92/43/EEC entitled 'Conservation of natural habitats and habitats of species'. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development.**

## 1.2. Relation with protection of species chapter

As mentioned above, the chapter of Directive 92/43/EEC entitled 'Protection of species' covers Articles 12 to 16 inclusive and deals with strictly protected animal and plant species listed in Annex IV of the directive.

Articles 12, 13 and 14, which are applicable from the date of implementation of Directive 92/43/EEC, i.e. 10 June 1994, cover certain plant and animal species which also figure in Annex II of the directive, and which therefore benefit from the provisions of Article 6 within the Natura 2000 sites hosting them.

As a consequence, an action may at the same time fall within the scope of both chapters.

([5]) Article 3(1) of Directive 92/43/EEC provides that 'the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC'.

([6]) Article 7 of Directive 92/43/EEC.

([7]) Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats (OJ L 38, 10.2.1982, p. 1).

([8]) Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13.12.1993, p. 1).

For example, the destruction of a resting place of the brown bear, *Ursus arctos,* may contravene the prohibition of Article 12(1)(d) while also running counter to Article 6 if the resting place is within a Natura 2000 site for the species.

While this may appear to result in duplication, a few points should be noted.

- In the first place, certain species of plant and animal covered by Articles 12, 13 and 14 do not figure within Annex II. Thus, they do not benefit directly from site conservation and protection within Natura 2000.
- In the second place, for species such as *Ursus arctos* which benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the protection afforded by Article 6 is limited to the Natura 2000 network whereas the protection afforded by the chapter on protection of species is not geographically limited (subject to any restriction mentioned in the annexes to the directive). Thus, Article 6 is concerned with **site** conservation and protection whereas the chapter on protection of species is more narrowly focused on the species (though this will obviously have implications for sites where species occur, in particular the breeding sites and resting places of animals).

**While certain plant and animal species benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the scope and the nature of the relevant provisions are different.**

## 1.3. Putting Article 6 into national law: the duty of transposition



It is important to note that the provisions of Article 6 require transposition into national law (i.e. they need to be the subject of provisions of national law giving effect to their requirements). In this respect, they come within the scope of Article 23 of the directive which states that '*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification*'. The deadline for transposition was 10 June 1994 (or 1 January 1995 in the case of Austria, Sweden and Finland).

This reflects the type of Community instrument that has been used, namely a directive. A directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. For most directives, the required result will need national legislation (see Annex I, point 1).

**Depending on the Member State concerned, Article 6 needed to be transposed into national law by 10 June 1994 or 1 January 1995.**

## 1.4. Time of application of Article 6: from which date do the obligations of Article 6 apply?

In general, a distinction needs to be made between the deadline for transposition of the provisions of Article 6 into national law and the date from which these provisions apply to individual sites.

As regards individual sites, a distinction needs to be drawn between special protection areas classified under Directive 79/409/EEC and other sites.

### 1.4.1. Special protection areas

The protection requirements regarding special protection areas (SPAs) are given in Article 4(4), first sentence of Directive 79/409/EEC which provides that, for those areas, *'… Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article …'.*

After the entry into force of Directive 92/43/EEC the above obligations are replaced pursuant to Article 7 of Directive 92/43/EEC which provides as follows:

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

Thus, the provisions of Article 6(1) do not apply to special protection areas (SPAs). However, analogous provisions apply to SPAs by virtue of Article 4(1) and (2) of Directive 79/409/EEC. The date from which these similar provisions should, in principle, apply to SPAs is the date from which Directive 79/409/EEC became applicable in the Member States (see Annex I, point 2).

As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these now apply to already classified SPAs.

However, given the wording of Article 7, a question arises as to whether the provisions of Article 4(4), first sentence of Directive 79/409/EEC remain applicable after the 'date of implementation of this directive' (10 June 1994 for the then Member States and 1 January 1995 for Austria, Finland and Sweden) until such time as a site is classified as an SPA.

In the *Santoña Marshes* case (see Annex I, point 3), the European Court of Justice established that the provisions of Article 4(4) first sentence were applicable to an unclassified site which should have been classified as an SPA from the date of implementation of Directive 79/409/EEC (i.e. 7 April 1981 for the then Member States and the date of accession for later Member States).

The underlying rationale of *Santoña Marshes* is that sites that deserve classification should be treated in the same way regardless of whether or not they are formally classified. The Commission services therefore consider that the provisions of Article 6(2), (3) and (4) are applicable to SPAs, or to sites which should be classified as SPAs, from the date of implementation of Directive 92/43/EEC.

**Article 6(1) of Directive 92/43/EEC does not apply to SPAs. However, there are analogous provisions in Article 4(1) and (2) of Directive 79/409/EEC and these apply from the date of implementation of that directive. As regards the date of application of Article 6(2), (3) and (4) of Directive 92/43/EEC to SPAs, it is reasonable to conclude that all sites classified, or qualifying for classification, as SPAs are subject to these provisions from the date of implementation of Directive 92/43/EEC.**

### 1.4.2. Sites based on Directive 92/43/EEC

Article 6(1) applies to special areas of conservation (SACs). According to Article 4(4) of the directive, SACs come into being by way of designation by the Member States. Such designation is only possible after a site has been adopted as a site of Community importance (SCI) in accordance with Article 4(2) of the directive. An SCI must be designated as an SAC *'as soon as possible and within six years at the*

*most*'. This means that the final deadline for SAC designation — and therefore for compliance with Article 6(1) — is 10 June 2004.

Article 4(5) of Directive 92/43/EEC provides as follows:

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

Thus, in contrast to the provisions of Article 6(1) which apply only when an SCI has been designated as an SAC, the provisions of Article 6(2), (3) and (4) become applicable as soon as a site becomes an SCI and before it is designated as an SAC. Member States are also free to choose an earlier date for the implementation of Article 6(2), (3) and (4), and some national legislation already provides for such earlier implementation.

According to Article 4 of Directive 92/43/EEC, Member States ought to have submitted their national lists by 10 June 1995 and the Commission adopted the Community list by 10 June 1998. However, no Community list could be adopted by 10 June 1998 owing to delays in submission of complete national lists.

The text of Directive 92/43/EEC seems to indicate that Member States do not need to pay attention to the provisions of Article 6 before the Community list has been adopted. However, other provisions of Community law as interpreted by the European Court of Justice need to be taken into consideration.

Article 10 (ex Article 5) of the Treaty establishing the European Community provides as follows:





> '*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*'

The European Court of Justice has, on several occasions, held that, even in the absence of transposing measures or the implementation of specific obligations resulting from a directive, the national authorities, when interpreting national law, should take all possible measures in order to achieve the results aimed at by a directive.

Furthermore, the European Court of Justice ruled in *Santoña Marshes* that a Member State could not escape from its duty to protect a site which, according to relevant scientific criteria, deserved protection, by not classifying it as a special protection area. It is possible that this principle could be used, by analogy, in questions arising from Directive 92/43/EEC.

In the light of the foregoing, Member State authorities are advised to ensure that sites on their national list of proposed SCIs are not allowed to deteriorate before the Community list of SCIs is adopted. Where the national list remains incomplete, they are advised to also ensure the non-deterioration of sites that, according to scientific evidence based on the criteria of Annex III of Directive 92/43/EEC, should be on the national list. One practical suggestion is to make correct use of environmental impact assessment (EIA) under Directive 85/337/EEC (impact assessment) in relation to potentially damaging projects. The European Court of Justice has already confirmed the importance which should be attached to sensitive natural sites when deciding whether projects should undergo an EIA under this directive (see Annex I, point 4).

The above considerations can be summarised in the following table:

| Site status | pSCI | SCI | SAC |
|---|---|---|---|
| **Deadline foreseen by the directive** | June 1995 | June 1998 | June 2004 |
| **Applicability of Article 6 provisions** | Optional for 6(1), (2), (3) and (4), need for measures to avoid site deterioration | 6(2), (3) and (4) | 6(1), (2), (3) and (4) |

Once the Community list is established, the position will become clear as to what requires site protection under the directive, and the advice on provisional site protection will no longer be applicable.

**As regards sites based on Directive 92/43/EEC, it can be argued that Member States, particularly after the date for adoption of the Community list expired on 10 June 1998, have certain obligations to act in a way so as to ensure that the aims of the directive are not jeopardised. Even in the absence of a Community list, Member States' authorities are therefore advised to at least abstain from all activities that may cause a site on the national list to deteriorate. Where a complete national list has not been submitted, the same advice applies to a site which, on the basis of the scientific criteria of the directive, clearly ought to be on the national list.**



# 2. Article 6(1)

Clarification of the concepts of conservation measures; statutory, administrative or contractual measures; and management plans.

## 2.1. The text

*'For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.'*

## 2.2. Scope

Article 6(1) lays down a general conservation regime which has to be established by the Member States for the special areas of conservation (SAC).

Article 6(1):

- provides for **positive** measures, involving management plans and statutory, administrative or contractual measures, which aim to achieve the general objective of the directive. In that regard, Article 6(1) is distinguished from the three other paragraphs of Article 6 which provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites;
- has a value of **reference** for the logic and the overall comprehension of Article 6; the structured reading and the comprehension of the three other paragraphs of Article 6 require a preliminary reading and comprehension of paragraph 1;
- establishes a general conservation regime which applies to **all** SACs of the Natura 2000 network without exception and to **all** the natural habitat types of Annex I and the species of Annex II present on the sites, except those identified as non-significant in the Natura 2000 standard data form (see Section 4.5.3);
- concerns the **SACs specifically**: Article 6(1) does not apply to the special protection areas (SPAs), unlike Article 6(2), (3) and (4). In this way, the legislator established:
  - — a regime laying down special conservation measures for the **SPAs** classified under the 'Birds' directive, according to its Article 4(1) and (2);
  - — a regime laying down conservation measures for the **SACs** designated under the 'Habitats' directive, according to its Article 6(1);
- relates to Article 2(3) which specifies that *'the measures … take account of economic, social and cultural requirements and regional and local characteristics'.*





**For all the SACs, Member States are required to draw up conservation measures. These are positive and apply to all the natural habitat types of Annex I and the species of Annex II present on the sites, except those whose presence is non-significant according to the Natura 2000 standard data form.**

## 2.3. What should be the content of the 'necessary conservation measures'?

### 2.3.1. The conservation concept

The conservation concept appears in the sixth recital of the directive which reads: *'Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable';* and in its eighth recital: *'whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued'.*

It is then defined in Article 1, point (a) of the directive: '*(a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);*'.

Member States have to adopt the conservation measures necessary to achieve the general aim of the directive as set out in its Article 2(1): '*The aim of this directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies*'. There is therefore a **result obligation.**

Article 2(2), in particular, specifies the objective of the measures to be taken under the terms of this directive: '*Measures taken ... shall be designed to maintain or to restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest*'. These measures have, according to Article 2(3), to '*take account of economic, social and cultural requirements and regional and local characteristics*'.

Article 3 specifies that it is the Natura 2000 network '*composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II*' which has to ensure the objective pursued by Article 2(2).

The necessary conservation measures have therefore to aim at maintaining or restoring the favourable conservation status of the natural habitat types and the species of Community interest. They are connected with the general objective of the directive which applies to the Natura 2000 network, as defined in Article 3.

**The fulfilment of the aim laid down in Article 2(1) largely depends on conservation measures that the Member States have to take in order to maintain or restore the natural habitat types and species at a favourable conservation status. These measures are implemented through the Natura 2000 network defined in Article 3(1), taking into account economic, social and cultural requirements and regional and local characteristics.**

## 2.3.2. The conservation status

The conservation status is defined in Article 1 of the directive:

- For a **natural habitat**, Article 1(e) specifies that it is: '*the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species ...*'.
- For a **species**, Article 1(i) specifies that it is: '*the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population ...*'.

The Member State has therefore to take into account all the influences of the environment (air, water, soil, territory) which act on the habitats and species present on the site.

The **favourable conservation status** is also defined by Article 1(e) for natural habitats and Article 1(i) for species.

- For a **natural habitat**, it occurs when:
  - '*its natural range and areas it covers within that range are stable or increasing;*
  - *the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future;*
  - *the conservation status of its typical species is favourable*'.

- For a **species**, it occurs when:
  - — *'the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;*
  - — *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future;*
  - — *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'*.

The favourable conservation status of a natural habitat or species has to be considered across its natural range, according to Articles 1(e) and 1(i), i.e. at biogeographical and, hence, Natura 2000 network level. Since, however, the ecological coherence of the network will depend on the contribution of each individual site to it and, hence, on the conservation status of the habitat types and species it hosts, the assessment of the favourable conservation status at site level will always be necessary.

**The conservation status of natural habitat types and species present on a site is assessed according to a number of criteria established by Article 1 of the directive. This assessment is done both at site and network level.**

### 2.3.3. The ecological requirements

Article 6(1) specifies that the necessary conservation measures have to correspond *'to the ecological requirements of the natural habitat types of Annex I and the species in Annex II present on the sites'*. It is therefore in relation to the ecological requirements of the natural habitat types and the species that Member States have to determine the conservation measures.





Although the directive does not contain any definition of the 'ecological requirements', the purpose and context of Article 6(1) indicate that these involve all the ecological needs of abiotic and biotic factors necessary to ensure the favourable conservation status of the habitat types and species, including their relations with the environment (air, water, soil, vegetation, etc.).

These requirements rest on scientific knowledge and can only be defined on a case-by-case basis, according to the natural habitat types of Annex I, the species of Annex II, as well as the sites which host them. Such knowledge is essential to make it possible to draw up the conservation measures, on a case-by-case basis.

The ecological requirements can vary from one species to another but also for the same species from one site to another.

Thus, for the bats included in Annex II of the directive, the ecological requirements differ between the period of hibernation (when they rest in underground environments, in hollow shafts or in dwellings) and the active period, from spring onwards (during which they leave their winter quarters and resume their activities of insect hunting).

For the Annex II amphibian *Triturus cristatus*, the ecological requirements vary during its life cycle. The species hibernates in the ground (cavities, fissures), then lays its eggs in spring and at the beginning of the summer in ponds. It then leaves the aquatic environment and lives on land during the summer and autumn. For the same species, the ecological requirements can therefore vary according to the sites (aquatic or land).

The identification of the ecological requirements of the natural habitat types of Annex I and the species of Annex II present on the sites is the **responsibility of the Member States.** The latter may wish to exchange their knowledge in this field, with the support of the European Commission and the European Environment Agency — European Topic Centre for Nature Conservation.

**The conservation measures have to correspond to the ecological requirements of the natural habitat types in Annex I and of the species in Annex II present on the site. The ecological requirements of those natural habitat types and species involve all the ecological needs necessary to ensure their favourable conservation status. They can only be defined on a case-by-case basis and on the basis of scientific knowledge.**

## 2.4. What form can the necessary conservation measures take?

The conservation measures can take at least two forms: the form of '*appropriate statutory, administrative or contractual measures…*' and '*if need be*', the form of '*appropriate management plans*'.

### 2.4.1. Management plans

The necessary conservation measures can involve '*if need be, appropriate management plans specifically designed for the sites or integrated into other development plans*'. Such management plans should address all foreseen activities, unforeseen new activities being dealt with by Article 6(3) and (4).

The words 'if need be' indicate that management plans may not always be necessary. If management plans are chosen by a Member State, it will often make sense to establish them before concluding the other measures mentioned in Article 6(1), particularly the contractual measures. Contractual measures will often involve a relationship between the competent authorities and individual landowners and will be limited to individual land-holdings which are normally smaller than the site. In such circumstances, a management plan focused on the site will provide a wider framework, and its contents will provide a useful starting point for the specific details of contractual measures.

The management plans must be '*appropriate and specifically designed for the sites*', therefore be targeted at the sites of the Natura 2000 network, **or** '*integrated into other development plans*'. The latter provision is in conformity with the principle of integration of the environment in the other Community policies. This integration has to contribute to the coherence of the network mentioned in Article 3(1). In any case, it may be necessary to apply Article 6(3) to those aspects of the management plan which are not connected to conservation management (see commentary on Article 6(3) under Section 4.3.3).

While no indication of the specific contents of management plans can be given, Annex II at the end of this document provides a number of important considerations that can be made in view of the preparation of such plans. Furthermore, Annex IIa provides an indicative list of LIFE-Nature projects which have produced management plans or other statutory, administrative or contractual measures (see below) aiming at site conservation.

**Member States can establish management plans which superimpose themselves on the other categories of measures. They are not always necessary but, if they are used, they should take into account the characteristics specific to each site and all foreseen activities. They may be stand-alone documents or incorporated into other development plans when those exist.**

## 2.4.2. Statutory, administrative or contractual measures

The phrase *'if need be'* refers only to the management plans and not to the statutory, administrative or contractual measures. Thus, even if a Member State considers that a management plan is unnecessary, it will nonetheless have to take such measures.

The division into these three categories of measures has to be considered in a broad sense. A variety of measures may be considered as appropriate to achieve the aim of the directive. In principle, this involves measures having a **positive effect** but, in some exceptional cases, it can also involve measures requiring **no action**. On the other hand, these measures are not necessarily new measures, since existing measures can be considered sufficient if they are appropriate.

Among measures involving positive action, *agri-environmental* or *sylvi-environmental* measures serve as a good example to illustrate how socioeconomic requirements can be taken into account according to Article 2(3).

1. *Agri-environmental measures:* for certain man-made, semi-natural Annex I habitat types (meadows, pastures) and Annex II species hosted in these habitats, agreements with farmers within the new rural development regulation ([9]) will be in most cases a sufficient contractual measure aiming at maintaining a favourable conservation status of habitat types and species.
2. *Sylvi-environmental measures:* appropriate measures might be an initiative by a forest company within the framework of a certain certification scheme provided that this initiative ensures that favourable conservation status is maintained.





In this perspective, all suitable EU funds (e.g. LIFE, rural development and regional funds) should be considered as a means for implementing these measures.

The choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States. This is in conformity with the principle of subsidiarity. However, Member States must choose at least one of the three categories, i.e. statutory, administrative, contractual.

There is no hierarchy between these three categories. Thus Member States have the choice to use, on a Natura 2000 site, just one category of measures (e.g. only contractual measures) or combined measures (e.g. combination of statutory and contractual measures according to the conservation issues of the natural habitat types in Annex I and the species in Annex II present on the site). Moreover, in addition to the selected obligatory measures, Member States can establish and implement management plans.

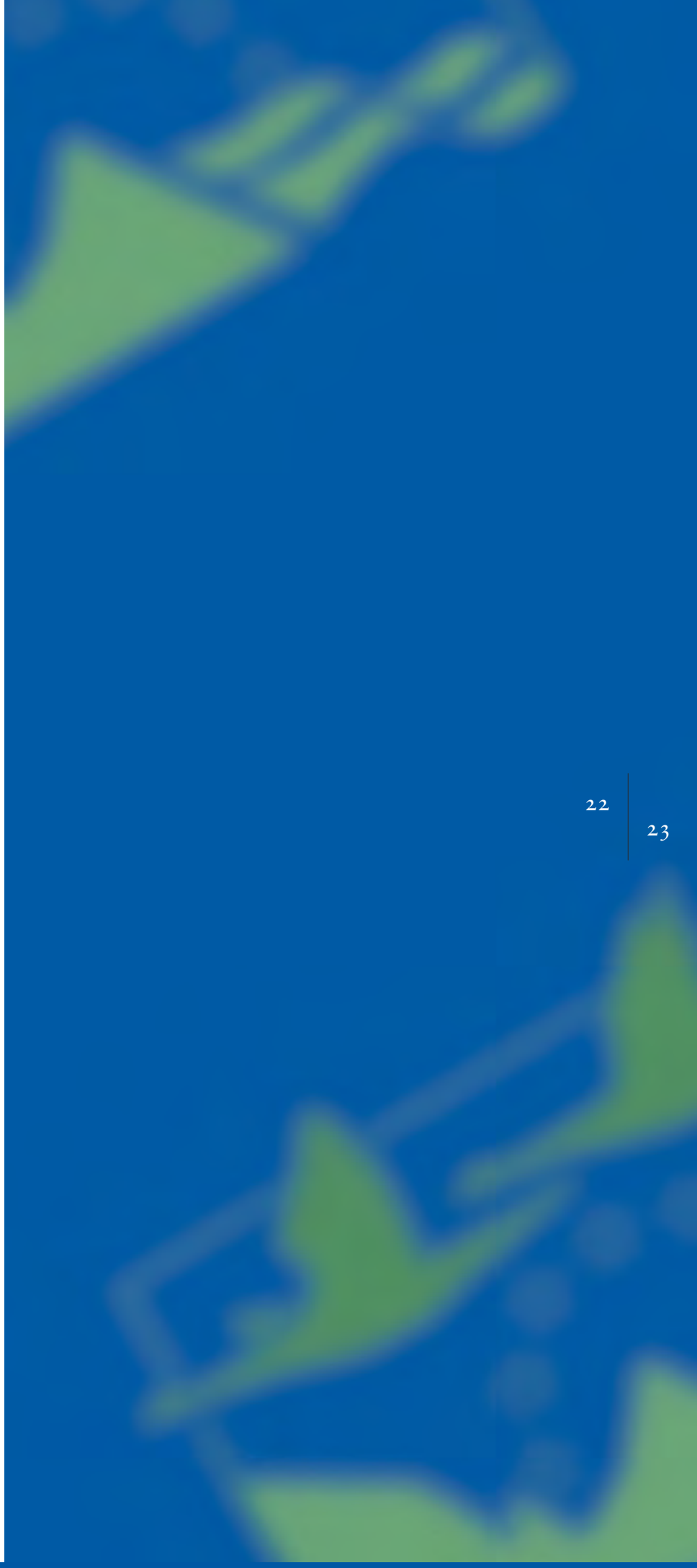
The three categories of measures are qualified as 'appropriate'. This qualifier is not defined in the directive. However, in the case of Article 6(1), the statutory, administrative or contractual measures are embraced within the concept of conservation measures. The qualifier 'appropriate' has no other objective than to recall that whatever the type of measure chosen by the Member States, there is an obligation to respect the general objectives of the directive.

Thus, if a Member State chooses the contractual measures, it always has the obligation to establish in a permanent way the necessary conservation measures which correspond to *'the ecological requirements*

([9]) Council Regulation (EC) No 1257/1999 of 17 May 1999, OJ L 160, 26.6.1999, p. 80.

*of the habitats of Annex I and the species of Annex II present on the sites'* and respect the general aim of the directive defined in Article 2(1).

**For SACs, Member States are required to use the appropriate statutory, administrative or contractual measures. These measures shall take into account socioeconomic requirements according to Article 2(3). They have to (a) correspond to the ecological requirements of habitats of Annex I and species of Annex II present on the sites and (b) fulfil the general objective of the directive to maintain or restore at a favourable conservation status the natural habitats and the species of fauna and flora of Community interest.**



# 3. Article 6(2)

Clarification of the concepts of *deterioration; disturbance; and significant effect*

## 3.1. The text

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

## 3.2. Scope

The article takes as a starting point the **prevention principle**: *'Member States shall take appropriate steps **to avoid**, in the special areas of conservation, the deterioration... as well as disturbances...'.*

These measures go beyond the simple management measures necessary to ensure conservation since these are already covered by Article 6(1). The words *'avoid'* and *'could be significant'* stress the anticipatory nature of the measures to be taken. It is not acceptable to await until deterioration or disturbances occur before taking measures (see under Section 4.4.2 the interpretation of *'likely to'* in Article 6(3)).

This article should be interpreted as requiring Member States to take all the appropriate actions which it may reasonably be expected to take, to ensure that no significant deterioration or disturbance occurs.

The scope of this article is broader than that of Article 6(3) and (4) which apply only to plans and projects requiring an authorisation. It is also applicable to the performance of activities which do not necessarily require prior authorisation, like agriculture or fishing.

Article 6(2):

- applies **permanently** in the special areas of conservation (SACs). It can concern past, present or future activities or events (for instance, in the case of a toxic spill affecting a wetland, this article would mean that all preventive measures should have been taken to avoid the spillage, even if its location is distant from the wetland). If an already existing activity in a SAC causes deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the necessary conservation measures foreseen in Article 6(1). This may require, if appropriate, that the negative impact is brought to an end either by stopping the activity or by taking mitigating measures. This can include economic compensation.

- **is not limited to intentional acts**, but could also cover any chance events that could occur (fire, flood, etc.), as long as they are predictable. In case of catastrophes this concerns only the obligation to take (relative) precautionary measures to decrease the risk of such catastrophes as long as they could jeopardise the aim of the directive.

The legislator envisaged certain **limits** to the responsibility of the Member States:

- **Spatial limit**. Measures aim only at species and habitats located *'in the SACs'*. On the other hand, measures may need to be implemented **outside** the SAC, i.e. if external events may have an impact on the species and the habitats inside the SAC. Indeed, the article does not specify that measures have to be **taken** in the SAC but to **avoid** in the SAC.

- **Limit of habitats and species concerned**. The appropriate measures concern only habitats and species *'for which the areas have been designated'*. In particular, the habitats and species concerned by the measures to be taken are those identified in the Natura 2000 standard data forms (see Sections 2.2 and 4.5.3). The aim is not therefore to take general conservation measures, but rather to take measures focused on the species and habitats which justified the selection of the special area of conservation. The disturbances and/or deterioration will thus be determined by the information which has been communicated by the Member States and which has been used to ensure the coherence of the network for the species and habitats concerned.

**Member States are required to take preventive measures to avoid deterioration and disturbances connected with a predictable event. These measures apply only to the species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.**

## 3.3. Does implementation differ for deterioration and disturbance?

In terms of **disturbance of species**, Article 6.2 specifies that appropriate steps have to be taken to avoid it '*in so far as such disturbance could be significant* ***in relation to the objectives*** *of this directive*'.

The disturbance in question has to be relevant to (have an impact on) the conservation status of the species in relation to the objectives of the directive. It is therefore in relation to these **objectives** that the Member State has to determine whether or not disturbance is significant.

In terms of **deterioration of habitats** however, the effect in relation to the objectives of the directive is not mentioned in the text of the directive. It is simply stated that the deterioration of habitats must be avoided. The purpose of all the measures taken under this directive has to correspond to the objectives of the directive and to respect the principle of proportionality. The deterioration of habitats is therefore also to be assessed against the objectives of the directive. Indeed, it seems difficult to assess deterioration in absolute terms without reference to measurable limits. As presented below, connecting deterioration to the objectives of the directive makes it possible to use Article 1 of the directive to interpret the limits of what one can regard as deterioration.

**Disturbance and deterioration should be assessed against the objectives of the directive.**

## 3.4. Which conditions should trigger measures by the Member States?

There exists an apparent difference between the limit of acceptability for the deterioration of a habitat or the disturbance of a species.

- In the case of **disturbance**, the latter has to be **significant** (a certain degree of disturbance is tolerated). In addition, it is not necessary to prove that there will be a real significant effect, but the likelihood alone (*'could be'*) is enough to justify corrective measures. This can be considered consistent with the prevention and precautionary principles.
- In the case of **deterioration**, the legislator did not explicitly give this margin. This does not exclude however some room for manoeuvre in determining what can be described as deterioration (see below).

Deterioration is a physical degradation of a habitat. It can be directly assessed through a series of indicators (see below), for example, a reduction in the area or characteristics of the habitat.

On the other hand, disturbances do not directly affect the physical conditions. However, if they are significant, they may trigger changes in physical parameters, which have the same result as deterioration. If disturbances are significant enough to trigger changes in this way, they can be assessed in the same way as deterioration, using indicators of conservation status (see below).

**Disturbances are assessed in the same way as deterioration as long as they trigger change in indicators of the conservation status of protected species in such a way as to affect the conservation status of the species concerned.**

## 3.5. When should measures in relation to disturbance and deterioration be taken?

First, it should be stressed that measures must be **appropriate**. This means that they should fulfil the main objective of the directive in contributing to the conservation status of the habitats or species concerned while taking account of *'economic, social and cultural requirements and regional and local characteristics'*.

The inter-linkage of the recitals and articles of the directive provides the context for considering the appropriate measures to be taken by the Member States (see Section 2.3).

As mentioned in the previous paragraph 3.4, disturbance and deterioration should be assessed against the conservation concept, bearing in mind that according to Article 3(1) the network is composed of **sites** and shall enable the natural habitats types and the species' habitats concerned to be maintained at **favourable conservation status** in their natural range.

The favourable conservation status, as defined in Article 1 of the directive, can serve as a term of reference to fix the limit of acceptable disturbance and deterioration with respect to the objectives of the directive and to determine if the appropriate measures are properly implemented (see below).





The conservation status of a habitat or species in a site will be assessed according to the contribution of this site to the ecological coherence of the network, either:

- against its initial status at the time of transmission of site-related information provided in the Natura 2000 standard data forms (see Section 4.5.3) if this conservation status is favourable; or
- against an aim of improving the conservation status announced at the time of the setting-up of the network. Indeed, if a Member State is obliged to propose the classification of habitats in an unfavourable conservation status, it is only logical to assume that it will set a restoration target for these habitats so as to ensure their sustainability. When Community funds are granted for the improvement of the conservation status of a habitat or species in a site, it is this improved status that will be taken into consideration.

On a particular site the conservation status should reflect the dynamic nature of the habitats and species concerned. In that regard, the importance of **surveillance** of the conservation status of habitats and species, as required by Article 11 of the directive, should be stressed.

**Deterioration or disturbance is assessed against the conservation status of species and habitats concerned. At a site level, the maintenance of the favourable conservation status has to be evaluated against the initial conditions provided in the Natura 2000 standard data forms when the site was proposed for selection or designation, according to the contribution of the site to the ecological coherence of the network. This notion should be interpreted in a dynamic way according to the evolution of the conservation status of the habitat or of the species.**

## 3.6. Indicators of disturbance and deterioration

The conditions which govern the concepts of disturbance and deterioration are well defined, but they should be assessed by the Member State, on the one hand, against the general conservation status of the species or the habitats concerned (at biogeographical level) and, on the other hand, against the local conditions (at site level). As a general rule, on a particular site, disturbance or deterioration is assessed on a case-by-case basis, using indicators (see below), with respect to the significance of their change in value. This is measured against (a) the conservation status of the natural habitat or species concerned, and (b) the contribution of the site to the coherence of the Natura 2000 network.

### 3.6.1. Deterioration of habitats

Deterioration is a physical degradation affecting a habitat. The definition of the conservation status (Article 1(e) — see Section 2.3), means that the Member State has to take into consideration all the influences on the environment hosting the habitats (space, water, air, soils). If these influences result in making the conservation status of the habitat less favourable than it was before, the deterioration can be considered to have occurred.

To assess this deterioration against the objectives of the directive, one can refer to the definition of the **favourable conservation status of a natural habitat** set out in Article 1(e), on the basis of the following factors:

- *'The **natural range** and **areas** it covers within that range are **stable or increasing**'.*

Any event which contributes to the reduction of the areas covered by a natural habitat for which this site has been designated can be regarded as deterioration. For example, the importance of reduction of the area of the habitat has to be assessed in relation to the total surface occupied in the site according to the conservation status of the habitat concerned;

- *'The **specific structure and functions of the area necessary for its long-term maintenance exist** and are likely to continue to exist in the foreseeable future'.*

Any impairment of the factors necessary for the long-term maintenance of the habitats can be regarded as deterioration.

The functions necessary for the long-term maintenance depend of course on the habitat concerned (it would be useful to have common indicators enabling to assess these elements for each habitat type). Member States have to know these requirements (by means of studies, data collection, etc.) since Article 6(1) provides that they have to take measures *'which correspond to the ecological requirements of the habitats in Annex I and species in Annex II'.*

- *'The **conservation status of its typical species** is favourable as defined in (i)' (see Section 2.3 for the definition of item (i) of Article 1).*

**Habitat deterioration occurs in a site when the area covered by the habitat in this site is reduced or the specific structure and functions necessary for the long-term maintenance or the good conservation status of the typical species which are associated with this habitat are reduced in comparison to their initial status. This assessment is made according to the contribution of the site to the coherence of the network.**

### 3.6.2. Disturbance of species

Contrary to deterioration, disturbance does not directly affect the physical conditions of a site; it concerns the species and it is often limited in time (noise, source of light, etc.). The intensity, duration and frequency of repetition of disturbance are therefore important parameters.

In order to be significant a disturbance must affect the conservation status. The conservation status of a species is defined in Article 1(i) (see Section 2.3).

In order to assess whether a disturbance is significant in relation to the objectives of the directive, reference can be made to the definition of the **favourable conservation status of a species** given in Article 1(i), on the basis of the following factors.

- *'**Population dynamics data** on the species concerned indicate that it is maintaining itself on a long-term basis as a viable element of its natural habitats'.*

Any event which contributes to the long-term decline of the population of the species on the site can be regarded as a significant disturbance.

- *'The **natural range** of the species is **neither being reduced** nor is likely to be reduced for the foreseeable future'*

Any event contributing to the reduction or to the risk of reduction of the range of the species within the site can be regarded as a significant disturbance.

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

Any event which contributes to the reduction of the size of the habitat of the species within the site can be regarded as a significant disturbance.



**Disturbance of a species occurs on a site when the population dynamics data for this site show that the species could no longer constitute a viable element of it in comparison to the initial situation. This assessment is done according to the contribution of the site to the coherence of the network.**

# 4. Article 6(3)

Clarification of the concepts of *plan or project; significant effect; appropriate assessment; site's conservation objectives; competent authorities; opinion of the public; integrity of the site*

## 4.1. The text

*'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'*

## 4.2. Scope

As regards **purpose and context**, the role of the third and fourth paragraphs of Article 6 needs to be considered in relation to that of the first (or, in the case of SPAs, with that of the first and second paragraphs of Article 4 of Directive 79/409/EEC) and second paragraphs of Article 6. In particular, it is important to remember that, even if it is determined that an initiative or activity does not fall within the scope of Article 6(3), it will still be necessary to make it compatible with the other aforementioned provisions.

It may be noted that ecologically positive or ecologically compatible activities may already be accommodated within Article 6(1) and (2) — for example, traditional farming practices which sustain particular habitat types and species. The provisions of Article 6(3) and (4) constitute a form of development regime, setting out the circumstances within which plans and projects with negative effects may or may not be allowed. The provisions thus ensure that negative economic and other non-ecological requirements can be balanced against conservation objectives.

Article 6(3) and (4) define a **step-wise procedure** for considering plans and projects ([10]).

(a) The first part of this procedure consists of an assessment stage and is governed by Article 6(3), first sentence.

(b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the decision of the competent national authorities.

(c) The third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration.



The applicability of the procedure and the extent to which it applies depend on several factors, and in the sequence of steps, each step is influenced by the previous step.



As regards **geographical scope**, the provisions of Article 6(3) are not restricted to plans and projects which exclusively occur in or cover a protected site; they also target developments situated outside the site but likely to have a significant effect on it.

**Article 6(3) and (4) set out the circumstances within which plans and projects with negative effects may or may not be allowed. Activities not falling within the scope of Article 6(3) will still have to be compatible with the provisions of Article 6(1) — or, in the case of SPAs, Article 4(1) and (2) of Directive 79/409/EEC — and 6(2) of Directive 92/43/EEC.**

## 4.3. What is meant by 'plan or project not directly connected with or necessary to the management of the site'?

In as much as Directive 92/43/EEC does not define 'plan' or 'project', due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.

([10]) A simplified flow chart of this procedure is presented in Annex III at the end of this document.

There are two arguments for giving a broad interpretation to 'plan' or 'project'.

- Firstly, the directive does not circumscribe the scope of either 'plan' or a 'project' by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site (see Annex I, point 5).
- Secondly, a corollary of the continued applicability of Article 6(2) to activities excluded from the scope of Article 6(3) and (4) is that, the more narrowly 'plan' and 'project' are defined, the more potentially restricted is the means to balance a conservation interest against a damaging non-conservation interest. This may produce disproportionate or inconsistent results.

### 4.3.1. Project

Support for a broad definition of 'project' is reinforced, by analogy, if we refer to **Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment** (as amended by Directive 97/11/EC) ([11]). That directive operates in a similar context, setting rules for the assessment of environmentally significant projects. Article 1(2) of Directive 85/337/EEC provides that 'project' means:

'*the execution of construction works or of other installations or schemes — other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources*.'

As can be seen, this is a very broad definition (see Annex I, point 6), which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered.

### 4.3.2. Plan

The word 'plan' has a potentially very broad meaning ([12]). This point has already been noted in an Advocate-General opinion (see Annex I, point 7).

Of obvious relevance are **land-use plans**. Some have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Both types of land-use plans should be considered covered by Article 6(3) to the extent that they are likely to have relevant significant effects on a Natura 2000 site.

**Sectoral plans** can also be considered as within the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, waste management plans and water management plans.

However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or a region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied.

---

([11]) OJ L 175, 5.7.1985, p. 40 and OJ L 73, 14.3.1997, p. 5 respectively.

([12]) The Commission has proposed a directive on the environmental assessment of plans and programmes (COM(96) 511 final, amended proposal COM(1999) 73) which may be of assistance in considering the term 'plan'. In that context, the terms 'plans' and 'programmes' can be used alternatively.

Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) in relation to details not covered by the plan assessment.

### 4.3.3. Not directly connected with or necessary to the management ...

From the context and purpose of Article 6, it is apparent that the term 'management' is to be treated as referring to the 'conservation' management of a site, i.e. the term 'management' is to be seen in the sense in which it is used in Article 6(1).

In making provision for conservation management plans, Article 6(1) of Directive 92/43/EEC envisages flexibility for Member States as regards the form such plans can take. The plans can either be specifically designed for the sites or 'integrated into other development plans'. Thus it is possible to have a 'pure' conservation management plan or a 'mixed' plan with conservation as well as other objectives.

The words '*not directly connected with or necessary to ...*' ensure that a non-conservation component of a plan or project which includes conservation management amongst its objectives may still require assessment.

For example, commercial timber harvesting may form part of a conservation management plan for a woodland designated as a special area of conservation. In as much as the commercial dimension is not necessary to the site's conservation management, it may need to be considered for assessment.



There may be circumstances where a plan or project directly connected with or necessary for the management of one site may affect another site.



For example, in order to improve the flooding regime of one site, it may be proposed to build a barrier in another site, with a possible significant adverse effect on the latter. In such a case, the plan or project should be the subject of an assessment as regards the affected site.

**The term 'project' should be given a broad interpretation to include both construction works and other interventions in the natural environment. The term 'plan' also has a broad meaning, including land-use plans and sectoral plans or programmes but leaving out general policy statements. Plans and projects related to conservation management of the site, either individually or as components of other plans and projects, should generally be excluded from the provisions of Article 6(3).**

## 4.4. How to determine whether a plan or project is 'likely to have a significant effect thereon, either individually or in combination with other plans or projects'

This phrase encapsulates a cause-and-effect relationship. On the one hand, it is necessary to explore what sorts of effects are covered (*'significant effect'*), and then to explore what sorts of causes are likely to create such effects (*'likely to have ... either individually or in combination'*).

Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny.

Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.

### 4.4.1. Significant effect

The notion of what is a 'significant' effect cannot be treated in an arbitrary way. In the first place, the directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is 'significant' is necessary to ensure that Natura 2000 functions as a coherent network.

While there is a need for objectivity in interpreting the scope of the term 'significant', clearly such objectivity cannot be divorced from the specific features and environmental conditions of the protected site concerned by the plan or project. In this regard, the conservation objectives of a site as well as prior or baseline information about it can be very important in more precisely identifying conservation sensitivities. Some of this information will be present in the data that accompanies the site selection process under Article 4 of Directive 92/43/EEC (see Section 4.5.3). Member States may also have available detailed site conservation management plans which describe variations in sensitivity within a site.

Against this background, it is clear that what may be significant in relation to one site may not be in relation to another (see Annex I, point 8).

For example, a loss of a hundred square metres of habitat may be significant in relation to a small rare orchid site, while a similar loss in a large steppic site may be insignificant.

**The notion of what is 'significant' needs to be interpreted objectively. At the same time, the significance of effects should be determined in relation to the specific features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site's conservation objectives.**

### 4.4.2. Likely to have ...

The safeguards set out in Article 6(3) and (4) are triggered not by a **certainty** but by a **likelihood** of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain.

It is again useful to refer to Directive 85/337/EEC, since the formula 'likely to have a significant effect' is almost identical to the basic formula used to create the assessment duty of Member States under the earlier directive ([13]). Directive 85/337/EEC and amending Directive 97/11/EEC are also of assistance in setting out a range of factors which may contribute to a likelihood of a significant effect.

([13]) See Article 2(1) of Directive 85/337/EEC.

Any proposal which is deemed to require an assessment under Directive 85/337/EEC on the grounds, *inter alia*, that it is likely to significantly affect a Natura 2000 site can be judged to also come under the assessment requirement of Article 6(3).

Directive 85/337/EEC in its Article 2(1) refers in particular to the factors of nature, size and location of the project. Amending directive 97/11/EEC in its Annex III presents a more detailed set of factors comprising, *inter alia*: the size of a project; the production of waste; pollution and nuisances; the risk of accidents; existing land use; the relative abundance, quality and regenerative capacity of natural resources in the area; the absorption capacity of the natural environment, with particular attention to natural areas and sites classified or protected under Directives 79/409/EEC and 92/43/EEC; the extent of the potential impact; the magnitude and complexity of the impact; the probability of the impact; the duration, frequency and reversibility of the impact.

A likelihood of significant effects may arise not only from plans or projects located **within** a protected site but also from plans or projects located **outside** a protected site. For example, a wetland may be damaged by a drainage project located some distance outside the wetland's boundaries. For this reason, it is important that Member States, both in their legislation and in their practice, allow for the Article 6(3) safeguards being applied to development pressures which are external to a Natura 2000 site but which are likely to have significant effects within it.

**The procedure of Article 6(3) and (4) is triggered not by a certainty but by a likelihood of significant effects, arising not only from plans or projects located within but also outside a protected site.**



### 4.4.3. ... either individually or in combination with other plans or projects

A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.

It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are **completed; approved but uncompleted**; or **not yet proposed**:

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.

  Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision.
- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been **actually proposed**. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other as yet unproposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

**When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed.**

## 4.5. What is meant by 'appropriate assessment of its implications for the site in view of the site's conservation objectives'?

The 'appropriate assessment' raises questions concerning form and content.

### 4.5.1. Form of the assessment

As pointed out above, the trigger for an assessment under Directive 85/337/EEC is almost identical to the trigger for an assessment under Directive 92/43/EEC, being essentially related to the likelihood of significant effects.

- The European Court of Justice has emphasised that, in relation to the transposition of Directive 85/337/EEC (and by implication its application), it is necessary to take into account sensitivity of location (see Annex I, point 9). For a project likely to have a significant effect on a site protected by Article 3, it will therefore often be appropriate to undertake an assessment that fulfils the requirements of Directive 85/337/EEC.

  Where an assessment for the purposes of Article 6(3) takes the form of an assessment under Directive 85/337/EEC, this will provide obvious assurances in terms of records and transparency.

- Where an assessment for the purposes of Article 6(3) does not take the form of an assessment under Directive 85/337/EEC, questions arise as to what may then be considered 'appropriate' in terms of form.

  In the first place, an assessment should be **recorded**. A corollary of the argument that the assessment should be recorded is the argument that it should be **reasoned**. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'.

Finally, **timing** is also important. The assessment is a step preceding and providing a basis for other steps — in particular, an approval or refusal of a plan or project. The assessment should therefore be considered as only comprising what is in the record of the assessment pre-dating these further steps. Of course, where a plan or project undergoes redesign before a decision is taken on it, it is quite in order to revise the assessment as part of an iterative process. However, it should not be open to authorities to add retrospectively to an assessment once the succeeding step in the sequence of steps set out in Article 6(3) and (4) has been taken.

**In some cases, an assessment under Directive 85/337/EEC (as amended by Directive 97/11/EC) could accommodate an assessment under Article 6(3). The latter should anyhow be recorded and provide a basis for other steps; in particular it should be sufficiently reasoned to allow the right decision to be taken.**

## 4.5.2. Content of the assessment

As regards content, an Article 6(3) assessment is narrower in scope than an assessment under Directive 85/337/EEC, being confined to implications for the site in view of the site's conservation objectives.

However, the ecological impacts of the plan or project may not be properly assessed in many cases without an assessment of the other environmental components (i.e. soil, water, landscape, etc) set out in Article 3 of Directive 85/337/EEC.



Furthermore, even allowing for an exclusively conservation focus, the assessment in its methodology can usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, Directive 85/337/EEC envisages that an assessment may contain information on several points, including a description of the project, a description of the aspects of the environment likely to be affected by the project and a description of the project's likely significant effects ([14]).



It is worth noting that, although, for purposes of Article 6(3), an assessment does not, strictly speaking, need to look beyond the plan or project proposed to address alternative solutions and mitigation measures, there may be a range of benefits from doing so.

In particular, an examination of possible **alternative solutions and mitigation measures** may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the integrity of the site.

As regards **mitigation measures**, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities. For example, they may cover:

- the dates and the timetable of implementation (e.g., not to operate during the breeding season of a particular species);

([14]) That directive makes reference to 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent, positive and negative effects' — see footnote 1 of Annex III.4 of the directive, which is identical to footnote 1 of Annex IV.4 of Directive 97/11/EC.

- the type of tools and operation to be carried out (e.g., to use a specific dredge at a distance agreed upon from the shore in order not to affect a fragile habitat);
- the strictly inaccessible areas inside a site (e.g., hibernation burrows of an animal species).

Mitigation measures are distinguishable from compensatory measures *sensu stricto* (see Section 5.4). Of course, well-implemented mitigation measures limit the extent of the necessary compensatory measures by reducing the damaging effects which require compensation.

Even where a broad assessment does not lead to the conclusion that the plan or project will not adversely affect the integrity of a site, the provisions of Article 6(4) suggest the practical value of such a broad exercise.

As regards **alternative solutions**, once it is proposed to consider approving a damaging plan or project, these become relevant (for more details, see under Section 5.3.1). Moreover, a reference to such solutions may also be needed to satisfy the independent requirements of Directive 85/337/EEC.

All these aspects above may be considered as ideally forming part of an iterative process seeking to improve the siting and design of a plan or project at the earliest stages.

Finally, the 'in combination' reference in Article 6(3) (see Section 4.4.3) has two implications in terms of the content of an assessment.

- Firstly, it means that the content of an assessment should address the potential for 'in combination' effects to arise from a specific plan or project under consideration in an approval procedure and other plans or projects not under consideration in the same approval procedure.
- Secondly, it means that the contents of the assessments of different plans or projects under consideration at the same time should include references to and take account of each other in so far as the different plans and projects give rise to 'in combination' effects.

**An Article 6(3) assessment should focus on the implications for the site in view of the site's conservation objectives. It could in its methodology usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, an examination of possible mitigation measures and alternative solutions may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the site. 'In combination' effects need also to be addressed in an assessment.**

### 4.5.3. How are 'the site's conservation objectives' established?

Article 4(1) requires Member States to propose a list 'indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host'. According to its second paragraph, the information on each site shall include a map of the site, its name, location, extent and the data resulting from the application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission ([15]).

The format requires that all Annex I habitat types present on a site and all Annex II species occurring at the site should be mentioned in the appropriate place in the data form. This information forms the basis for a Member State establishing 'the site's conservation objectives', for example through a man-

([15]) Standard data form, established by Commission Decision 97/266/EC of 18 December 1996 (OJ L 107, 24.4.1997, p. 1).

agement plan. The reason for a site's inclusion in the network is evidently the protection of those habitats and species. Sometimes, there may be competition between different habitat types and species, and it may, of course, be appropriate to prioritise when establishing the site's conservation objectives (for example, by giving precedence to a priority habitat type as against a competing non-priority habitat type).

Where the presence of the Annex I habitat type or Annex II species is deemed to be 'non-significant' for purposes of the format, these should not be considered as included in 'the site's conservation objectives'. The Member States are also invited to present information on other important species of flora and fauna than those listed in Annex II (point 3.3). This information has no relevance either for the determination of a site's conservation objectives.

**The information provided according to the standard data form established by the Commission forms the basis for a Member State's establishment of the site's conservation objectives.**

## 4.6. Decision-making

### 4.6.1. The 'competent national authorities'

It is clear that the word 'national' in this expression has been used in contrast with the word 'Community' or 'international'. Thus, the term refers not only to authorities within the central administration but also to regional, provincial or municipal authorities, which have to give an authorisation or consent to a plan or project.





A court can constitute a competent authority if it has the discretion to make a decision on the substance of a proposed plan or project for purposes of Article 6(3).

**Competent national authorities are those entitled to give an authorisation or consent to a plan or project.**

### 4.6.2. When is it appropriate to obtain the opinion of the general public?

Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment under Directive 85/337/EEC, public consultation is necessary.

In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention ([16]) which emphasises the importance of public consultation in relation to environmental decision-making.

**Public consultation should be considered in the light of the provisions of Directive 85/337/EEC and the Aarhus Convention.**

([16]) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This Convention was concluded in Aarhus, Denmark in June 1998. The European Community is one of the signatories.

### 4.6.3. The concept of the 'integrity of the site'

It is clear from the context and from the purpose of the directive that the 'integrity of the site' relates to the site's conservation objectives (see Section 4.5.3 above). For example, it is possible that a plan or project will adversely affect the integrity of a site only in a visual sense or only habitat types or species other than those listed in Annex I or Annex II. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3), provided that the coherence of the network is not affected.

On the other hand, the expression 'integrity of the site' shows that focus is here on the specific site. Thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State.

As regards the connotation or meaning of 'integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation.

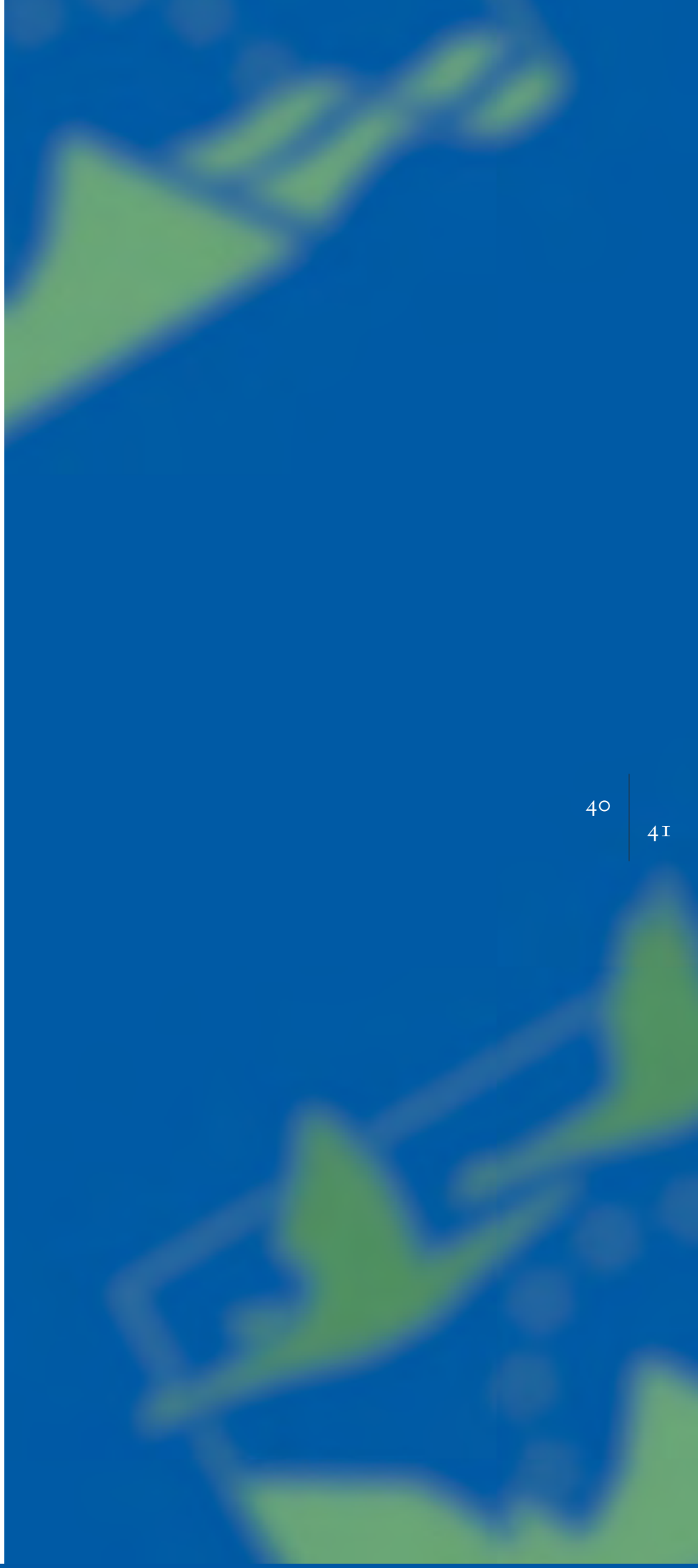
The 'integrity of the site' has been usefully defined as '*the coherence of the site's ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified*' ([17]).

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.

When looking at the 'integrity of the site', it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term.

**The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives.**

([17]) PPG 9, UK Department of the Environment, October 1994.



# 5. Article 6(4)

Clarification of the concepts of *alternative solutions; imperative reasons of overriding public interest; compensatory measures; overall coherence; opinion of the Commission*

## 5.1. The text

*'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*

*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest'.*

## 5.2. Scope

This provision forms part of the procedure of the assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect the special area of conservation (SAC). Two fundamental considerations arise.

- On the one hand, it addresses specific situations (exceptions) with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the sites concerned.
- On the other hand, its concrete application has to be done in respect of the various steps provided for and in the sequential order established.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that there is a high degree of certainty that the initiative in question will not affect this site, the competent authorities can give their consent on the plan or project. In case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed, as in the case of negative conclusions.

Being a derogation from Article 6(3) this provision has to be **interpreted in a restrictive way**, so that its application is limited to circumstances where all the conditions required are satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions indeed exist in each particular case.





**The provisions of Article 6(4) apply when the results of the preliminary assessment under Article 6(3) are negative or uncertain. The sequential order of its steps has to be followed.**

## 5.3. Initial considerations

### 5.3.1. Examining alternative solutions

The **first step** of the competent authorities is to examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too.

In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between these alternative solutions. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

**It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.**

### 5.3.2. Examining imperative reasons of overriding public interest

In the absence of alternative solutions — or in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the abovementioned conservation aims of the directive — the **second step** of the competent authorities is to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question.

The concept of '*imperative reason of overriding public interest*' is not defined in the directive. However, Article 6(4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interests. As regards the '*other imperative reasons of overriding public interest*' of social or economic nature, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the directive. Thus, projects that lie **entirely** in the interest of companies or individuals would not be considered to be covered.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

The 'imperative requirement' concept was worked out by the Court of Justice as an exception to the principle of free movement of goods. Among these imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environment protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, Community law also knows the concept of 'service of general economic interest', evoked in Article 86(2) (ex 90(2)) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe ([18]), the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: '*they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service* ([19]). *It is the case in particular of services in transport, energy, communication networks*'.

Having regard to the **structure of the provision**, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the abovementioned imperative reasons weighs in favour of the latter. This should be determined along the following considerations.

(a) The public interest must be **overriding:** it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive (see, for example, its fourth recital stating '*Community's natural heritage')* (see Annex I, point 10).

(b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short-term economic interests or other interests which would only

([18]) COM(96) 443, of the 11.9.1996.

([19]) The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.

yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.

**It is reasonable to consider that the 'imperative reasons of overriding public interest, including those of a social and economic nature' refer to situations where plans or projects envisaged prove to be indispensable:**
**— within the framework of actions or policies aiming to protect fundamental values for citizens' lives (health, safety, environment);**
**— within the framework of fundamental policies for the State and society;**
**— within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.**

## 5.4. Adopting compensatory measures

### 5.4.1. What is meant by 'compensatory measures' and when should they be considered?

The term '*compensatory measures*' is not defined in the 'Habitats' directive. Experience would suggest the following distinction.

- Mitigation measures in the broader sense, which aim to minimise or even cancel the negative impacts on the site itself (see Section 4.5).
- Compensatory measures *sensu stricto*: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project. For example, general tree-planting to soften a landscape impact does not compensate for the destruction of a wooded habitat with quite specific characteristics.



Measures required for the 'normal' implementation of the 'Habitats' or 'Birds' directives cannot be considered compensatory for a damaging project. For example, the implementation of a management plan or the proposal/designation of a new area, already inventoried as of Community importance, constitute 'normal' measures for a Member State. Compensatory measures should be additional to proper implementation.

The compensatory measures should be considered only after having precisely ascertained a negative impact on the integrity of a Natura 2000 site. Proposing compensatory measures from the beginning could not exempt from the need to respect beforehand the steps described in Article 6, in particular the study of alternatives and the comparative assessment of the interest of the project/plan in relation to the natural value of the site.

**The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the 'Nature' directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the 'last resort'. They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.**

### 5.4.2. Content of compensatory measures

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of one or several natural habitats '*within the biogeographical region concerned*'. It results from the fact that:

- a site should not be irreversibly affected by a project before the compensation is indeed in place. For example, a wetland should normally not be drained before a new wetland, with equivalent biological characteristics, is available for inclusion in the Natura 2000 network;
- compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the directives.

In terms of the **'Birds' directive**, compensation cannot be the designation of an inventoried area which should have already been classified by the Member State. One could on the other hand accept, as a compensation, work to improve the biological value of an area (to be designated) or of a SPA (designated) so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the '*Habitats' directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the directive had not been deemed essential at the time of the drawing up of the biogeographical list.

In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

**The compensatory measures can consist of:**
**— recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;**
**— improving a habitat on part of the site or on another Natura 2000 site, proportional to the loss due to the project;**
**— in exceptional cases, proposing a new site under the 'Habitats' directive.**

**The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network.**

### 5.4.3. 'Overall coherence' of the Natura 2000 network

The expression '*overall coherence*' appears in Article 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Article 3(1) which states that Natura 2000 is '*a coherent European ecological network of special areas of conservation*' and in Article 3(3) which stipulates that '*where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.*'

Article 10, which deals more generally with land-use planning and development policy, stipulates that

> *'Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 200 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.*
>
> *Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.'*

The word 'ecological' is used both in Article 3 and Article 10 to explain the character of the coherence. It is obvious that the expression '*overall coherence*' in Article 6(4) is used in the same meaning.

Article 6(4) requires to 'protect' the overall coherence of Natura 2000. Thus, the directive presumes that the 'original' network has been coherent. If the derogation regime is used, the situation must be corrected so that the coherence is fully restored.

- Under the **'Habitats' directive** the selection of a site for the Natura 2000 network rests on:
  - — the taking into account of habitat and species in proportions (surfaces, populations) described in the standard data form;
  - — the inclusion of the site in a biogeographical region within which it is selected;
  - — the selection criteria established by the 'Habitats' Committee and used by the European Topic Centre — Nature Conservation to advise the Commission to retain a site on the Community list.
- The **'Birds' directive** does not provide for biogeographical regions, or selection at Community level. By analogy, one could consider that **the overall coherence of the network** is ensured if: 46 47
  - — compensation is ensured along the same migration path;
  - — the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

**In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: (a) address, in comparable proportions, the habitats and species negatively affected; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site.**

**The distance between the original site and the place of the compensatory measures is not therefore an obstacle, as long as it does not affect the functionality of the site and the reasons for its initial selection.**

### 5.4.4. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (trans-European network).

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a **State aid** (within the meaning of Article 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a State aid as long as it is granted in exchange of works carried out.

**The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.**

### 5.4.5. Communication to the Commission of the compensatory measures

The competent national authorities have to communicate to the Commission the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate that process the Commission services have prepared a standard format ([20]) for supplying information to the Commission according to the provisions of Article 6(4)1 or 6(4)2. In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

This communication should enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, the communication of certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which required the realisation of the plan or project can also prove necessary, insofar as these elements affected the choice of the compensatory measures.

**The communication of compensatory measures must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. However, it is not the Commission's role to suggest compensatory measures.**

## 5.5. What happens with sites hosting priority habitats and/or species?

The second subparagraph of Article 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species. The realisation of plans or projects likely to adversely affect these sites could be justified only if the evoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the initiative envisaged.

In other words, damage to the sites would only be accepted as overruling the fulfilment of the objectives of the directive when the specific imperative reasons mentioned above occur or, alternatively, after the additional procedural safeguard of an independent appraisal by the Commission.

This provision raises a number of questions relating to:

- the identification of sites concerned;

([20]) This format is presented in Annex IV of this document.

- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment;
- the procedure for the adoption of the Commission's opinion and the consequences which arise from this opinion.

### 5.5.1. The sites concerned

Article 6(4), second subparagraph, applies when the realisation of the plan or project is likely to affect a site hosting priority habitats and/or species. In this regard, it would be reasonable to consider that a plan or project:

(a) not affecting, in any manner, a priority habitat/species; or

(b) affecting a habitat/species which has not been taken into account in the selection of a site ('non-significant presence' in the standard data form)

should not de facto justify that a site should be subject to this second subparagraph.

**Article 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.**

### 5.5.2. The concepts of 'human health', 'public safety' and 'primary beneficial consequences for the environment'

Human health, public safety and primary beneficial consequences for the environment constitute the most important imperative reasons of overriding public interest. However, like the concept of 'imperative reasons of overriding public interest' these three categories are not defined expressly. 48 49

Community law refers to public health and public safety reasons as ones which can justify the adoption of restrictive national measures to the free movement of goods, workers and services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of Community policy in the field of the environment. In the same view, the primary beneficial consequences for the environment constitute a category which must be included in the aforementioned fundamental objectives of environmental policy.

Within the framework of the principle of subsidiarity, it rests with the competent national authorities to check whether such a situation occurs. Of course, any situation of this kind is likely to be examined by the Commission within the framework of its activity of control on the correct application of Community law.

As regards the concept of 'public safety', it is useful to refer to the judgement of the Court of Justice of 28 February 1991 in Case C-57/89, *Commission* v *Germany* (*'Leybucht Dykes'*). That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, not least because the Court's approach influenced the drafting of Article 6. At issue were construction works to reinforce dykes on the North Sea at Leybucht. These works involved a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the specific case, the Court confirmed that **the danger of flooding and the protection of the coast** constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum.

**The national authorities can authorise the realisation of the plan or project only if the proof of the existence of the aforesaid reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.**

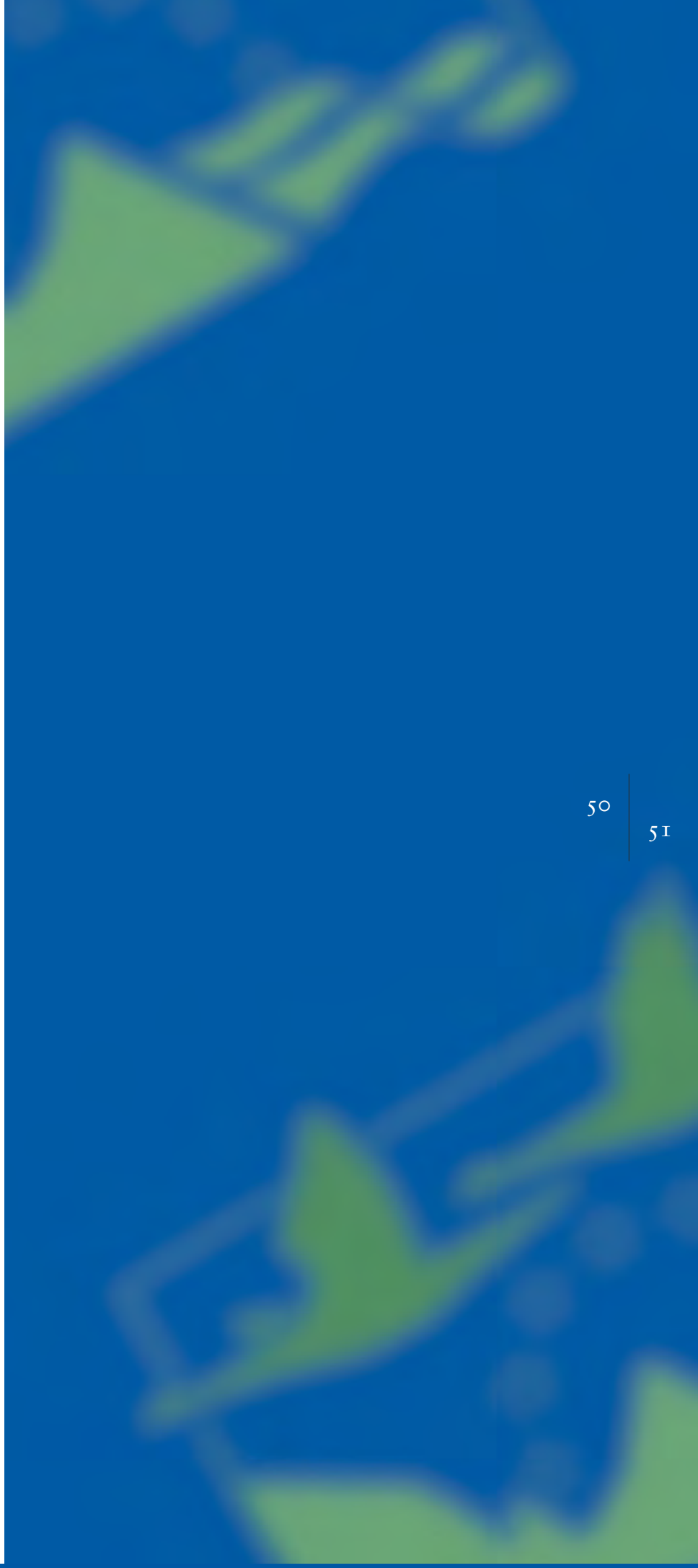
### 5.5.3. Adoption of the Commission's opinion — its consequences

In the case of imperative reason of overriding public interest other than human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion ([21]). One must therefore refer once again to the economy and to the aims pursued by the provision in question. The opinion has to cover the assessment of the ecological values which are likely to be affected by the plan or project, the relevance of the invoked imperative reasons and the balance of these two opposed interests, as well as an evaluation of the compensation measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the realisation of the plan or project with regard to the invoked imperative reason.

From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address the Commission's arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community law and, if necessary, initiate appropriate legal action.

**The Commission, in delivering its opinion, should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in a case of non-conformity with Community law, legal action may be taken.**

([21]) The relevant standard format (Annex IV) also covers the request for a Commission opinion according to the provisions of Article 6(4)2.



# Annexes



# Annex I

## Court case references

(1) The need for a strict transposition of Article 6 has already been signalled in a case brought before the European Court of Justice (Opinion of Advocate General Fennelly in Case C-256/98, *Commission* v *France*, delivered on 16 September 1999).

(2) See the decision of the European Court of Justice in Case C-355/90, *Commission* v *Spain* [1993] ECR I-4221 ('*Santoña Marshes*') and its decision of 18 March 1999 in Case C-166/97, *Commission* v *France (Seine Estuary)*.

(3) As above.

(4) Case C-392/96, *Commission* v *Ireland*, judgment of ECJ of 21 September 1999.

(5) This point is also underlined by Advocate General Fennelly of the European Court of Justice in the case above under (1).

(6) The relevant case law of the European Court of Justice further emphasises that the concept of 'project' is to be broadly interpreted — see in particular judgment of 24 October 1996 in Case C-72/95, *Kraaijeveld*.

(7) As above under (1).

(8) To see what in practice may be considered 'significant', it is helpful to refer to the case law of the European Court of Justice, in particular Case C-355/90, *Commission* v *Spain* [1993] ECR I-4221 ('*Santoña Marshes*'). Although that case was not decided by reference to Article 6(3) and (4) of Directive 92/43/EEC (being decided by reference to the preceding protection regime for SPAs under Directive 79/409/EEC), it serves to indicate some of the types of activity which may be considered as having significant effects on a protected site.

(9) The Court has stated that '*Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of (Directive 85/337/EEC) such as fauna and flora … are sensitive to the slightest alteration.*' (Case C-392/96, *Commission* v *Ireland*, judgment of ECJ of 21 September 1999).

(10) See also the emphasis the ECJ placed on the common responsibilities of the Member States in the context of the 'Birds' directive in Cases C-252/85 and C-262/85 (Respectively: *Commission* v *France* [1988] ECR 2243 and *Commission* v *Italy* [1987] ECR 3073).

# Annex II

## Considerations on management plans

While the appropriate management plans are not always necessary, at both the Galway seminar ([22]) and the Bath Conference ([23]), participants stressed that the management plans could constitute an effective means to fulfil the obligations provided for by the 'Habitats' directive.

The following extract from the conclusions of the Galway seminar sets out a number of considerations which may be helpful in view of the preparation of management plans:

### 1. Methodology

- Is a management plan for the site really needed? Explain why
- Who will initiate the plan? Who will be responsible for the plan?
- What is important about the site (both natural value and socioeconomic context)?
- What are its main threats?
- What do we want to achieve?
- How do we want to achieve it, according to what precise time schedule?
- How much will it cost? Will it optimise the benefits for nature conservation?

### 2. Objectives

The objectives of the management plan for the site have to correspond to the ecological requirements of the natural habitats and species significantly present on it in order to ensure their favourable conservation status. They must be as clear as possible, realistic, quantified and manageable. Use clear language with concrete formulation, to be understandable by everybody.

- What is the favourable conservation status for each habitat type and species present on the site?
- How does it contribute to the integrity of the site and the coherence of the network?
- Is it assessed in a dynamic way according to the evolution of the conservation status of the habitats or species concerned?

### 3. Consultation and implementation

It is an essential part of the process to establish a management plan needing a multidisciplinary and professional approach.

- Have you identified all the local actors?
- Have you involved them according to a bottom-up approach?
- When do you involve them?

An illustration of the consultation method is the *document d'objectifs* in France where all interest groups are invited to participate under the responsibility of the competent authorities (*préfet de région*).

([22]) Organised by the Irish authorities from 9 to 11 October 1996 in Galway, Ireland on SAC Site Management.

([23]) Organised by the Commission and the UK presidency from 28 to 30 June 1998 in Bath, UK, on Natura 2000 and People.

## 4. Monitoring and evaluation

These issues are one of the most important parts of the plan, especially for determining whether you have been successful with your plan. As with the objectives of the management plan, monitoring has to be clearly and accurately defined, including an analysis of financial matters.

# Annex II *A*

## Examples of LIFE-Nature projects ([24]) that have involved management plans or statutory, administrative or contractual measures

For each project, its relevant aspects are indicated below:

### Belgique-België

- *Protection through acquisition and management of the last calcareous mires in Belgium (B4-3200/95/435)*

  The provincial authority has secured the bulk of this very valuable site by leasing it from the owners.

- *Integral Coastal Conservation Initiative (B4-3200/96/483)*

  Preparation of management plans for both the coastal (dune) and the marine habitats (offshore).

### Deutschland

- *Protecting great bustard habitats in Brandenburg (B4-3200/92/14529)*

  Contractual arrangements with farmers were concluded, involving land purchase and leasing, or management agreements.

- *Preservation and re-establishment of the Trebeltal fen* and *Restoration and conservation of riverine fens in Mecklenburg-Vorpommern (B4-3200/94/731* and *B4-3200/95/260)*

  Elaboration and implementation of a management plan to restore riverine and fen habitats, through close cooperation with conservation and water authorities.

- *Transnational programme for the conservation of bats in western-central Europe (B4-3200/95/842)*

  Contractual arrangements with landowners and public authorities, and establishment of a management plan.

- *Conservation and development of nature of the Federseelandscape (B4-3200/96/489)*

  Rural land consolidation procedure, supported through agri-environment measures.

([24]) Further information can be found on Internet at: http://europa.eu.int/comm/life/nature/databas.htm

## Ελλαδα - Greece

- *Management and protection of the threatened biotopes of western Crete with ecotopes and priority species (B4-3200/95/850)*

  Preparation of management plans with direct involvement of local authorities.

- *The Mediterranean monk seal in Greece: Conservation in action (B4-3200/96/500)*

  Drawing up management plans in permanent consultation with the various stakeholders.

## España

- *First, second and third phases of the action programme for the conservation of the brown bear and its habitat in the Cantabrian mountains (B4-3200/92/15185 & 94/736 & 95/523)*

  Agreements with hunters for the management of hunting areas in a way that is compatible with bear conservation

- *First and second phases of the creation of a network of flora micro-reserves and purchase of land of significant botanical interest in the Valencia region (B4-3200/93/766 & 95/521)*

  Agreements with the land-owners and implementation of management plans for the microreserves (160 sites)



- *First and second phases of the conservation programme for three threatened vertebrate species in the Pyrenees (sub-project Spain) (B4-3200/93/772, 95/277, 95/524)*

  Agreements with hunters for the maintenance of reserve areas for the Gypaetus barbatus, and compensation payments to avoid timber cutting in forest within the brown bear distribution area.

- *Conservation of the little bustard, great bustard and lesser kestrel in the SPAs of Extremadura (B4-3200/96/507)*

  Agreement with farmers for the improvement of the steppe habitat.

## France

- *Protection programme for bogs in France (B4-3200/95/518)*

  Preparation of a manual for the management of bog habitats.

- *Experimental drawing up of management plans for future French Natura 2000 sites (B4-3200/95/519)*

  Testing of management plans on 35 sites and drafting of a methodological guide for preparing management plans for Natura 2000 sites.

## Ireland

- *Development of management plans and emergency actions aimed at candidate SACs (B4-3200/95/837)*

  Developing management plans for potential SACs

## Österreich

- *Bear protection programme for Austria (B4-3200/95/847)*

  Elaboration of a management plan in cooperation with all authorities and interest groups concerned and a strong public participation input.

- *Wetland management in the Upper Waldviertel. (B4-3200/96/539)*

  Developing management plans for numerous small wetland sites (bogs, ponds, small river-areas), and partly implementing them in close contact with the affected landowners and users.

## Portugal

- *Second phase of the project for conservation of the stepparian bird fauna of Castro Verde (B4-3200/95/510)*

- *New technology applied to nature conservation in Guadiana valley (B4-3200/95/511)*

  Both projects involved the preparation and implementation of management plans for areas that after the end of the projects were integrated into SPAs.

## Suomi-Finland

- *Protection of biodiversity, and particularly of flying squirrel habitats, in the Nuuksio area (B4-3200/95/508)*

  Preparation of a management plan for recreation and conservation in privately owned areas.

- *Saimaa ringed seal management plan for Lake Pihlajavesi (B4-3200/95/505)*

  Land use plans focusing on seal conservation.

## Sverige

- *Protection and restoration of Stora Alvaret on Öland Island, south-east Sweden (B4-3200/96/547)*

- *Preservation of the hermit beetle, Osmoderma eremita (B4-3200/97/288)*

  Use of agri-environmental schemes for the long-term management of the sites.

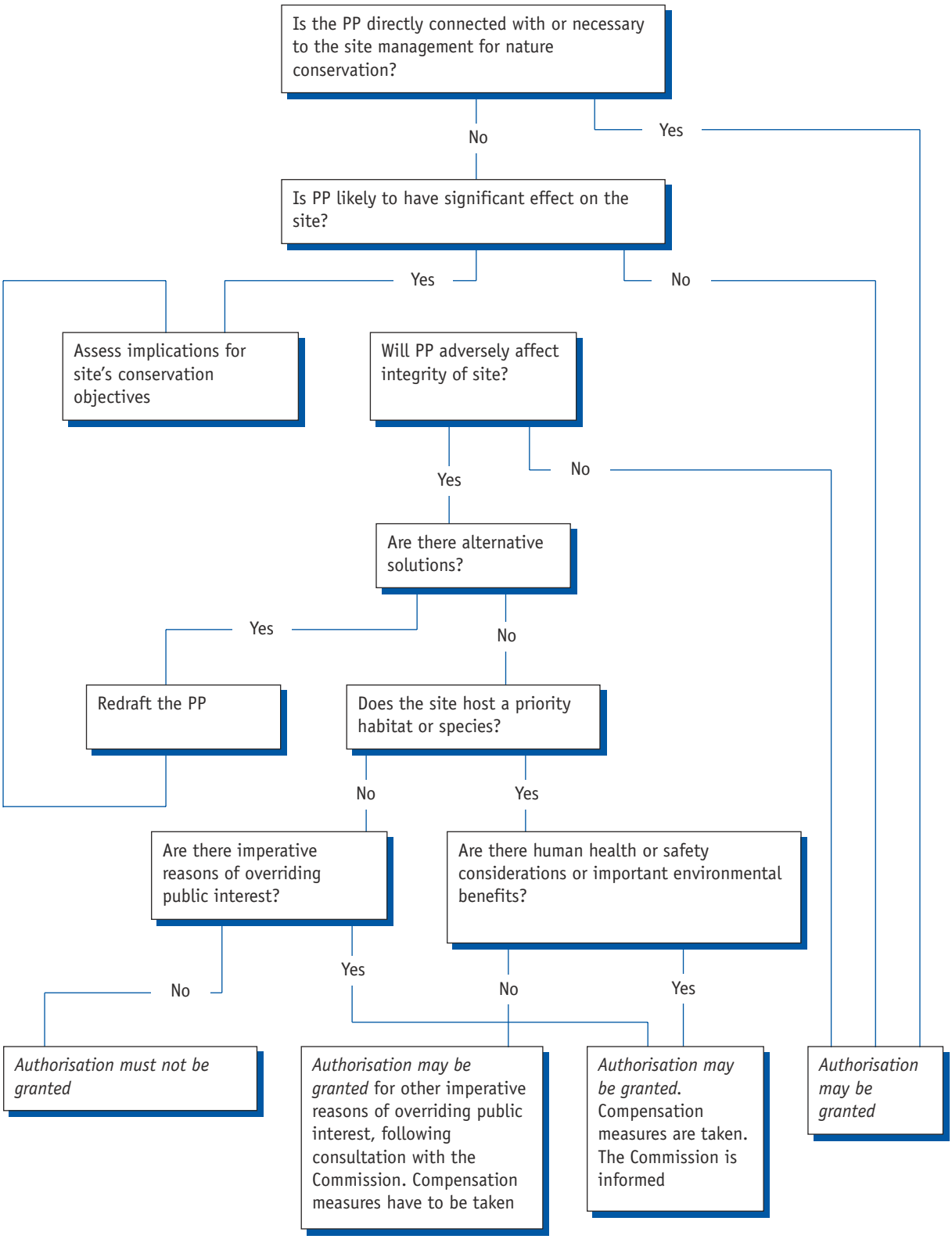
## United Kingdom

- *Conservation management of priority upland habitats through grazing: guidance on management of upland Natura 2000 sites (B4-3200/95/854)*

  Development of a practical manual for grazing management planning.

# Annex III

## Consideration of plans and projects affecting Natura 2000 sites



# Annex IV

## Form for submission of information to the European Commission according to Article 6(4)

Member State: Date:

**Information to the European Commission**
**according to Article 6 of the 'Habitats' directive**
**(Directive 92/43/EEC)**

Documentation sent for: ☐ information (Article 6(4)1) ☐ opinion (Article 6(4)2)

Competent national authority:

Address:

Contact person:

Tel., fax, e-mail:

# 1. Plan or project

Name and code of Natura 2000 site affected:

This site is:

☐ an SPA under the 'Birds' directive

☐ a proposed SCI under the 'Habitats' directive

☐ hosting a priority habitat/species

Summary of the plan or project having an effect on the site:

## 2. Negative effects

Summary of the assessment of the negative effects on the site:

NB: This summary should focus on the adverse effect expected on the habitats and species for which the site has been proposed for the Natura 2000 network, include the appropriate maps and describe the already decided mitigation measures.

## 3. Alternative solutions

Summary of alternative solutions studied by the Member State:

Reasons why the competent national authorities have concluded that there is absence of alternative solutions:

# 4. Imperative reasons

Reason to nevertheless carry out this plan or project:

- ☐ Imperative reasons of overriding public interest, including those of a social or economic nature (in the absence of priority habitat/species)
- ☐ human health
- ☐ public safety
- ☐ beneficial consequences of primary importance for the environment
- ☐ other imperative reasons of overriding public interest

Short description of the reason:

# 5. Compensation measures

Foreseen compensatory measures and timetable:

# Annex V

## Member State nature protection authorities ([25])

### Belgique-België

- Ms Els MARTENS
  AMINAL — Afdeling Natuur
  Koning Albert II laan 20,
  bus 8
  Ferraris-gebouw, 4de verdieping, lokaal 4G43
  B-1000 Brussel

- Mr Patrick DE WOLF
  DGRNE
  Av. Prince de Liège 15, B-5100 JAMBES

### Danmark

- Mr Olaf G. CHRISTIANI
  Ministry of the Environment and Energy,
  The National Forest and Nature Agency
  Haraldsgade 53, DK-2100 COPENHAGEN

- Ms Tine NIELSEN SKAFTE
  The National Forest and Nature Agency
  Haraldsgade 53, DK-2100 COPENHAGEN

### Deutschland

- Dr Ursula VON GLISCYNSKI
  Ministry for the Environment, Nature
  Conservation and Nuclear Safety, Referat NI 2
  Allee 90, D-53048 BONN

- Mr Detlef SZYMANSKI
  Hessisches Ministerium des Innern und für
  Landwirtschaft, Forsten und Naturschutz
  Hölderlinstr. 1-3,
  D-65187 WIESBADEN

### Ελλάδα-Greece

- Mrs Stavroula SPYROPOULOU
  Ministry of Environment, Physical Planning
  and Public Works, Environmental Planning
  Division, Nature Management Section
  36 Trikalon str, GR-11526 ATHENS

- Mr Panagiotis DROUGAS
  General Secretariat for Forests and the Natural
  Environment, Department of Aesthetic
  Forests, National Parks and Game
  Management
  Ippokratous str. 3-5, GR-10164 ATHENS



### España

- Mr Jesus SERRADA HIERRO
  Dirección General de Conservación de la
  Naturaleza MIMAM
  c/Gran Via de San Francisco, 4. 4a,
  E-28005 MADRID

- Mr Miguel AYMERICH DESPOINTES
  Dirección General de Conservación de la
  Naturaleza, MIMAM
  c/Gran Via de San Francisco, 4. 4a,
  E-28005 MADRID

### France

- Mr Jean-Marc MICHEL
  Ministère de l'Environnement, Direction de la
  Nature et des Paysages
  20, avenue de Ségur, F-75302 PARIS 07 SP



([25]) List of delegates to the 'Habitats' Committee, established under Directive 92/43/EEC. An updated list can be found on the Internet at: http://europa.eu.int/comm/life/nature/databas.htm

- Mr Henri JAFFEUX
  Ministère de l'Environnement, Direction de la Nature et des Paysages
  20, avenue de Ségur, F-75302 PARIS 07 SP

## Ireland

- Dr Alan CRAIG
  National Parks and Wildlife, Dúchas, Dept of Arts, Heritage, Gaeltacht and the Islands
  Ely Court 7, Ely Place, DUBLIN 2, Ireland

- Mr Peadar CAFFREY
  National Parks and Wildlife, Dúchas, Dept. of Arts, Heritage, Gaeltacht and the Islands
  Ely Court 7, Ely Place, DUBLIN 2, Ireland

## Italy

- Mrs Patrizia DE ANGELIS
  Ministero dell'Ambiente, Servizio Conservazione della Natura
  Via Assisi, 163, I-00187 ROMA

- Mr Alberto ZOCCHI
  Ministero dell'Ambiente, Servizio Conservazione della Natura
  Via Assisi, 163, I-00181 ROMA

## Luxembourg

- Mr Claude ORIGER
  Ministère de l'Environnement
  18, Montée de la Pétrusse,
  L-2918 LUXEMBOURG

- Mrs Marie-Paule KREMER
  Ministère de l'Environnement
  18, Montée de la Pétrusse,
  L-2918 LUXEMBOURG

## Nederland

- Mr Garry POST
  Ministry of Agriculture, Nature, Management and Fisheries, Department for Nature Management
  73 Bezuidenhoutseweg, PO Box 20401,
  2500 EK DEN HAAG, Nederland

## Österreich

- Herr Mag. Christian PLÖSSNIG
  Amt der Tiroler Landesregierung, Abt. Umweltschutz
  Eduard Wallnöfer Platz 1,
  A-6020 INNSBRUCK

- D. I. Günter LIEBEL
  Bundesministerium für Umwelt, Jugend und Familie, Abt. II/5
  Stubenbastei 5, A-1010 WIEN

## Portugal

- Mr José Manuel MARQUES
  Instituto de Conservação da Natureza
  Rua da Lapa, 73, P-1200-701 LISBOA

## Suomi-Finland

- Mr Esko JAAKKOLA
  Ministry of the Environment, Land Use Department
  PO Box 380, SF-00131 HELSINKI

## Sverige

- Ms Nilla THOMSON
  Ministry of Environment,
  S-10333 STOCKHOLM

- Mr Jan TERSTAD
  Swedish Environmental Protection Agency
  Blekholmsterrassen 36,
  S-10648 STOCKHOLM

## United Kingdom

- Mr M. PRITCHARD
  Head of European Wildlife Division,
  Department of the Environment Transport
  and the Regions
  Tollgate House, Houlton Street,
  BRISTOL, BS2 9DJ, United Kingdom

- Mr Trevor SALMON
  Department of the Environment, Transport
  and the Regions, European Wildlife Division
  Tollgate House, Houlton Street,
  BRISTOL, BS2 9DJ, United Kingdom

European Commission

**Managing Natura 2000 sites : The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC**

Luxembourg: Office for Official Publications of the European Communities

2000 — 69 pp. — 21 x 29.7 cm

ISBN 92-828-9048-1

# Venta • Salg • Verkauf • Πωλήσεις • Sales • Vente • Vendita • Verkoop • Venda • Myynti • Försäljning

## BELGIQUE/BELGIË

**Jean De Lannoy**
Avenue du Roi 202/Koningslaan 202
B-1190 Bruxelles/Brussel
Tél. (32-2) 538 43 08
Fax (32-2) 538 08 41
E-mail: jean.de.lannoy@infoboard.be
URL: http://www.jean-de-lannoy.be

**La librairie européenne/**
**De Europese Boekhandel**
Rue de la Loi 244/Wetstraat 244
B-1040 Bruxelles/Brussel
Tél. (32-2) 295 26 39
Fax (32-2) 735 08 60
E-mail: mail@libeurop.be
URL: http://www.libeurop.be

**Moniteur belge/Belgisch Staatsblad**
Rue de Louvain 40-42/Leuvenseweg 40-42
B-1000 Bruxelles/Brussel
Tél. (32-2) 552 22 11
Fax (32-2) 511 01 84

## DANMARK

**J. H. Schultz Information A/S**
Herstedvang 12
DK-2620 Albertslund
Tlf. (45) 43 63 23 00
Fax (45) 43 63 19 69
E-mail: schultz@schultz.dk
URL: http://www.schultz.dk

## DEUTSCHLAND

**Bundesanzeiger Verlag GmbH**
Vertriebsabteilung
Amsterdamer Straße 192
D-50735 Köln
Tel. (49-221) 97 66 80
Fax (49-221) 97 66 82 78
E-Mail: vertrieb@bundesanzeiger.de
URL: http://www.bundesanzeiger.de

## ΕΛΛΑΔΑ/GREECE

**G. C. Eleftheroudakis SA**
International Bookstore
Panepistimiou 17
GR-10564 Athina
Tel. (30-1) 331 41 80/1/2/3/4/5
Fax (30-1) 323 98 21
E-mail: elebooks@netor.gr

## ESPAÑA

**Boletín Oficial del Estado**
Trafalgar, 27
E-28071 Madrid
Tel. (34) 915 38 21 11 (Libros),
913 84 17 15 (Suscrip.)
Fax (34) 915 38 21 21 (Libros),
913 84 17 14 (Suscrip.)
E-mail: clientes@com.boe.es
URL: http://www.boe.es

**Mundi Prensa Libros, SA**
Castelló, 37
E-28001 Madrid
Tel. (34) 914 36 37 00
Fax (34) 915 75 39 98
E-mail: libreria@mundiprensa.es
URL: http://www.mundiprensa.com

## FRANCE

**Journal officiel**
Service des publications des CE
26, rue Desaix
F-75727 Paris Cedex 15
Tél. (33) 140 58 77 31
Fax (33) 140 58 77 00
E-mail: europublications@journal-officiel.gouv.fr
URL: http://www.journal-officiel.gouv.fr

## IRELAND

**Government Supplies Agency**
Publications Section
4-5 Harcourt Road
Dublin 2
Tel. (353-1) 661 31 11
Fax (353-1) 475 27 60
E-mail: opw@iol.ie

## ITALIA

**Licosa SpA**
Via Duca di Calabria, 1/1
Casella postale 552
I-50125 Firenze
Tel. (39) 055 64 83 1
Fax (39) 055 64 12 57
E-mail: licosa@licosa.com
URL: http://www.licosa.com

## LUXEMBOURG

**Messageries du livre SARL**
5, rue Raiffeisen
L-2411 Luxembourg
Tél. (352) 40 10 20
Fax (352) 49 06 61
E-mail: mail@mdl.lu
URL: http://www.mdl.lu

## NEDERLAND

**SDU Servicecentrum Uitgevers**
Christoffel Plantijnstraat 2
Postbus 20014
2500 EA Den Haag
Tel. (31-70) 378 98 80
Fax (31-70) 378 97 83
E-mail: sdu@sdu.nl
URL: http://www.sdu.nl

## ÖSTERREICH

**Manz'sche Verlags- und**
**Universitätsbuchhandlung GmbH**
Kohlmarkt 16
A-1014 Wien
Tel. (43-1) 53 16 11 00
Fax (43-1) 53 16 11 67
E-Mail: bestellen@manz.co.at
URL: http://www.manz.at

## PORTUGAL

**Distribuidora de Livros Bertrand Ld.ª**
Grupo Bertrand, SA
Rua das Terras dos Vales, 4-A
Apartado 60037
P-2700 Amadora
Tel. (351) 214 95 87 87
Fax (351) 214 96 02 55
E-mail: dlb@ip.pt

**Imprensa Nacional-Casa da Moeda, SA**
Rua da Escola Politécnica nº 135
P-1250 -100 Lisboa Codex
Tel. (351) 213 94 57 00
Fax (351) 213 94 57 50
E-mail: spoce@incm.pt
URL: http://www.incm.pt

## SUOMI/FINLAND

**Akateeminen Kirjakauppa/**
**Akademiska Bokhandeln**
Keskuskatu 1/Centralgatan 1
PL/PB 128
FIN-00101 Helsinki/Helsingfors
P./tfn (358-9) 121 44 18
F./fax (358-9) 121 44 35
Sähköposti: sps@akateeminen.com
URL: http://www.akateeminen.com

## SVERIGE

**BTJ AB**
Traktorvägen 11
S-221 82 Lund
Tlf. (46-46) 18 00 00
Fax (46-46) 30 79 47
E-post: btjeu-pub@btj.se
URL: http://www.btj.se

## UNITED KINGDOM

**The Stationery Office Ltd**
Orders Department
PO Box 276
London SW8 5DT
Tel. (44-20) 78 70 60 05-522
Fax (44-20) 78 70 60 05-533
E-mail: book.orders@theso.co.uk
URL: http://www.tsonline.co.uk

## ÍSLAND

**Bokabud Larusar Blöndal**
Skólavördustig, 2
IS-101 Reykjavik
Tel. (354) 552 55 40
Fax (354) 552 55 60
E-mail bokabud@simnet.is

## NORGE

**Swets Norge AS**
Østenjoveien 18
Boks 6512 Etterstad
N-0606 Oslo
Tel. (47-22) 97 45 00
Fax (47-22) 97 45 45
E-mail: kytterlid@swets.nl

## SCHWEIZ/SUISSE/SVIZZERA

**Euro Info Center Schweiz**
c/o OSEC
Stampfenbachstraße 85
PF 492
CH-8035 Zürich
Tel. (41-1) 365 53 15
Fax (41-1) 365 54 11
E-mail: eics@osec.ch
URL: http://www.osec.ch/eics

## BĂLGARIJA

**Europress Euromedia Ltd**
59, blvd Vitosha
BG-1000 Sofia
Tel. (359-2) 980 37 66
Fax (359-2) 980 42 30
E-mail: Milena@mbox.cit.bg

## ČESKÁ REPUBLIKA

**ÚSIS**
NIS-prodejna
Havelkova 22
CZ-130 00 Praha 3
Tel. (420-2) 24 23 14 86
Fax (420-2) 24 23 11 14
E-mail: voldanovaj@usiscr.cz
URL: http://usiscr.cz

## CYPRUS

**Cyprus Chamber of Commerce**
**and Industry**
PO Box 1455
CY-1509 Nicosia
Tel. (357-2) 66 95 00
Fax (357-2) 66 10 44
E-mail: demetrap@ccci.org.cy

## EESTI

**Eesti Kaubandus-Tööstuskoda**
(Estonian Chamber of Commerce and Industry)
Toom-Kooli 17
EE-0001 Tallinn
Tel. (372) 646 02 44
Fax (372) 646 02 45
E-mail: einfo@koda.ee
URL: http://www.koda.ee

## HRVATSKA

**Mediatrade Ltd**
Pavla Hatza 1
HR-10000 Zagreb
Tel. (385-1) 481 94 11
Fax (385-1) 481 94 11

## MAGYARORSZÁG

**Euro Info Service**
Hungexpo Európa Ház
PO Box 44
H-1441 Budapest
Tel. (36-1) 264 82 70
Fax (36-1) 264 82 75
E-mail: euroinfo@euroinfo.hu
URL: http://www.euroinfo.hu

## MALTA

**Miller Distributors Ltd**
Malta International Airport
PO Box 25
Luqa LQA 05
Tel. (356) 66 44 88
Fax (356) 67 67 99
E-mail: gwirth@usa.net

## POLSKA

**Ars Polona**
Krakowskie Przedmiescie 7
Skr. pocztowa 1001
PL-00-950 Warszawa
Tel. (48-22) 826 12 01
Fax (48-22) 826 62 40
E-mail: books119@arspolona.com.pl

## ROMÂNIA

**Euromedia**
Strada Franceza Nr 44 sector 3
RO-70749 Bucuresti
Tel. (40-1) 315 44 03
Fax (40-1) 315 44 03
E-mail: mnedelciu@pcnet.pcnet.ro

## ROSSIYA

**CCEC**
60-letiya Oktyabrya Av. 9
117312 Moscow
Tel. (7-095) 135 52 27
Fax (7-095) 135 52 27

## SLOVAKIA

**Centrum VTI SR**
Nám. Slobody, 19
SK-81223 Bratislava
Tel. (421-7) 54 41 83 64
Fax (421-7) 54 41 83 64
E-mail: europ@tbb1.sltk.stuba.sk
URL: http://www.sltk.stuba.sk

## SLOVENIJA

**Gospodarski Vestnik**
Dunajska cesta 5
SLO-1000 Ljubljana
Tel. (386) 613 09 16 40
Fax (386) 613 09 16 45
E-mail: europ@gvestnik.si
URL: http://www.gvestnik.si

## TÜRKIYE

**Dünya Infotel AS**
100, Yil Mahallessi 34440
TR-80050 Bagcilar-Istanbul
Tel. (90-212) 629 46 89
Fax (90-212) 629 46 27
E-mail: infotel@dunya-gazete.com.tr

## AUSTRALIA

**Hunter Publications**
PO Box 404
3067 Abbotsford, Victoria
Tel. (61-3) 94 17 53 61
Fax (61-3) 94 19 71 54
E-mail: jpdavies@ozemail.com.au

## CANADA

**Les éditions La Liberté Inc.**
3020, chemin Sainte-Foy
G1X 3V6 Sainte-Foy, Québec
Tel. (1-418) 658 37 63
Fax (1-800) 567 54 49
E-mail: liberte@mediom.qc.ca

**Renouf Publishing Co. Ltd**
5369 Chemin Canotek Road Unit 1
K1J 9J3 Ottawa, Ontario
Tel. (1-613) 745 26 65
Fax (1-613) 745 76 60
E-mail: order.dept@renoufbooks.com
URL: http://www.renoufbooks.com

## EGYPT

**The Middle East Observer**
41 Sherif Street
Cairo
Tel. (20-2) 392 69 19
Fax (20-2) 393 97 32
E-mail: inquiry@meobserver.com
URL: http://www.meobserver.com.eg

## INDIA

**EBIC India**
3rd Floor, Y. B. Chavan Centre
Gen. J. Bhosale Marg.
400 021 Mumbai
Tel. (91-22) 282 60 64
Fax (91-22) 285 45 64
E-mail: ebic@giasbm01.vsnl.net.in
URL: http://www.ebicindia.com

## JAPAN

**PSI-Japan**
Asahi Sanbancho Plaza #206
7-1 Sanbancho, Chiyoda-ku
Tokyo 102
Tel. (81-3) 32 34 69 21
Fax (81-3) 32 34 69 15
E-mail: books@psi-japan.co.jp
URL: http://www.psi-japan.co.jp

## MALAYSIA

**EBIC Malaysia**
Level 7, Wisma Hong Leong
18 Jalan Perak
50450 Kuala Lumpur
Tel. (60-3) 21 62 62 98
Fax (60-3) 21 62 61 98
E-mail: ebic-kl@mol.net.my

## MÉXICO

**Mundi Prensa Mexico, SA de CV**
Río Pánuco No 141
Colonia Cuauhtémoc
MX-06500 Mexico, DF
Tel. (52-5) 533 56 58
Fax (52-5) 514 67 99
E-mail: 101545.2361@compuserve.com

## PHILIPPINES

**EBIC Philippines**
19th Floor, PS Bank Tower
Sen. Gil J. Puyat Ave. cor. Tindalo St.
Makati City
Metro Manilla
Tel. (63-2) 759 66 80
Fax (63-2) 759 66 90
E-mail: eccpcom@globe.com.ph
URL: http://www.eccp.com

## SOUTH AFRICA

**Eurochamber of Commerce in South Africa**
PO Box 781738
2146 Sandton
Tel. (27-11) 884 39 52
Fax (27-11) 883 55 73
E-mail: info@eurochamber.co.za

## SOUTH KOREA

**The European Union Chamber**
**of Commerce in Korea**
5th FI, The Shilla Hotel
202, Jangchung-dong 2 Ga, Chung-ku
100-392 Seoul
Tel. (82-2) 22 53-5631/4
Fax (82-2) 22 53-5635/6
E-mail: eucck@eucck.org
URL: http://www.eucck.org

## SRI LANKA

**EBIC Sri Lanka**
Trans Asia Hotel
115 Sir chittampalam
A. Gardiner Mawatha
Colombo 2
Tel. (94-1) 074 71 50 78
Fax (94-1) 44 87 79
E-mail: ebicsl@itmin.com

## THAILAND

**EBIC Thailand**
29 Vanissa Building, 8th Floor
Soi Chidlom
Ploenchit
10330 Bangkok
Tel. (66-2) 655 06 27
Fax (66-2) 655 06 28
E-mail: ebicbkk@ksc15.th.com
URL: http://www.ebicbkk.org

## UNITED STATES OF AMERICA

**Bernan Associates**
4611-F Assembly Drive
Lanham MD20706
Tel. (1-800) 274 44 47 (toll free telephone)
Fax (1-800) 865 34 50 (toll free fax)
E-mail: query@bernan.com
URL: http://www.bernan.com

## ANDERE LÄNDER/OTHER COUNTRIES/ AUTRES PAYS

**Bitte wenden Sie sich an ein Büro Ihrer Wahl/ Please contact the sales office of your choice/ Veuillez vous adresser au bureau de vente de votre choix**

**Office for Official Publications**
**of the European Communities**
2, rue Mercier
L-2985 Luxembourg
Tel. (352) 29 29-42455
Fax (352) 29 29-42758
E-mail: info.info@cec.eu.int
URL: http://eur-op.eu.int

14

KH-28-00-187-EN-C

ISBN 92-828-9048-1

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg

## Environment themes

General

Water

Land

Air

Industry

Waste

**Nature**

Urban

Funding

Law

Economics

Assessment

Nuclear issues

Risks

Education

*see our publications catalogue at:*
http://europa.eu.int/comm/environment/pubs/home.htm

# Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

**CLARIFICATION OF THE CONCEPTS OF: *ALTERNATIVE SOLUTIONS, IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST, COMPENSATORY MEASURES, OVERALL COHERENCE, OPINION OF THE COMMISSION.***

January 2007

**This guidance document should be read in conjunction with the booklet published by the European Commission in 2000 and entitled "Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". The current document intends to further develop and replace the section on Article 6(4) of this earlier publication leaflet. The document reflects the views of Commission services only and it is not of a binding nature.**

## Table of content

**1.1. The text**

**1.2. Scope**

*1.2.1. Substantial scope*

*1.2.2. Temporal scope*

**1.3. Initial considerations**

*1.3.1. Examining alternative solutions*

*1.3.2. Examining imperative reasons of overriding public interest*

**1.4. Adopting compensatory measures**

*1.4.1. What is meant by "compensatory measures" and when should they be considered?*

*1.4.2. "Overall coherence" of the Natura 2000 Network*

*1.4.3. Objective and general contents of compensatory measures*

*1.4.4. What to include in the programme of compensation measures?*

**1.5. Criteria for designing compensatory measures**

*1.5.1. Targeted compensation*

*1.5.2. Effective compensation*

*1.5.3. Technical feasibility*

*1.5.4. Extent of compensation*

*1.5.5. Location of compensatory measures*

*1.5.6. Timing of compensation*

*1.5.7. Long term implementation*

**1.6. Who bears the cost of the compensatory measures?**

**1.7. Communication to the Commission of the compensatory measures**

**1.8. What happens with sites hosting priority habitats and/or species?**

*1.8.1. The sites concerned*

*1.8.2. The concepts of "human health", "public safety" and "primary beneficial consequences for the environment"*

*1.8.3. The adoption of the Commission's opinion – its consequences*

### 1.1. The text of Article 6.4 of the Habitats Directive

*"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*

*Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".*

### 1.2. Scope

#### *1.2.1. Substantial Scope*

This provision forms part of the procedure of assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect a Special Area of Conservation (SAC), a Special Protected Area (SPA) or a Site of Community Importance (SCI)[1]. Two fundamental considerations arise:

- On the one hand, it addresses exceptions with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the site(s) concerned.

- On the other hand, its concrete application has to be done in the respect of the various steps provided for and in the sequential order[2] established by the Directive.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that no reasonable scientific doubt remains as to the absence of effects in the site, the competent authorities can give their consent on the plan or project. In case of doubt, or negative conclusions, the precautionary and preventive principles should be applied and procedures under art. 6(4) followed. Furthermore, taking into account the precautionary principle and applying a preventive approach might also lead to the decision not to proceed with the plan or project.

[1] Article 6(2), 6(3) and 6(4) only applies to sites which are placed on the list of sites selected as sites of Community importance (SCI). Thus, these provisions do not apply to sites eligible for identification as sites of Community importance on the national lists transmitted to the Commission (pSCI). The protection regime for the pSCI is defined in case C-117/03 (Judgement of the Court of 13 January 2005, Dragaggi) and in case C-244/05 (Judgement of the Court of 14 September 2006, Bund Naturschutz).

[2] In its Opinion for the case C-239/04 the Advocate General (paragraphs 44-46) seems to consider that there is no a sequential order between the examination of alternative solutions and imperative reasons of overriding public interest.

To this effect, the Court has already held, in case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging*[3] and confirmed in C-6/04 *Commission v United Kingdom of Great Britain and Northern Ireland*[4], that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional upon there being a probability, or a risk, that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk is considered to exist if it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on the site concerned.

The above mentioned approach is also reflected in the Judgement of the Court of 26 October 2006 in the case C-239/04[5] regarding the construction of a motorway in Portugal, where it is mentioned that any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised.

The decision to go ahead with a plan or project must meet the requirements of Article 6(4). In particular, it must be documented that:

1 The alternative put forward for approval, is the least damaging for habitats, for species and for the integrity of the Natura 2000 site, regardless of economic considerations, and that no other feasible alternative, exists that would not affect the integrity of the site.

2 There are imperative reasons of overriding public interest, including 'those of a social or economic nature'.

Being an exception to Article 6(3), this provision can only be applied to circumstances where all the conditions required by the Directive are fully satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions do indeed exist in each particular case.

3 Once the lack of suitable alternatives and the acceptance of imperative reasons of overriding public interest are fully ascertained and documented, all compensatory measures that are needed to ensure the protection of the overall coherence of the Natura 2000 network have to be taken. Therefore, compensatory measures should be considered only when the application of other safeguards, such as mitigation measures, is not sufficient. The compensatory measures adopted must **always** be communicated to the Commission.

**The provisions of Art. 6(4) apply when the results of the preliminary assessment under Art. 6(3) are negative or uncertain. That is:**
**1. The plan or project will adversely affect the integrity of the site**
**2. Doubts remain as to the absence of adverse effects on the integrity of the site linked to the plan or project concerned**
**"The sequential order of its steps has to be followed".**

[3] Judgement of the Court of 7 September 2004 in case C-127/02, paragraphs 57 and 61.

[4] Judgement of the Court of 20 October 2005 in case C-6/04, paragraph 54.

[5] Judgement of the Court of 26 October 2006, Commission/Portugal (case C-239/04, paragraph 24).

#### *1.2.2. Temporal scope*

The judgement delivered by the Court of Justice in relation to the case C-209/04 states the principles with regard to the temporal applicability of Article 6(3) and consequently Article 6(4) of the Habitats Directive. In order to determine whether projects must be subject to an environmental assessment in accordance with Article 6(3), the Court uses a formal criterion: the date of the application for the authorisation for a project. Thus, if the application for authorisation was formally lodged before the expiry of the time-limit for transposition of the Directive or before the accession to the EU, the project is not subject to the requirements laid down in Article 6(3) and (4). However, if the application for authorisation was formally lodged after the expiry of the time-limit for transposition of the Directive or after the accession to the EU, the project is subject to the requirements laid down in Article 6(3) and (4).

### 1.3. Initial considerations

*Ensure quality of appropriate assessment under article 6 (3)*

Appropriate assessments of the implications of the plan or project for the site concerned must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. This implies that all aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.

Assessment procedures of plans or projects likely to affect Natura 2000 sites should guarantee full consideration of all elements contributing to the site integrity and to the overall coherence of the network, both in the definition of the baseline conditions and in the stages leading to identification of potential impacts, mitigation measures and residual impacts. These determine what has to be compensated, both in quality and quantity.

Regardless of whether the provisions of Article 6(3) are delivered following existing environmental impact assessment procedures or other specific methods, it must be ensured that:

- Article 6(3) assessment results allow full traceability of the decisions eventually made, including the selection of alternatives and any imperative reasons of overriding public interest.
- The assessment should include all elements contributing to the site’s integrity and to the overall coherence of the network as defined in the site’s conservation objectives and Standard Data Form, and be based on best available scientific knowledge in the field. The information required should be updated and could include the following issues:
    - Structure and function, and the respective role of the site’s ecological assets
    - Area, representativity and conservation status of the priority and non-priority habitats in the site

- Population size, degree of isolation, ecotype, genetic pool, age class structure, and conservation status of species under Annex II of the Habitats Directive or Annex I of the Birds Directive present in the site
- Role of the site within the biographical region and in the coherence of the Natura 2000 network
- Any other ecological assets and functions identified in the site

– It should include a comprehensive identification of all the potential impacts of the plan or project likely to be significant on the site, taking into account cumulative impacts and other impacts likely to arise as a result of the combined action of the plan or project under assessment and other plans or projects.
– The assessment under Article 6(3) applies the best available techniques and methods, to estimate the extent of the effects of the plan or project on the biological integrity of the site(s) likely to be damaged.
– The assessment provides for the incorporation of the most effective mitigation measures into the plan or project concerned, in order to avoid, reduce or even cancel the negative impacts on the site.
– The characterisation of the biological integrity and the impact assessment should be based on the best possible indicators specific to the Natura 2000 assets which must also be useful to monitor the plan or project implementation.

To meet the requirements of Article 6(3) assessment, it seems most appropriate that the Natura 2000 authorities set up the specific formal requirements regarding the type of information and criteria to follow when carrying out the appropriate assessment. Dissemination and training to the relevant parties (E.g. authorities at a different level of government, consultants and plan or project developers) it is highly recommended.

### *1.3.1. Examining alternative solutions*

In line with the need to prevent undesired impairment to the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when significant negative effects on the integrity of a site have been identified. This should be observed especially in the case of effects on priority habitats and/or species protected under the Habitats Directive or globally endangered bird species listed in Annex I of the Birds Directive. The competent authorities have to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should be considered at this stage.

Subsequently, the competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question[6]. All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 Network have to be analyzed. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations or routes, different scales or designs of development, or alternative processes.

[6] In its Opinion for the case C-239/04, the Advocate General (paragraph 44) considers that "among the alternatives short-listed "*the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.*"

In conformity with the principle of subsidiarity, it rests with the competent national authorities to asses the relative impact of these alternatives solutions on the site concerned. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

**It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.**

### *1.3.2. Examining imperative reasons of overriding public interest*

In the absence of alternative solutions - or in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the above-mentioned conservation aims of the Directive - the competent authorities have to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question.

The concept of *"imperative reason of overriding public interest"* is not defined in the Directive. However, Article 6 (4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interests. As regards the *"other imperative reasons of overriding public interest"* of social or economic nature, it is clear from the wording that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

The "imperative requirement" concept was worked out by the Court of Justice as an exception to the principle of free movement of goods. Among the imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environmental protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, Community law also recognises the concept of "service of general economic interest", evoked in Article 86(2) (ex 90(2)) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe[7], the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: "*they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific*

[7] COM (96) 443, of the 11.09.1996.

*obligations of public service*[8]*. It is the case in particular of services in transport, energy, communication networks*".

Having regard to the *structure of the provision*, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

a) the public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see e.g. its 4th recital stating *"Community's natural heritage"*) (see Annex I point 10).

b) in this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive.

**It is reasonable to consider that the "imperative reasons of overriding public interest, including those of social and economic nature" refer to situations where plans or projects envisaged prove to be indispensable:**
**- within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, environment);**
**- within the framework of fundamental policies for the State and the Society;**
**- within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service.**

In order to provide readers with a more precise indication of what might legitimately considered as potential imperative reasons of overriding public interest, some **examples** have been extracted from the Opinions delivered by the Commission in the framework of Article 6(4) and are related to the reasoning given by Member States.

*Intersection of the Peene Valley (Germany) by the planned A 20 motorway (Germany)*
*A 20 motorway is part of the trans-European road network. An east-west link has to be created in Mecklenburg-Western Pomerania in order to link it with central regions of the Community.*
*Mecklenburg-Western Pomerania suffers from an exceptionally high unemployment. For several years its unemployment rate has been almost the double of that in the old Länder. The gross national product created in Mecklenburg-Western Pomerania, as compared to the percentage of the population, is significantly lower than the average gross national product.*

[8]The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, the equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.

*Project Mainport Rotterdam" Development Plan (The Netherlands)*
*Portuary and industrial activity in the Rotterdam area is one of the main pillars of Dutch economy. The harbour of Rotterdam is an essential multimodal crossroads in the TEN-T Network and is therefore of Community importance. Expected growth in global container handling and chemical industrial activity will lead to increased demand for space which will have to be met if the competitive position of the Rotterdam harbour in the Hamburg – Le Havre range has to be maintained.*
*The development of the Rotterdam port, also brings into focus the question of promoting modal-shift particularly in relation to freight transport. It is clear that shifting freight from road to water will have considerable benefits in terms of reduced green-house gas emissions, reduced atmospheric pollution and reduced congestion. These benefits should be recognised in assessing questions of public interest.*

*Extension of the site of Daimler Chrysler Aerospace Airbus Gmbh in Hamburg-Finkenwerder (Germany)*
*Outstanding importance for the region of Hamburg and northern Germany and the European aerospace industry. Project will contribute to the technological advance and foster the European co-operation in the aviation business. Positive effect on the economic and social situation of the bordering regions and positive impact on the competitiveness of the European aeronautic industry. Important number of highly qualified new jobs, needed to counterbalance the considerable loss of jobs in the industrial sector of the region.*

*High speed line (TGV East) (France)*
*Lack of options for linking the existing lines. The European TGV East project was viewed favourably in the Council of Ministers of the European Community on 1990 and was chosen as a priority project by the European Council in 1994, having benefited from Union decisions regarding the priority of infrastructure projects to be implemented.*

*Operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery (Germany)*
*Due to its geological and infrastructure qualities the Prosper Haniel coal mine and the continuation of its mining activities contribute to achieving the general objectives of the German long term energy policy at the federal and regional level, and in particular the interest of supply security and to maintain the leading position of European mining and coal energy technologies. The closure of the Prosper Haniel mine would have unacceptable direct and indirect economic and social consequences at the regional level with a direct loss of jobs in coal mining and in up-stream industries and downstream services.*

*La Breña II Reservoir Project (Spain)*
*Provide enough water for human consumption, industrial uses and agriculture, which cannot be available in the current situation of the River Guadalquivir basin.*

For further examples and information concerning the Opinions delivered by the Commission: http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

### 1.4. Adopting compensatory measures

#### *1.4.1. What is meant by "compensatory measures" and when should they be considered?*

In the context of article 6 of the Habitats Directive, mitigation measures must be clearly distinguished from compensatory measures.

The term "*compensatory measures"* is not defined in the 'Habitats' Directive. Experience would suggest the following distinction:

- mitigation measures in the broader sense, are those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project. These measures are an integral part of the specifications of a plan or project (see section 4.5 of the leaflet "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive"), and

- compensatory measures *sensu stricto*: are independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained.

For instance, an extension of underground coal mining activities of the colliery into areas which so far had not been exploited will cause large scale ground subsidence, accompanied by flooding and increase of ground water levels with considerable impacts on all ecosystems in the area. To compensate for the negative effects of the project, land will be selected following ecological criteria for the creation of non-priority habitat types (beech and oak forests) by re-afforestation or transformation/improvement of existing forests. It is also considered the creation and improvement of alluvial forests and restoration or optimisation of riverbeds to compensate for the loss of priority habitat type (Residual alluvial forests - *Alnion glutinoso-incanae*) and non-priority habitat type (water courses of plain to montane levels with floating vegetation). The measure will contribute also to compensate the negative impact of the project on the species *Lampetra planeri.*

Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EC law. For example, the implementation of a management plan, or the proposal/designation of a new area, already inventoried as of Community importance, constitute "normal" measures for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the protection and management of Natura 2000 sites.

Another example of compensation can be given in the case of a harbour extension leading to the destruction of a roosting site for birds and the diminution of low depth inter-tidal mudflats and reedbeds. The recreation of a high tide roosting site and of shallow beaches associated to mudflats as well as habitat restoration of reedbeds and wet meadows through hydraulic works, environmental measures for the agricultural use of reedbeds and meadows, and management of hunting pressure, would compensate for the negative impact caused by the project.

Consequently, compensatory measures are not a means to allow the implementation of plans or projects while escaping the obligations of Article 6. They should be considered only after having ascertained a negative impact on the integrity of a Natura 2000 site. Specifically, the logic and rationale of the assessment process requires that if a negative impact is foreseen then an evaluation of alternatives should be carried out as well as an appreciation of the interest of the plan/project in relation to the natural value of the site. Once it is decided that the project/plan should proceed, then it is appropriate to move to a consideration of compensation measures. This approach has also been confirmed in the opinion given by the advocate general in the case C 239-/04 (paragraph 35).

**The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the "Nature" Directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the "last resort". They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.**

### *1.4.2. "Overall coherence" of the Natura 2000 network*

The expression *"overall coherence"* appears in Art. 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Art. 3(1) which states that Natura 2000 is *"a coherent European ecological network of special areas of conservation that shall enable the natural habitats types and species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range"*. Hence, two different criteria are considered, on the one hand the targeted species and habitats in terms of quantity and quality, and on the other hand the role of the site in ensuring the adequate geographical distribution in relation to the range.

Art. 3(3) stipulates that *"where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10."*

Art. 10, which deals more generally with land use planning and development policy, stipulates that

> *"Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.*
>
> *Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species."*

The word “ecological” is used both in Art. 3 and Art. 10 to explain the character of the coherence. It is obvious that the expression *“overall coherence”* in Art. 6(4) is used in the same meaning.

Having said this, it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned.

Art. 6(4) requires to “protect” the overall coherence of Natura 2000. Thus, the Directive presumes that the “original” network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the bio-geographical distribution has to be replaced adequately.

At this stage it would be useful to recall that under the Habitats Directive the selection of a site for the Natura 2000 Network rests on:

- the taking into account of the habitat(s) and species in proportions (surface areas, populations) described in the standard data form;
- the inclusion of the site in a biogeographical region within which it is located;
- the selection criteria established by the ‘Habitats’ Committee and used by the European Topic Centre on Biological Diversity to advise the Commission to retain a site on the Community list.

Competent authorities should be looking at these criteria when designing the compensatory measures for a project, and should ensure that they provide the properties and functions comparable to those which had justified the selection of the original site.

The *‘Birds’ Directive* does not provide for bio-geographical regions, or selection at Community level. However by analogy, it could be considered that *the overall coherence of the network* is ensured if:

- compensation fulfils the same purposes that motivated the site's designation in accordance with Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function along the same migration path;
- the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

For instance, if an SPA which has a specific function to provide resting areas for migratory bird species in their way towards the north is negatively affected by a project, the compensatory measures proposed should focus on the specific function played by the site. Therefore, compensating with measures that could recreate the necessary conditions for resting of the same species in an area out of the migratory path or within the migratory path but far away would not be sufficient to ensure the overall coherence of the network. In this case, compensation should provide for suitable resting areas for the targeted species correctly located in the migratory path so that they will be realistically accessible to the birds which would have used the original site affected by the project.

**In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; b) provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough that the compensatory measures concern the same biogeographical region in the same Member State.**

**The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.**

### *1.4.3. Objective and general contents of compensatory measures*

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of natural habitats types and habitats of species "*within the biogeographical region concerned"*. In short, ensure the maintenance of the overall coherence of the Natura 2000 Network. It results from this:

- that, as a general principle, a site should not be irreversibly affected by a project before the compensation is indeed in place. However, there may be situations where it will not be possible to fill this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as an original one negatively affected by a project. Therefore, best efforts should be made to assure compensation is in place beforehand and in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime.

- that the compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the Directives.

Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats types or in natural habitats that need a long period of time to provide the same ecological functionality. Under these circumstances, the zero option should be seriously considered.

While designations of new Natura 2000 sites can be part of a compensation package under Article 6(4), the designations on their own are insufficient without the accompanying measures.

In terms of the *'Birds' Directive*, this could include, as a compensation, work to improve the biological value of an area, which is either designated or will be designated, so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the '*Habitats' Directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat or the biological improvement of a substandard habitat within an existing designated site, or even the addition to the Natura 2000 Network of a new site of comparable quality to the original site. In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

Compensatory measures appropriate or necessary to adverse effects on Natura 2000 site can consist of:

- Restoration or enhancement in existing sites: restoring the habitat to ensure the maintenance of its conservation value and compliance with the conservation objectives of the site or improving the remaining habitat in proportion to the loss due to the plan or project on a Natura 2000 site;
- Habitat Recreation: recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;
- As described above and in association with other works, proposing a new site under the Habitats and Birds Directive.

The range of compensatory measures found in current practice within the EU in the frame of the Habitats Directive also includes:

- Species reintroduction.
- Species recovery and reinforcement, including reinforcement of prey species.
- Land purchase.
- Rights acquisition.
- Reserve creation (including strong restrictions in land use).
- Incentives for certain economic activities that sustain key ecological functions.
- Reduction of (other) threats, usually upon species, either through action on a single source or though co-ordinated action on all threat factors (E.g. resulting from space-crowded effects).

**In principle, the result of implementing compensation has normally to be operational at the time when the damage is effective on the site concerned. Under certain circumstances where this can not be fully fulfilled, overcompensation would be required for the interim losses.**

The option of habitat banking as compensatory measure under Article 6(4) is of very limited value due to the tight criteria mentioned in relation to the need for compensation to ensure the protection of the coherence of the network *(Section 1.4.2)*.

Nevertheless, there could be a potential use of the concept of habitat banking in a constraint regime linked to Article 6(1). For instance, where a development is foreseen it might be appropriate to consider and implement within the management plan designed for the site or integrated into other development plans, the necessary compensatory measures that would be required in the context of such development and consequently before any decision is made by the competent authorities.

#### *1.4.4. What to include in the programme of compensation measures?*

The compensatory measures under Article 6(4) must address all issues, whether technical and/or legal or financial, necessary to accomplish the objective of offsetting the negatives effects of a plan or project and preserving the overall coherence of the Natura 2000 network. The following provides an overview of the issues to include in the programme of compensatory measures.

- Tight coordination and cooperation between Natura 2000 authorities, assessment authorities and the proponent of the compensatory programme (i.e. plan or project proponent and external consultants involved).
- Clear objectives and target values according to the conservation objectives of the site.
- Analysis of the technical feasibility of the measures in relation to their conservation objectives.
- Analysis of the legal and/or financial feasibility of the measures according to the timing required.
- Explanation of the time-frame in which the achievement of the conservation objectives is expected.
- Timetable for implementation and their co-ordination with the schedule for the plan or project implementation.
- Public information and/or consultation stages.
- Specific monitoring and reporting schedules based on progress indicators according to the conservation objectives.
- The appropriate budget programme approved during the suitable period to guarantee the success of the measures.

### 1.5. Criteria for designing compensatory measures

#### *1.5.1. Targeted compensation*

Compensatory measures under the Habitats Directive must be established according to reference conditions that are defined after the characterisation of the biological integrity of the site likely to be lost or deteriorated, and according to the likely significant negative effects that would remain after mitigation. Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem including structural and functional assets. In the framework of the Habitats Directive, the biological integrity of a site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 network.

Targeted compensation requires that an appropriate Article 6(3) assessment has been correctly undertaken in line with the provisions mentioned in the previous chapter.

Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected.

This entails that the compensatory programme must necessarily consist of ecological measures, for example in the form of habitat restoration or enhancement, population reinforcement and/or any other actions that may be suitable for the purpose. Therefore, payments to members or towards special funds, regardless of whether these are ultimately directed to nature conservation projects are not suitable under the Habitats Directive. In addition, any secondary or indirect measure that might be proposed to enhance the performance of the core measures or the outcome of the compensation scheme, must have a clear relationship to the objectives and targets of the compensatory scheme.

As an example, in designing compensation, clear objectives must be established:

- Identify the total numbers of species affected
- Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
- Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc;
- Identify the likely populations of species and the habitat functions at favourable conservation status;
- Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

Any uncertainty over the precise nature and/or magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a worse-case scenario.

### *1.5.2. Effective compensation*

The feasibility and effectiveness of compensatory measures are critical to the administration of Article 6(4) of the Habitats Directive in agreement to the precautionary principle and good practice. In ensuring effectiveness, technical feasibility must go hand in hand with the appropriate extent, timing and location of the compensatory measures.

Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network (i.e. the ecological structure and functions impaired and the habitats and species involved). The estimated timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start in view of the implementation of the measures. This must be based on the best scientific knowledge available, complemented with specific investigations for the precise location where the compensatory measures will be implemented. Measures for which there is no reasonable guarantee of success should not be considered

under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in compliance with the preventive principle.

In addition, the most effective option, which allow for the greatest chances of success must be chosen when it comes deciding between different possibilities for compensation.

The programme of compensatory measures needs to include detailed monitoring during implementation to ensure effectiveness in the long term. Being in the framework of the Natura 2000 network, such monitoring should be co-ordinated with, and eventually integrated into, that foreseen under Article 11 of the Habitats Directive.

Measures showing in practice a low level of effectiveness in contributing to the objectives should be modified accordingly.

#### *1.5.3. Technical feasibility*

According to current knowledge, it is highly unlikely that the ecological structure and function as well as the related habitats and species populations can be reinstated up to the status they had before the damage by a plan or project. To overcome the intrinsic difficulties standing in the way of full success for the reinstatement of ecological conditions, compensatory measures must be designed:

- Following scientific criteria and evaluation in accordance with best scientific knowledge,

- and taking into account specific requirements of the ecological features to be reinstated (e.g. soil, humidity, exposure, genetic pool, existing threats and other conditions critical to the success of reinstatement).

The critical aspects to technical feasibility will determine the suitability of the location of compensatory measures (spatial feasibility), the appropriate timing and their required extent.

In addition, the choice of particular measures and their design must respect the existing guidance for each particular practice, habitat creation, habitat restoration, population reinforcement, species reintroduction, or any other measure considered in the compensatory programme.

#### *1.5.4. Extent of compensation*

The extent required for the compensatory measures to be effective has a direct relationship to the quantitative and qualitative aspects inherent to the elements of integrity (i.e. including structure and functionality and their role in the overall coherence of the Natura 2000 network) likely to be impaired and to the estimated effectiveness of the measures.

Consequently, compensation ratios are best set on a case-by-case basis and must be initially determined in the light of the information managed during Article 6(3) assessment and ensuring the minimum requirements to meet ecological functionality. The ratios may then be redefined according to the results observed when monitoring the effectiveness, and the final decision on the proportion of compensation must be justified.

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project).

### *1.5.5. Location of compensatory measures*

Compensatory measures should be located to accomplish the highest effectiveness in maintaining the overall coherence of the Natura 2000 network. This entails a set of pre-conditions that any compensatory measure should meet:

- The area selected for compensation must be within the same biogeographic region (for sites designated under the Habitats Directive) or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned. Further on, the area should provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution.
- The area selected for compensation must have -or must be able to develop- the specific features attached to the ecological structure and functions, and required by the habitats and species populations. This relates to qualitative aspects like the uniqueness of the assets impaired and demands the consideration of local ecological conditions.
- Compensatory measures must not jeopardize the preservation of the integrity of any other Natura 2000 site contributing to the overall coherence of the network. When carried out in existing Natura 2000 site(s), the measures must be consistent with the conservation objectives of the site(s) and must not be understood as a means to undertake the overall management required for the site(s).

In addition, there is general agreement that the local conditions necessary to reinstate the ecological assets at stake are found as close as possible to the area affected by the plan or project. Therefore, locating compensation within or nearby the Natura 2000 site concerned in a location showing suitable conditions for the measures to be successful seems the most preferred option. However, this is not always possible and it is necessary to set a range of priorities to be applied when searching locations that meet the requirements of the Habitats Directive:

1) Compensation within the Natura 2000 site provided the necessary elements to ensure ecological coherence and network functionality exist within the site.

2) Compensation outside the Natura 2000 site concerned, but within a common topographical or landscape unit, provided the same contribution to the ecological structure and/or network function is feasible. The new location can be another site designated as Natura 2000 or a non-designated location. In the latter case, the area must be designated as Natura 2000 site itself and be subject to all the requirements of the ‘nature’ directives.

3) Compensation outside the Natura 2000 site, in a different topographical or landscape unit. The new location can be another site designated as Natura 2000. If compensation takes place on a non-designated location, the area must be designated as Natura 2000 site itself and be subject to all the requirements of the ‘nature’ directives.

New designations as part of compensation measures shall be submitted to the Commission before those are implemented and before the realisation of the project but after its authorisation. The new designations should be made available to the Commission through the established channels and procedures as in the process of adoption of the SCI lists and SPA designations *(business as usual)*.

Best cooperation and coordination shall be ensured by Member States when dealing with the location of compensatory measures in the frame of transboundary projects.

#### *1.5.6. Timing of compensation*

Timing the compensatory measures demands a case-by-case approach, where the schedule adopted must ensure the continuity of the ecological processes essential for maintaining the biological structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area. In addition, other factors and processes must also be considered:

- A site must not be irreversibly affected before compensation is in place.
- The result of compensation should be effective at the time the damage occurs on the site concerned. Under certain circumstances where this can not be fully achieved, overcompensation would be required for the interim losses.
- Time lags might only be admissible when it is ascertained that they would not compromise the objective of 'no net losses' to the overall coherence of the Natura 2000 network.
- Time lags must not be permitted, for example, if they lead to population losses for any species protected in the site under Annex II of Directive 92/43/EEC or Annex I of Directive 79/409/EEC, requiring particularly attention when it entails priority species.
- It may be possible to scale down in time compensatory measures according to whether the significant negative effects would presumably arise in the short, medium or long term.

The application of specific measures to outweigh interim losses that would occur until the conservation objectives are met may be advisable. All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.

#### *1.5.7. Long term implementation*

Compensatory measures require that a sound legal and financial basis for long-term implementation and for their protection, monitoring and maintenance be secured in advance of impacts upon habitats and/or species occur. This could involve:

- Making effective a temporary protection, even if the SCI/SPA status is only granted later.

– Devising binding enforcement tools at the national level aimed to ensure the full implementation and effectiveness of compensation (e.g. linked to liability under EIA directive, if applicable, or to the Environmental Liability Directive when in force; subsidising plan or project approval to the robustness of the relevant provisions for implementation of compensatory measures).

– Devising the necessary legal means in case land or rights purchase is deemed essential for the effective implementation of the measures according to good practice (e.g. typified procedures for compulsory purchase on grounds of nature conservation).

– Establishing monitoring programmes for the whole life of the project, including objectives, responsible bodies and resources needs, indicators, and requirements on reporting to the Commission. This could be best performed by independent bodies specifically set up for the purpose and in close coordination and cooperation with the Natura 2000 authorities.

### 1.6. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (Trans European Network). In particular, financial assistance from the European Regional Development Fund (ERDF) is possible for compensatory measures associated to projects that are being financed with this fund and provided it is given according to the objectives, rules and procedures applicable to this fund.

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a *State Aid* (within the meaning of Art. 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a state aid as long as it is granted in exchange of works carried out.

**The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.**

### 1.7. Information to the Commission of the compensatory measures

The competent national authorities have to inform the Commission of the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate the process the Commission services have prepared a standard format[9] for supplying information to the Commission according to the

[9] This format is presented in Annex IV of this document.

provisions of Art. 6(4). In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

The information should enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, the communication of certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which required the realisation of the plan or project can also prove necessary, insofar as these elements affected the choice of the compensatory measures.

**The information about compensatory measures must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. However, it is not the Commission's role to suggest compensatory measures.**

*When in the planning process must the Commission be informed about compensatory measures and who is responsible for this information?*

In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the directive were not correctly applied, compensatory measures should be submitted to the Commission **before** they are implemented and indeed before the realisation of the plan or project concerned but after its authorisation. It is therefore advised that compensatory measures should be submitted to the Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied.

As responsible bodies for the preservation of the overall coherence of, and for updating the information on, the Natura 2000 network, the authorities responsible for Natura 2000 in each Member State must play an important role in this process, and the information would be submitted through the national authority via the Permanent Representations of each Member State as with the process for the adoption of site lists.

### 1.8. What happens with sites hosting priority habitats and/or species?

The second subparagraph of Art. 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species and is likely to affect these priority habitats and/or species. The realisation of plans or projects likely to adversely affect these sites could be justified only if the evoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the initiative envisaged.

In other words, damage to the sites would only be accepted as overruling the fulfilment of the objectives of the directive when the specific imperative reasons mentioned above occur or, alternatively, after the additional procedural safeguard of an independent appraisal by the Commission.
This provision raises a number of questions relating to:

- the identification of sites concerned;
- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment;
- the procedure for the adoption of Commission's opinion and the consequences which arise from this opinion.

#### *1.8.1. The sites concerned*

Article 6(4), second subparagraph, applies when the realisation of the plan or project is likely to affect a site hosting priority habitats and/or species. In this regard, it would be reasonable to consider that a plan or project:

a) not affecting, in any manner, a priority habitat/species; or

b) affecting a habitat/species which has not been taken into account in the selection of a site ("non-significant presence" in the Standard Data Form)

should not de facto justify that a site should be subject to this second subparagraph.

Since the Birds Directive does not rank any species as priority, compensatory measures aiming to offset effects on SPAs' bird populations would never require the Commissions' opinion.

**Art. 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.**

#### *1.8.2. The concepts of "human health", "public safety" and "primary beneficial consequences for the environment"*

Human health, public safety and primary beneficial consequences for the environment constitute the most important imperative reasons of overriding public interest. However, like the concept of "imperative reasons of overriding public interest" these three categories are not defined expressly.

Community law refers to public health and public safety reasons as reasons which can justify the adoption of restrictive national measures to the free movement of goods, workers, services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of the Community policy in the field of the environment. In the same view, the primary beneficial consequences for the environment constitute a category which must be included in the aforementioned fundamental objectives of the environmental policy.

Within the framework of the principle of subsidiarity, it rests with the competent national authorities to check whether such a situation occurs. Of course, any situation of this kind is likely to be examined by the Commission within the framework of its activity of control on the correct application of Community law.

As regards the concept of "public safety", it is useful to refer to the judgement of the Court of Justice of 28 February 1991 in Case C-57/89, Commission v Germany ("*Leybucht Dykes")*. That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, not least because the Court's approach influenced the drafting of Article 6. At issue were construction works to reinforce dykes on the North Sea at Leybucht. These works involved a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the specific case, the Court confirmed that the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum.

**The national authorities can authorise the realisation of the plan or project only if the proof of the existence of the afore mentioned reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.**

### *1.8.3. The adoption of Commission's opinion - its consequences*

As confirmed by the Judgement of the Court of 14 September 2006 in case C-244/05, the Commission would only deliver an opinion under Article 6(4) when dealing with sites which are placed on the list of sites selected as sites of Community importance (SCI).

In the case of imperative reasons of overriding public interest other that human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion[10]. One must therefore refer once again to the economy and to the aims pursued by the provision in question. The opinion has to cover the assessment of the ecological values which are likely to be affected by the plan or project, the relevance of the invoked imperative reasons and the balance of these two opposed interests, as well as an evaluation of the compensation measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the realisation of the plan or project with regard to the invoked imperative reason.

From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address Commission's arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community law and, if necessary, initiate the appropriate legal action. While the Directive does not include any specific deadline regarding the adoption of the Commission's opinion, Commission services will make all necessary efforts to carry out the assessments and to draw the appropriate conclusions as speedily as possible.

[10] The relevant standard format (Annex IV) covers also the request for a Commission opinion according to the provisions of Art. 6(4)2.

**The Commission, in delivering its opinion, should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in case of non-conformity with Community law, legal action may be taken.**

## *ANNEX*

**Form for submission of information to the European Commission according to Art. 6(4)**

Member State*:* Date*:*

**Information to the European Commission**
**according to Article 6 of the Habitats Directive**
**(Dir. 92/43/EEC)**

Documentation sent for/ □ information/ □ opinion/

(art. 6(4).1) (art. 6(4).2)

Competent national authority*:*

Address*:*

Contact person*:*

Tel., fax, e-mail:

## 1. PLAN OR PROJECT

Name and code of Natura 2000 site affected*:*

This site is:

- □ a SPA under the Birds directive
- □ a proposed SCI under the Habitats directive
- □ hosting a priority habitat/species

Summary of the plan or project having an effect on the site:

## 2. NEGATIVE EFFECTS

Summary of the assessment of the negative effects on the site*:*

N.B.: this summary should focus on the adverse effect expected on the habitats and species for which the site has been proposed for the Natura 2000 network, include the appropriate maps and describe the already decided mitigation measures.

## 3. ALTERNATIVE SOLUTIONS

Summary of alternative solutions studied by the Member State *:*

Reasons why the competent national authorities have concluded that there is absence of alternative solutions

## 4. IMPERATIVE REASONS

Reason to nevertheless carry out this plan or project*:*

- ☐ Imperative reasons of overriding public interest, including those of a social or economic nature (in the absence of priority habitat/species)
- ☐ human health
- ☐ public safety
- ☐ beneficial consequences of primary importance for the environment
- ☐ other imperative reasons of overriding public interest

Short description of the reason:

## 5. COMPENSATION MEASURES

Foreseen compensatory measures and timetable*:*

# GUIDANCE DOCUMENT

# The implementation of the Birds and Habitats Directives in estuaries and coastal zones

## with particular attention to port development and dredging




EUROPEAN COMMISSION

environment

***Europe Direct is a service to help you find answers to your questions about the European Union.***

**Freephone number** (*)**:**
**00 800 6 7 8 9 10 11**

(*) Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.

More information on the European Union is available on the Internet (http://europa.eu).

Cataloguing data can be found at the end of this publication.

Luxembourg: Publications Office of the European Union, 2011

ISBN 978-92-79-19372-9
doi: 10.2779/44024

© European Union, 2011
Reproduction is authorised provided the source is acknowledged.

*This document reflects the view of the Commission services and is not of a binding nature.*

*European Commission, January 2011*
*Reproduction is authorised provided the source is acknowledged*

Photo: istockphoto

It has greatly benefitted from discussions with and information supplied by experts from Member States and key stakeholder groups, within the framework of the EC Estuaries and Ports Working Group.

# GUIDELINES ON THE IMPLEMENTATION OF THE BIRDS AND HABITATS DIRECTIVES IN ESTUARIES AND COASTAL ZONES

with particular attention to port development and dredging



January 2011

NATURA 2000

# TABLE OF CONTENTS

**EXECUTIVE SUMMARY ..... 5**

**1 POLICY BACKGROUND ..... 9**

1.1 Estuaries, coastal zones and the EU Nature legislation ..... 9
1.2 The Integrated Maritime Policy and the European Ports Authority ..... 12

**2 ISSUES OF CONCERN ..... 13**

2.1 Pressures on estuaries and coastal zones ..... 13
2.2 Main concerns of the port sector with regard to the implementation of the Birds and Habitats Directives ..... 15
2.3 Climate change: A particular issue of concern for estuaries and coastal zones ..... 16

**3 GUIDELINES ..... 17**

3.1 Conservation objectives in dynamic environments ..... 17
3.1.1 Understanding and managing estuaries and coastal zones as complex and dynamic ecosystems ..... 17
3.1.2 Protecting habitats and species of Community interest ..... 19
3.1.3 Setting conservation objectives for the estuarine and coastal habitats ..... 20

3.2 Integrated planning ..... 22
3.2.1 Management plans ..... 22
3.2.2 Spatial planning ..... 23
3.2.3 Benefiting from partnerships and public participation ..... 26

3.3 Project development and maintenance activities ..... 26
3.3.1 Integrated projects and working with nature ..... 27
3.3.2 How to handle appropriate assessment and “likely significant impact”? ..... 28
3.3.3 The relationship between SEA, EIA and Appropriate Assessments (AA) ..... 28
3.3.4 Compensation schemes and their follow-up ..... 30
3.3.5 Addressing dredging and maintenance activities ..... 31

3.4 Dealing with uncertainties: adaptive management ..... 33

**ANNEXES ..... 35**

**GLOSSARY ..... 43**

# EXECUTIVE SUMMARY

This document provides sector specific guidance on the implementation of the Birds and Habitats Directives in estuaries and coastal zones. The guidance has benefitted from discussions held in the context of a specific working group with representatives from Member States, stakeholder organisations and environmental NGOs.

Its development followed a request of the ports and maritime services sector. Ports, especially in Western Europe, are often situated in or near estuaries. These are dynamic and highly productive ecosystems and in many cases designated Natura 2000 sites. Estuaries provide the necessary shelter and suitable conditions for maritime access to ports.

Ports fulfil a strategic role in the development and realisation of global trade and they periodically need to expand. Previously not subject to many environmental requirements, the application and interpretation of environmental legislation, including the EU nature directives, has presented new challenges to the sector which, in recent years, has sometimes resulted in delays in port development projects.

Ports play an essential role in economic development and seek legal certainty as a prerequisite for new development projects. The European Port's policy, as formulated by the European Commission, has recommended reviewing legal constraints that may hinder development projects ('fast track procedure'). The present guidance document provides a number of recommendations and elements of good practice to enhance port development and management in or near Natura 2000 sites.

Some key recommendations are:

- The design of plans or projects should always be based on mutually beneficial strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives, according to the 'working with nature' concept.
- Damage prevention or avoidance measures should always be preferred to compensation measures.
- Pre-assessments to evaluate the potential for impact of a plan or project on Natura 2000 sites should always be foreseen. This is necessary in order to decide whether a plan or project is likely to have significant effects on a Natura 2000 site and whether an 'appropriate assessment' in the sense of Article 6(3) of the Habitats Directive is required.
- Thorough and timely stakeholder consultation is always recommended in order to prevent the raising of objections during the project permitting process.
- Maintenance of ports and navigational access should be dealt with in the context of integrated management plans for the entire waterway or the affected Natura 2000 site. Capital dredging operations should be designed as a part of sustainable dredging and sediment management schemes.
- In case of any remaining minor scientific uncertainty with regard to the effects of a plan or project or the related mitigation or compensatory measures, the measures should include a pre-defined and validated scheme to monitor the actual impacts and a framework to adapt the mitigation and compensation measures to the actual impacts.

## Introduction

Estuaries and coastal zones are among the most productive ecosystems in the world, with both high ecological and economic values. They are of prime importance for wildlife, especially migrating and breeding birds and of major value in terms of their rich natural resources (e.g. as nursery grounds for commercially important fish). In addition, they also offer a wide variety of ecosystem services such as shoreline stabilization, nutrient regulation, carbon sequestration, detoxification of polluted waters and supply of food and energy resources (Millennium Ecosystem Assessment, 2005).

As a result they provide a wide range of economic benefits to many sectors, including fishermen, industrial complexes and amenity services such as tourism and recreation. Estuaries are also often ideal locations for ports, harbours and shipyards as they provide the necessary shelter for ships as well as access further inland along major rivers.

Estuaries and coastal zones are however also amongst the most dynamic and complex ecosystems in the world. They are made up of a wide range of different habitats, which exist in an ever-changing mosaic structure. Typical habitats that make up an estuary include sand banks, mudflats and sand flats, salt marshes and at their coastal edge sand dunes, coastal lagoons, shallow inlets and bays, reefs, islets and small islands, sandy beaches, sea cliffs.

Most of these habitat types are protected under Directive 92/43/EEC on the conservation of natural habitats and wild flora and fauna (commonly referred to as 'the Habitats Directive'). Shorebirds are dependent on estuaries and coastal zones during their migrations from breeding to wintering grounds. Furthermore, numerous bird species breed in estuarine and coastal habitats. As a result, many estuaries and coastal areas are also protected under Directive 2009/147/EC on the conservation of birds (commonly referred to as 'the Birds Directive').

Over a long history and even more so today, many of Europe’s ports are logistic hubs handling cargo from all over the world. The importance and demand for maritime transport has increased significantly in the last 30 years and is likely to continue to do so in the future. The European Commission supports this transport network through its ports policy, and through the promotion of the “Motorways of the Sea” and Short Sea Shipping.

As stated in the Communication on a European Ports Policy[1], more than 1 200 merchant ports cover some 100 000 km of European coasts. They are key points of modal transfer and are of vital interest to handle 90% of Europe's international trade. In support of the EU’s general transport policy[2], they handle 40% of the volume of tonne-kilometres carried out in intra-Community trade. The European Commission has recognized this fact through its Communication on ‘An Integrated Maritime Policy for the European Union’ which states that seaports and shipping allow Europe to benefit from the rapid growth in international trade and to play a leading role in the global economy[3].

Maritime ports, especially those connected with or situated far inland in estuaries connected with navigable inland waterways and railways, can also play a significant role in reducing $CO_2$ emissions, but will also have to face the effects of climate change.

[1] COM(2007) 616
[2] COM(2006) 314.
[3] (EC, 2007)

Inevitably there will be occasions where port and fairway developments and maintenance and Natura 2000 designation overlap and at times fail to coincide. The Habitats and Birds Directives do not, a priori, preclude the possibilities for further development and use of estuaries and coastal zones within or around Natura 2000 sites. Instead they lay down stepwise procedures to ensure that any such developments are done in a way that is compatible with the protection of species and habitats of European importance for which the sites have been designated. In the case of projects of overriding public interest, and in the absence of alternative solutions, the Directive provides a mechanism that can allow damaging developments, provided that compensation and adaptation ensures that the overall coherence of the Natura 2000 Network is not compromised.

The pressure on coastal zones and estuaries has encouraged a shift towards more integrated and efficient spatial planning. This, combined with early stakeholder dialogue, has proven over the years to be an effective way to promote sustainable development in line with the EU environmental legislation (including for nature protection, water and the marine environment), the European port policy and the European Integrated Maritime Policy.

**Purpose of this document**

The European Commission has already published several guidance documents to support Member States in implementing the Birds and Habitats directives in the protection of Natura 2000 (see annex 1); this guidance also helps citizens and stakeholders in better understanding key provisions of the Directives. However, there is a need for further clarifications, explanations and even prospective views on the application of the EU nature legislation to port development and the management of estuaries and coastal zones, especially in light of their importance as access-routes for seagoing ships.

The aim of the present guidance document is to explain the protection regime, defined under Article 6 of the Habitats Directive that applies to Natura 2000 sites in the specific context of estuaries and coastal zones. The primary focus is on clarifying, explaining and elaborating on the implementation of EU nature legislation for Natura 2000 sites located in estuaries and overlapping with, fairway channels and coastal zones, with particular attention to port-related activities, including dredging and industry (e.g. shipyards).

Other environmental legislation such as the Water Framework Directive (2000/60/EC), the Marine Strategy Framework Directive (2008/56), the directive 2001/42/EC on strategic environmental assessments (SEA) or the directive 85/337/EEC on environmental impact assessments are beyond the scope of this document and therefore not addressed in detail in this document. Aspects related to urbanisation, agriculture or other developments in the same areas or related to pressures resulting from inland waterborne transport are not considered in this work, but these activities will also need to be considered in management plans for estuarine Natura 2000 sites and in integrated coastal zone management as well as when assessing cumulative effects of different activities.

The present guidelines have benefited from discussions within a specific working group on estuaries, coastal zones and ports established by the European Commission (DG ENV and DG TREN). This group included stakeholders from different sectors and met six times during 2007-2009. In addition to the guidelines, a supporting technical document with technical and scientific background information has been prepared.

The Technical Supporting Document includes general information on the study approach, the literature used and the results of the exchange of information between the Working Group and the consultancy firm that was in charge of the overall coordination. The Technical Supporting Document can be downloaded from the public Circa Platform: http://circa.europa.eu/Public/irc/env/estuary/home.

The present guidelines are intended to be faithful to the text of the relevant Directives and the wider principles underpinning EU law on the environment and port-related activities. They are not legislative in character, they do not provide any new rules but give further clarification, building on existing guidelines. The guidelines reflect the views of the Commission services on the implementation of the directives in estuaries and coastal zones.

They are not of a binding nature. It should be stressed that any interpretation of EU legislation rests exclusively with the EU Court of Justice. The guidelines are intended to respect the existing case law and may need to be adapted in light of any emerging new jurisprudence of the Court.

The present guidelines have the ambition to reconcile the needs for port development and for environmental protection. The target audiences and users of these guidelines are local, regional and national or federal competent authorities, port and waterway authorities, operators, industries, dredging companies and associations, maritime service industry, Environmental NGOs, Conservation agencies and Natura2000 site managers.

# 1. POLICY BACKGROUND

## 1.1. Estuaries, coastal zones and the EU Nature legislation,

In response to the rapid global decline in biodiversity, the European Union has set itself the goal, at the European Summit in Gothenburg in 2001, "to halt the decline of biodiversity in the EU by 2010"[4] and to "restore habitats and natural systems"[5]. This commitment is now firmly embedded in all aspects of EU policy. 'Nature and biodiversity' is one of four priority areas for action under the 6th Environment Action Programme (6th EAP)[6], which sets out the framework for environmental policy-making in the EU for the period 2002-2012. The 6th EAP also advocates, in accordance with the Treaty, the full integration of environmental protection requirements, including those related to biodiversity conservation, into all other EU policies and actions.

Together, the "Birds" and "Habitats" Directives are the cornerstones of EU biodiversity policy. They enable EU Member States to work together, within the same strong legislative framework, to protect Europe's most valuable species and habitats across their entire natural range within the EU, irrespective of political or administrative boundaries.

Both directives require Member States to designate specific terrestrial and marine sites, which together constitute the Natura 2000 network. This network consists of Special Protected Areas (SPAs) -protecting bird species and Special Areas of Conservation (SACs) - protecting habitats and other species of EU conservation concern. The aim of the Natura 2000 network is to assure the long-term survival of Europe's most threatened species and habitats. Other provisions of the directives include a strict system of species protection, as well as monitoring and reporting schemes.

Article 6 of the Habitats Directive plays a crucial role in the management and sustainable use of the sites that make up the Natura 2000 network. In the spirit of integration, it provides a series of procedural safeguards to ensure that economic development goes hand in hand with nature conservation. It is the responsibility of the Member States to transpose the directives into their respective national legislation and to put in place appropriate mechanisms to implement the provisions in practice.

Article 6 of the Habitats Directive includes three types of measures:

1. Positive conservation measures for the Special Areas of Conservation (SACs) as foreseen by article 6.1 involving e.g. management plans and statutory, administrative or contractual measures[7],
2. Preventive measures for all sites as foreseen under article 6.2 to avoid the deterioration of natural habitats (as well as significant disturbance of species) and under article 6.3, to assess the effects of new plans and projects,
3. Procedural safeguards, including a derogation and compensation regime, under article 6.4 for authorising plans or project that are likely to have adverse effects on Natura 2000 sites.

---

[4] Presidency Conclusions, Göteborg European Council 15 and 16 June 2001
[5] COM (2001) 264 final
[6] Decision No 1600/2002/EC, OJ L 242, 10.9.2002, p.1
[7] For SPAs, obligations of article 4.1 & 4.2 of the birds directive will apply and there are considered as positive measures also.

***Article 6 of the ''Habitats'' Directive 92/43/EEC***

***1.*** *For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*

***2.*** *Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*

***3.*** *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives....competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site....*

***4.*** *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected....where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety....*

Coastal and estuarine habitats protected under the Habitats Directive cover a total area of more than 45,000 km² of the EU territory (see Table 1, only the marine and intertidal part, excluding dune systems or other related fresh wetlands).

These protected habitats also provide resting areas for birds and seals, spawning areas for fishes, feeding areas for mammals as well as specific plant habitats. Estuarine and coastal ecosystems can also include other protected habitats of Community interest, such as Grey Dunes (habitat code 2130).

***Table 1****: Area of coastal and estuarine habitats protected under EU Nature legislation (according to the Natura 2000 Database – November 2009)*

| **Coastal and estuarine Natura 2000 habitats of relevance to the present document** | **Total area in the EU-27 territory (2009)** |
|---|---|
| Estuaries – habitat code: 1130 (306 sites) | 643.704,44 ha |
| Coastal lagoons*– habitat code: 1150 (644 sites) | 503.263,71 ha |
| Large shallow inlets and bays – habitat code: 1160 (373 sites) | 1.250.743,52 ha |
| Sandbank which are slightly covered by sea water all the time – habitat code: 1110 (517 sites) | 2.436.613,35 ha |
| Mudflats and sand flats not covered by seawater at low tide – habitat code 1140 (422 sites) | 809.204,53 ha |
| **Total** | 5.643.529,55 ha |

The following EU environmental directives on environmental assessments are also directly relevant to development plans and projects in estuaries and coastal zones (see chapter 3.3.3):

- Directive 2001/42/EC on the evaluation of the effects of certain plans and programmes on the environment (commonly referred to as the '**SEA' Directive**)[8] The purpose of the SEA Directive 2001/42/EC is to ensure that the environmental consequences of ***certain plans and programmes*** are identified, assessed and taken into account during their preparation and before their adoption.

[8] OJ L 197, 21.7.2001, p. 30–37 – see http://ec.europa.eu/environment/eia/home.htm

- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended in 1997 (97/11/EC), 2003 (2003/35/EC) and 2009 (2009/31/EC) – (commonly referred to as the '**EIA' Directive**[9].) While the SEA process operates at the level of public plans and programmes, Environmental Impact Assessments (EIA) operate at the level of ***individual public and private projects***.

Estuaries and coastal water bodies are also of interest under the **Water Framework Directive 2000/60/EC** (WFD). The WFD establishes a framework for the protection of all surface waters (rivers, lakes, transitional and coastal) and groundwater at EU level and aims to achieve a good ecological status (or a good ecological potential for heavily modified water bodies) and a good chemical status by 2015.

Estuaries and coastal waters are identified as transitional or coastal water bodies. According to the WFD their deterioration should be prevented and their aquatic ecosystem status protected and enhanced. There is frequently a geographical overlap between Natura 2000 sites and WFD water bodies in estuarine and coastal ecosystems. Although the principal aim of the WFD and the Nature directives is to protect ecosystems, their objectives, measures and tools are not entirely complementary. Attention should be given to the synergies between the nature Directives and the WFD where they both apply.

Under the Water Framework Directive, a Common Implementation Strategy (CIS) was developed in order to address the challenges in a co-operative and coordinated way and a series of guidance documents have been produced (see annex 1). It is important to remember that Article 4(2) of the WFD states that if the conservation objectives of the Habitats Directive are more stringent than the requirements of the WFD then those of the former will apply. The same is also true of the converse. Detailed information and guidelines on the implementation of the WFD can be found on the following website: http://ec.europa.eu/environment/water/water-framework/index_en.html

**The Marine Strategy Framework Directive (MSFD, 2008/56/EC)** provides a more comprehensive view and deals also with ecosystem services in marine areas. It establishes a framework for the protection and restoration of marine ecosystems. According to this directive, Member States must take the necessary measures to achieve or maintain a good environmental status (GES) in the marine environment by the year 2020. The geographical scope of the MSFD overlaps with the WFD in coastal waters. The MSFD environmental status only applies in the latter insofar as particular aspects of the environmental status of the marine environment are not already addressed through that Directive (e.g. litter, noise, cetaceans). The MSFD, however, does not apply to transitional waters such as estuaries.

The two more recent directives complement the nature directives by putting increased emphasis on the role of ecosystems. As mentioned above, estuaries are ecosystems with very dynamic characteristics: they are subject to daily and seasonal changes as well as hydro-morphological evolution. Their biodiversity parameters and typical species will also evolve over time. Although concern for biodiversity is a common denominator, it is not difficult to imagine that, while habitats change in response to morphological evolution, some habitats may even disappear or change significantly. Especially in estuaries it is important to recognize the dynamic nature of this environment.

[9] OJ L 156, 25.6.2003, p. 17, OJ L 140, 5.6.2009, p. 114 – see http://ec.europa.eu/environment/eia/home.htm

## 1.2. The Integrated Maritime Policy and the European Ports Policy

The economic importance of the European coastline was underlined in the Commission's Communication on an Integrated Maritime Policy[10]; Maritime regions account for some 40% of the EU's GDP and population. Shipbuilding and shipping, ports and fisheries remain key maritime activities, but offshore energy and coastal and maritime tourism generate massive revenues. According to the European Maritime Policy, the capacity development of ports and coastal fairway channels must mirror the growth of Europe's domestic and international trade and occur in a way that is compatible with related EU policy objectives, in particular its environmental and competitiveness goals.

The Communication on a European Ports Policy[11] aims at a performant European port system able to cope with the future challenges of European transport needs. One of the objectives of the action plan under this Communication is to increase the carrying capacity of ports in order to allow a further increase of maritime and fluvial transport. There are more than 1200 merchant ports in Europe, comprising key points of modal transfer and of vital economic interest as they handle 90% of Europe's international trade. Even if these figures will fluctuate due to economic ups and downs, the long term trends remain one of continued growth; at the same time waterborne transport features low $CO_2$ emission rates, compared to other transport modes (mainly road but also railways).

During the consultation phase, prior to the adoption of the Communication on a European Ports Policy, the issue of environmental concerns in ports emerged. Port stakeholders expressed fears about legal uncertainty in relation to the implications for their activities arising from the Birds and Habitats Directives. On the other hand: in order to generate a license for growth, ports are increasingly embracing a more sustainable development approach.

Many ports and navigation channels are located in estuaries and coastal zones that host environmentally sensitive areas with high ecological value. The need to designate Natura 2000 sites in estuaries and coastal zones and the need to increase the carrying capacity of ports in order to meet the European transport needs is proving to be a challenge to many Member States; this has resulted in local disputes and several EU Court of Justice decisions and jurisprudence. However, in response to this challenge some Member States have already developed approaches to facilitate port development in line with the requirements of the Habitats Directive.

In its Communication on a European Ports Policy the Commission recognized the challenges in combining port infrastructures and environmental Directives. Consequently, the Commission services have responded to the request by port industry to provide guidelines on the interpretation of both nature Directives. This constitutes the policy background to the present guidelines, which have the ambition to reconcile the need for port development with EU environmental protection standards.

[10] European Commission, (2007), An Integrated Maritime Policy for the European Union, COM (2007) 575
[11] European Commission, (2007), Communication on European Ports Policy, COM (2007) 616, 18.10.2007

# 2. ISSUES OF CONCERN

## 2.1. Pressures on estuaries and coastal zones

Human activities in coastal and estuarine areas include navigation, dredging, aggregate and sand extraction, fisheries, aquaculture, industry (including oil and gas extraction, wind farms development), drainage of sewage and waste water, water extraction (e.g. for power stations and industry), safety (including sea defence and flood protection), recreation including bird watching and hunting, urbanisation, cover for cables, pipes and tunnels, military activities and research activities.

All these activities taken individually or in combination can potentially generate significant effects on the nature conservation objectives of estuaries and coastal zones. Impacts directly related to waterways and port related activities are illustrated below.

1. Dredging operations

Capital and maintenance dredging and the relocation of dredged material affects the hydrodynamic regime and geomorphology of the estuary: Natural sedimentation takes place in estuaries depending on the hydraulic forces in the basin and the amount of sediment available. Sediment is either supplied from erosion in the catchment area or from the marine environment or both. Beyond a certain point, a sort of balance is reached and the estuary begins to release sediment, rather than retain it. Any factor influencing the hydrodynamic regime and/or the geomorphology may modify the balance and the flux of sediments and lead to modifications in the localisation of habitats composing estuarine and coastal ecosystems (e.g. mudflats or sandbanks).

Capital dredging needs special attention because it may reverse the trend of estuarine infilling and affect the equilibrium state of the estuary. This occurs because deepening an estuary may permit a salt wedge intrusion to travel further upstream, increase shoreline wave action, change tidal range and tidal currents, and suspended sediment load and sedimentation. Additionally, the hydrodynamic changes and their effect on sediment erosion, deposition and transport may cause secondary geomorphological changes away from the dredging location, including the potential erosion of mudflats and salt marshes.

Maintenance dredging is the periodic or continuous activity necessary to maintain the navigable depth in an estuary or on the open coast. The effects of maintenance and capital dredging on a site can be similar. The critical difference is that whilst capital dredging imposes the major change, maintenance dredging prevents the system from returning to its original state, albeit in smaller stages. This means that there will be ongoing issues that will need to be addressed if habitats and species are to be maintained at favourable conservation status. Some of these impacts can be rectified by modifying dredging practices and by using sediment feeding techniques, but they are not universally applicable.

There are also circumstances where dredged materials can be put to beneficial uses such as increasing sediment supplies to beaches, although care needs to be taken to avoid smothering of important sub-tidal communities. This illustrates the need for careful assessment of hydrodynamic effects in estuaries and coastal waters. Careful design of dredging and relocation of dredged material is an integral part of sediment management schemes.

2. Maintenance activities

Maintenance activities other than maintenance dredging, such as the maintenance or replacement or installation of navigation marks, piles, lights, vessel traffic schemes and moorings, the extension of slipways and jetties and the maintenance of soft sea walls, flood defences and wave screens may have adverse effects on conservation objectives in estuaries and coastal zones.

3. Commercial shipping operations

Commercial shipping operations within ports can be divided into two broad categories, vessel operation and movements and cargo operations. The movement of ships through estuarine and coastal waters may potentially affect the characteristics of a habitat both through the generation of waves and propeller-induced turbidity in the water column. The effects of vessel movement can either be harmful, e.g. intertidal erosion of estuaries and/or putting sediments back into suspension, or beneficial, e.g. aeration of the water column.

Noise (above and under water) associated with shipping has the potential to cause disturbance to protected marine animals. The anchoring of vessels (outside an anchoring area) may disturb or damage animals and plants on the seabed (e.g. shellfish beds, soft corals, sea grasses). Ship emissions into the air, waste handling and ballast water treatment can have an impact on nearby coastal habitats.

Cargo handling of dry bulk cargos may cause dust emissions and air pollution (nitrogen, sulphur). Handling of liquid bulks may require discharge through pipelines, which provides a potential risk for leaks, emissions and spillages. Accidental release of cargoes into the marine environment may have important environmental effects. The spread of invasive alien species imported via ballast water or otherwise by vessels can also have a negative influence on protected areas. Last but not least vessel movement poses a risk of disasters (oil or cargo spilling).

Operational aspects of commercial shipping (waste handling, ballast water management, air pollution…) are subject to national or international rules and regulations (such as the ballast water treaty of the International Maritime Organization and MARPOL protocols annex 1-6). In addition there is a voluntary port authorities initiative to promote “Green shipping” by developing an Environmental index. This index is focusing mainly on air pollution coming from sea going vessels.

4. Port reclamation and land use

The port itself may have impacts on Natura2000 because it leads to the building of new infrastructures (terminals, rail, pipeline, roads, new industries and large areas for logistic companies) that may affect nearby Natura 2000 sites. In certain areas the available space is insufficient and ports may need to reclaim land from the sea. Land reclamation in Natura 2000, be it on land or on sea, will in most cases, require nature compensation schemes.

5. Industrial complexes

Port areas often include industrial complexes such as refineries, energy plants, dry and wet bulk hubs and container terminals. The cumulative effects of industrial operations, shipping and traffic can lead to adverse ecological effects on nearby Natura 2000 sites. Environmental issues such air quality, noise and waste are regulated by specific legislation and policies which is not, however, covered by the present guidelines. The use of the best available

technologies is often mandatory and can as such limit environmental pressure on protected sites as well.

## 2.2 Main concerns of the port sector with regard to the implementation of the Birds- and Habitats directives

One of the key issues for port sector development is the capability to plan new projects well ahead and securely. Delays in the planned dates for terminal extension have been experienced in various European ports during recent years. The European Sea Ports Organisation (ESPO) attributes these delays to a number of different causes, ranging from internal politics within the port, environmental objections, investigations into market share implications, funding difficulties, court cases, etc.(ESPO, 2007).

ESPO has already published in 2007 its Code of Practice on the Birds and Habitats Directives (ESPO, 2007), which contains a number of recommendations to port authorities faced with the legal implications of the provisions of the Birds and Habitats Directives in their wider port development areas. The last chapter of the Code of Practice presents a list of topics for which further guidance from the European Commission was invited.

The following are some concerns presented from a port authority point of view when it comes to the development and operation of ports near or in a protected estuarine or coastal zone. With the exception of the issue of cost sharing among relevant stakeholders, most of these concerns are being addressed in the present guidance document.

1. How could a proactive approach and integral planning lead to more legal certainty?
2. How can early agreements between all stakeholders be reached through wide public consultation and involvement of interested parties in project design?
3. How can costs be shared amongst all relevant stakeholders who can benefit from integrating socio-economic development objectives with nature conservation objectives in Natura 2000 areas?
4. How can compensation requirements be avoided through the systematic application of efficient mitigation measures, in a way that negative effects can be avoided beforehand?
5. How can the cooperation between project developers, environmental agencies and NGOs be enhanced with a view to promoting flexible approaches and mutual benefit situations?

Another important issue for port and waterway operators is how to handle maintenance activities such as dredging within or adjacent to Natura 2000 sites. Whereas extensive guidelines in relation to Article 6 of the Habitats Directive already exist for new plans and projects, ongoing activities have so far been less covered. Chapter 3.3.4 will therefore provide further guidance on this issue.

For port developers it is also important to know how much detail is actually necessary to sufficiently assess the potential effects of new plans or projects in order to comply with the requirements of the Birds and Habitats directives. Guidance on how to deal with uncertainties is an important issue in this regard. ESPO produced a checklist that is useful as a self guidance document (se Annex 3).

### 2.3 Climate change: A particular issue of concern for estuaries and coastal zones

Coastal zones and floodplains are among the most vulnerable areas to climate change as they are vulnerable to sea level rise combined with increased risks of storms, intense rainfall and flash floods leading to widespread damage to built-up areas and infrastructure.

Flood protection measures such as dyke construction, land reclamation and other types of sea defences may lead to the "coastal squeeze" phenomenon whereby less and less space is available for natural coastal processes to accommodate eroding forces or adjust to changes such as sea-level rise. "Coastal squeeze" occurs especially in low-lying and inter-tidal areas, which would naturally adjust to the changes in sea level, storms and tides, but cannot do so due to the construction of inflexible barriers such as roads, dykes, urbanisation, port and industrial infrastructure.

Innovative measures to prevent coastal squeeze should be taken in estuaries and coastal zones. Natural squeeze with similar effects occurs where the coast abuts rising ground and there is nowhere for eroded habitats to be displaced onto because the land is rising.

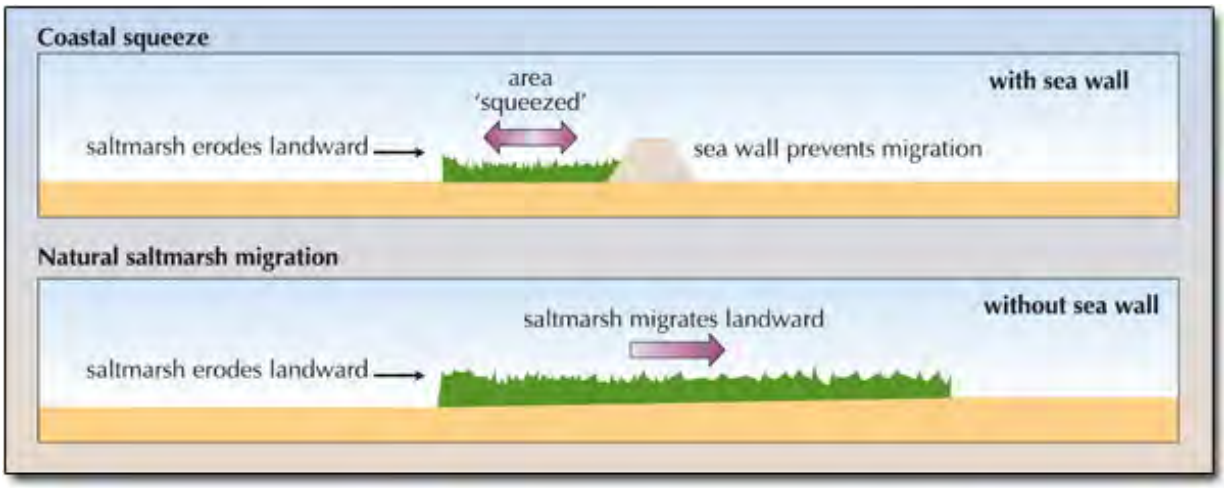



*Figure 1: Coastal Squeeze is created when habitat migration (in response to sea-level rise) is prevented by tidal/flood defences (Environment Agency, UK, 2005).*

Climate change will heavily affect Europe's natural environment and nearly all sections of society and the economy. Sea-level rise will reduce the sheltering effect of breakwaters and quay walls, but also periods of decreased precipitation in the river catchment areas can lead to lower rates of freshwater run-off and higher sedimentation rates within the estuary. As a result low river water levels during dry summer periods can hamper inner shipping to inland ports as well.

Sea level rise induced by climate change obviously leads to changing tidal characteristics like higher tidal amplitude and resulting current velocities. This may lead to a further increase of tidal pumping, an effect that can further reduce valuable shallow water areas and cause unwanted sedimentation even leading to a loss of biodiversity and last but not least increase the need for dredging. But the main problem with sea level rise is that there may not be sufficient sediment to allow mudflats and sandflats to keep pace with sea level rise. In such cases this is likely to lead to an increase in sub-tidal habitats. There may be a problem in a very small number of European ports from sub-tidal sedimentation but there is a greater problem with possible sediment export and increased erosion because of insufficient accommodation space to allow rollover to take place.

# 3. GUIDELINES

The present guidelines are intended to provide national competent authorities, port and waterway authorities and operators as well as environmental NGOs with a practical set of recommendations on the implementation of the Birds and Habitats Directives in estuaries and coastal zones with special attention to port development and dredging operations. The following main aspects have been covered: Conservation objectives in dynamic environments, integrated planning, new developments and adaptive strategies. The application of these guidelines should lead to more efficient planning and development approaches and support "fast-track procedures" for port expansion, according to the Communication on strategic goals and recommendations for the EU's maritime transport policy until 2018, COM (2009) 8.

Practice has shown that early cooperation among interested and affected parties is often a prerequisite for successful planning and elimination of delays. Estuaries and coastal zones are very complex and dynamic environments that attract interest from a wide range of sectors. They generally have an exceptionally rich nature conservation and socio-economic interest. This makes the planning of development projects a complex process but one that can nevertheless be carried out in a balanced, cost-effective, timely and integrated manner. A key objective is, provided all parties are aware of the obligations imposed on them under law, the basic understanding of how estuaries function as ecosystems.

## 3.1. Conservation objectives in dynamic environments

### 3.1.1. Understanding and managing estuaries and coastal zones as complex and dynamic ecosystems

Before setting conservation objectives in dynamic environments such as estuaries and coastal zones, it is important to understand how such complex ecosystems function, how they evolve "morphologically" and how they may be influenced by anthropological pressures and climate change. The balance between the different components (physical, chemical, biological and hydro morphological) of the estuarine and coastal ecosystems is very complex and can be easily affected by human activities such as port related activities, agriculture or flood alleviation measures. Both ecological and economic values of such ecosystems will have to be maintained in order to satisfy societal needs.

An Ecosystem approach, as outlined in the Marine Strategy Framework Directive[12], is well adapted to the management of complex systems such as estuaries and coastal zones. The ecosystem approach considers the ecosystem as an ecological entity with typical structure, processes and functions that interact with the surrounding environment. The ecosystem approach brings the analysis to a higher spatial level than just the habitats/ water body approach. Climate change will have potential impacts on the biodiversity and hydromorphology of estuarine and coastal areas, as well as on human activities such as port development and operation.

[12] 2008/56/EC (Official Journal of the EU of 25.6.2008): General provisions, article 1.3: ecosystem-based approach to the management of human activities, ensuring that the collective pressure of such activities is kept within levels compatible with the achievement of conservation objectives, good ecological and good environmental status, and that the capacity of estuarine, coastal and marine ecosystems to respond to human-induces changes is not compromised, while enabling the sustainable use of marine goods and (ecosystem) services by present and future generations.

*Guidelines for planning and decision-making based on ecosystem knowledge*

- The physical processes and morphological evolution of the specific estuaries and coastal zones should be investigated in detail. A best available and sound scientific knowledge on these elements should be established by the competent authorities as a basis for the establishment of nature conservation objectives for such ecosystems.
- Before setting conservation objectives in estuaries and coastal zones designated as Natura 2000 sites, the presence, geographic distribution and actual conservation status of all habitats and species protected under the nature directives, as well as the potential threats to which those elements are exposed, should be established in detail.
- Integrated management plans for estuaries should be established and implemented as an important instrument to conserve and protect critical processes, areas and species whilst providing space for sustainable economic development. Where possible these management plans should be part of the overall river basin management plan.
- Nature conservation objectives and socio-economic development objectives should be considered together for the establishment of integrated management plans for Natura 2000 sites. An ecosystem-approach should be applied which enables the sustainable use of goods and services that fully respects the site's conservation objectives.
- When an estuary or a coastal zone evolves, the presence or absence of species and habitats will also evolve. Therefore, the conservation objectives and measures for Natura 2000 sites should take into account the system-specific dynamics and evolutionary trends. There is also a need to take account of the difference between natural trends and those driven by human influences, namely coastal squeeze and morphological changes imposed by channel deepening.
- Where uncertainties or lack of knowledge on physical, morphological or biological processes still exist, these should be minimized as far as possible by additional research; where uncertainty remains adaptive monitoring programmes should be foreseen. New evidence and scientific information should be fed back into the management plan and where necessary lead to an appropriate adaptation of the management measures and monitoring schemes.
- Possible adaptation measures to climate change should also be considered when developing conservation objectives. In particular, regional sediment unbalance should be addressed. Shortage of sediment may lead to further erosion, e.g. from marshes, Wadden Sea areas (1110, 1130, and 1140), sandbanks, beaches and dunes.
- Proactive and strategic approaches to coastal management should be developed, giving priority to increasing coastal safety and ecosystem resilience and to maintaining a good sediment balance in the coastal and estuarine systems.
- Where possible, nature areas should be expanded proactively rather than reacting to catastrophic or climate change impacts. Dispersal corridors for species should be foreseen as an important adaptation tool.
- Where changes in sedimentation rates lead to loss of important habitats such as shallow waters, adapted sediment management schemes should be considered as an instrument to achieving conservation objectives.

### 3.1.2. Protecting habitats and species of Community interest

On the North-East Atlantic coast, estuaries are subject to the tide. River estuaries are coastal inlets where, unlike 'large shallow inlets and bays' there is generally a substantial freshwater influence. The mixing of fresh water and seawater and the reduced current flows in the shelter of the estuary lead to deposition of fine sediments, often forming extensive intertidal sand and mud flats. Estuarine ecosystems are characterized by subtidal and intertidal habitats (slikke) including salt marshes (schorre). Baltic, Mediterranean and Black sea river mouths are considered as being estuary subtypes with brackish water and nearly no tide.

Estuaries and coastal zones are dynamic systems consisting at the same time of several habitat types and habitats of species. Sand banks (1110[13]), sand flats and mudflats (1140), reefs (1170) and salt marshes (1310 to 1330) may also be a component part of habitat 1130 Estuaries. They also include corridors for migratory species (as fishes) and resting areas for many birds. Estuaries and coastal zones are sometimes related to coastal lagoons (1150*) or to large shallow inlets and bays (1160).

Channels and/or shipping lanes, where present, form an integral part of the habitat type 'Estuaries' in all geographical conditions; they play a role in the hydrological functioning of estuaries and nearby coastal zones, including the circulation of water and the deposition of sediments.

An estuary is generally to be considered as a complex of different habitats. Other adjacent coastal areas must be considered when setting conservation objectives for estuaries or coastal zones. For the definition of habitats, further guidance is provided by the Interpretation Manual of European Union Habitats. The manual was revised in 2007 for some habitats (e.g. marine habitats 1110, 1170 and 1180). Some national guidance documents also exist. However, for the habitat-type estuaries-1130, different definitions/interpretation exist, depending on the Member States.

Several key parameters determine the biological functioning within estuaries and coastal zones. The presence or absence of species (angiosperms, benthic invertebrate fauna, fish fauna, birds and mammals…) depend on the system's behaviour and its ecological food web. They are influenced by physical parameters such as turbidity and salinity. Significant changes in the physical elements of estuaries and coastal zones, such as port and waterway development projects, can possibly affect the survival of specific species in the food chain.

Regarding specific aquatic habitats targeted by the Habitats Directive, the chemical, biological and hydromorphological elements covered by good ecological status according to the Water Framework Directive (WFD) already contribute towards the achievement of the objectives of the nature directives. Some of the typical species of Annex 1 habitats are used as indicators for the assessment of ecological status under the WFD (angiosperms, benthic fauna, fish).

The conservation status of species and habitats protected under the nature directives may not entirely rely on the good ecological quality of water bodies as defined under the WFD, even if this is certainly a key contribution. The local conservation status of species may rely on other specific elements that have to be defined on a case by case basis.

[13] Habitat code according to the Habitats Directive

Additional measures to those foreseen by the WFD but possibly required under the birds or habitats directive could be for example: quiet resting areas for seals or feeding zones on intertidal habitats for otter or for birds at low tide or even the creation of suitable nesting sites for birds. Main challenge should be to look for an approach generating mutual benefits and to harmonize goals, objectives, and measures from both WFD and Natura2000 at an early stage.

*Guidelines on the designation Natura 2000 sites and integration with the WFD*

- An estuary or coastal zone forms an ecological unit with the surrounding terrestrial and subtidal coastal habitat types. In terms of nature conservation, these different habitat types should not be treated separately, and this reality should be taken into account when defining the site boundaries.
- Navigation channels and/or shipping lanes remain an integral part of designated Natura 2000 sites and should be covered by the management plans.
- Member States and local authorities should coordinate the setting of conservation objectives and the implementation and monitoring of measures under the Nature and Water Framework Directives. Where possible integrated WFD and Natura 2000 management plans should be established.

### 3.1.3. Setting conservation objectives for the estuarine and coastal habitats

The development of conservation objectives for estuaries and coastal areas is a real challenge as these areas are very complex and dynamic ecosystems. The final responsibility for developing appropriate conservation objectives, priorities and instruments that are adapted to national, regional and local contexts always lies with the Member States.

The following questions may arise in this context:

- How are conservation objectives set at national/ local level?
- How can Natura 2000 management plans follow an ecosystem approach and yet assist in quantifying conservation objectives and establishing conservation measures for habitats and species?
- How can socio-economic objectives be integrated within the Natura 2000 conservation objectives and management plans?

Conservation objectives and conservation measures have to be established both at the national and at the site level. According to Article 2.1 of the Habitats Directive, the aim of the Directive is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the entire "European territory of the Member States to which the Treaty applies".

According to Article 4.4 of the Habitats Directive, the Member States must designate the sites of Community importance as special areas of conservation, "establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed."

According to Article 6.1., Member States must establish conservation measures for each particular special area of conservation. Specific site level conservation objectives take into account the priorities established according to Article 4.4. They will help to determine specific site-related conservation measures.

Conservation objectives at Member state level and site level have a complementary nature because Natura 2000 is a network where each site will have a specific function in the overall coherence of the system. It means that conservation objectives at site level will also contribute to achieving conservation objectives at the national level.

When determining the specific conservation measures at the site level, Article 2.3 of the Habitats Directive allows "*to take account of economic, social and cultural requirements and regional and local characteristics*". This consideration cannot , however, jeopardize the overall objective of the Natura 2000 network which is *'to enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range*". All the sites will have a specific contribution to this objective, but the contributions of all sites are not necessarily equivalent.

Three kinds of obligations can be described for the SACs: proactive conservation measures as foreseen by article 6.1, preventive measures as foreseen by article 6.2 to avoid the deterioration of natural habitats and specific measures for assessing and authorising new plans and projects as foreseen by article 6.3 & 6.4. The conservation objectives for a specific site have to consider all these obligations. The special conservation measures under Article 4 of Birds Directive require equivalent measures to Article 6(1) Habitats Directive for Special Protection Areas. The provisions under Article 6.2, 6.3 and 6.4 also apply to Special Protection Areas under the Birds Directive.

*Guidelines for setting conservation objectives*

- Once a site of Community importance has been adopted in accordance with the procedure laid down in Article 4(2) of the Habitats Directive, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed (Article 4.4 of the Habitats Directive).
- When considering conservation objectives, the national competent authorities should consider the dynamic nature of estuaries and coastal waters and the related natural range of fluctuations of protected species and habitats types.
- Consideration of conservation objectives should have full regard to the morphological, chemical and biological processes. The ecological functions of estuaries und coastal waters should be recognised, such as hydrological functions, function as spawning area, nursery or seasonal habitats for migratory species.
- Conservation objectives and measures for a Natura 2000 site should be based on the assessment of the local conservation status of protected habitats and species, the relative importance of the site for the coherence of Natura 2000 and for the maintenance or restoration, at a favourable conservation status of such habitats and species. They should also reflect the threats of degradation or destruction to which the site is exposed. The effects of a plan or project on the integrity of the site must be assessed (art. 6.3) in the light of the site's conservation objectives.
- The conservation status at the date of designation of the site should be used as a reference value for evaluating its deterioration (art. 6.2). In this context, gains made as a result of restorative measures taken or other improvements e.g. bird population increases, due to pressure elsewhere or response to climate change, as well as

losses caused by natural developments or climate change also need consideration. The site's Standard Data Form (SDF) remains an important reference document with this regard.

- Port and waterway authorities should be consulted in the early processes of the development and implementation of conservation measures for those Natura 2000 sites situated near ports or connected with navigational access. When establishing conservation measures for a particular site, economic, social and cultural requirements and regional and local characteristics such as the actual situation in ports and the expected future economic developments should be taken into account while not jeopardizing the contribution of the respective site to achieving the overall objective of the Natura 2000 network and the coherence of the Natura 2000 network.
- Conservation objectives should not be static; on the contrary, they need to be adapted to the actual evolution of the conservation status of species and habitats and to the evolution of other ecological factors in a complex and dynamic environment.
- Monitoring schemes should be established to monitor short and long term evolution, such as morphological dynamics and sediment circulation/ re-distribution. On the basis of measured trends the conservation objectives and management measures can be revisited where and when necessary (applying the principles of adaptive management).

## 3.2. Integrated planning

### 3.2.1. Management plans

Management plans are recommended for Natura 2000 sites but not mandatory under the Habitats Directive. They appear to be an appropriate solution to reflect transparent conservation objectives and develop measures to preserve or enhance the natural values in line with the system's processes. A management plan creates opportunities to reconcile sustainable economic development, safety issues, accessibility with nature conservation objectives. It offers the possibility to integrate recurring and routine maintenance activities with conservation objectives.

Management plans also provide an appropriate tool for reconciling recurring and routine activities, such as maintenance dredging, with environmental protection and for engaging port authorities and other stakeholders in the management of Natura 2000 sites.

If maintenance activities are directly connected with the management of the site and as such integrated into a Natura 2000 management plan they will be designed in such a way that they are not likely to have adverse effects on the integrity of the site or compromise its conservation objectives. In this case, such activities can be authorised without appropriate assessment according to Article 6(3) of the Habitats Directive.

The integration of Strategic port plans, WFD river basin management plans and Natura 2000 management plans may offer opportunities for reducing administrative burden, delays and legal uncertainties.

*Guidelines for Natura2000 management plans:*

- Integrated management plans should be established for Natura 2000 sites, in particular for sites that are adjacent to port operations or other industrial activities.
- Port and waterway authorities should be actively involved in the setting up of management plans for Natura 2000 sites near ports and related waterways.
- Strategic port plans, WFD river basin management plans and Natura 2000 management plans should be coordinated and where possible integrated, so as to fully benefit of potential win-win situations.
- Recurring maintenance activities necessary to facilitate port operations and navigational access should be integrated into the management plans and designed in a way that they are not detrimental to the conservation objectives of the site.

### 3.2.2. Spatial planning

Spatial planning and integrated management, based on prospective and proactive approaches, can help achieve implementation of conservation measures on the sites and greater legal certainty for port development projects. Integrated planning is a way to look for synergies and complementarity ; it provides a tool to promote social responsibility and sustainable development. It should help to avoid paradoxes, conflicts, and ultimately competition for space. Anticipating frictions will save time and avoid procedural 'battles'.

The European Commission Recommendation 2002/413/EC on Integrated Coastal Zone Management (ICZM) paves the way for better strategic planning. Integrated Coastal Zone Management shall implement an « *environmentally sustainable, economically equitable, socially responsible, and culturally sensitive management of coastal zones, which maintains the integrity of this important resource while considering local traditional activities and customs that do not present a threat to sensitive natural areas and to the maintenance status of the wild species of the coastal fauna and flora* » (Janssen, 2005).

The strategic approach proposed by ICZM emphasizes the protection of the coastal environment (based on an ecosystem approach preserving its integrity and functioning) but also the threat posed by climate change or unsustainable economic activities and employment options. ICZM Recommendation proposes some principles as the "use of a combination of instruments designed to facilitate coherence between sectoral policy objectives and coherence between planning and management".

Similarly, the Marine Strategy Framework Directive 2008/56 (MSFD) requires Member States to adopt by 2016 programmes of measures, which can include "spatial and temporal distribution controls: management measures that influence where and when an activity is allowed to occur" (Annex VI). It thereby provides a regulatory basis for maritime spatial planning for marine waters under the scope of the MSFD.

Integrated spatial planning offers opportunities for anticipating difficulties and adverse environmental impacts and avoiding potential conflicts and delays in project development. Resolving problems at a spatial level means that individual projects will have to face fewer difficulties for consent if the project leaders and the permitting authority can rely on those overarching plans during a decision making process based on a pre- or appropriate assessments that have been carried out at the spatial level.

Spatial and integrated planning is not in contradiction with the concept of fast track procedures proposed by the European Commission[14] as anticipation may solve problems encountered later on. Better planning needs some additional time, but as a consequence, it allows the avoidance of conflicts during the authorization procedures and finally it contributes to eliminating "uncertainties" and causes for delays.

Land-use plans and sectoral plans, including flood risk management plans are of obvious relevance. Some have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Integrated strategic plans are designed to ensure in advance that the baseline conditions exist to undertake integrated projects. Such plans should be submitted to strategic environmental assessments and appropriate assessments in the framework of Article 6.3 of the Habitat Directive.

Land use planning is an integrative process, in which different claims of utilization are subject to an evaluation process. Appropriate assessments according to Article 6(3) of the Habitats Directive critically evaluate the potential impacts of the plan on Natura 2000 sites and identify possible amendments to policies or proposals so that adverse effects on Natura 2000 sites can be avoided. One of the key benefits of the appropriate assessment at plan level is that it requires decisions to be made on the content of the plan that will help avoid possible significant negative effects on Natura 2000 sites and therefore also possible conflicts and delays at the project level. In this sense, the provisions of Article 6 are not only a legal requirement but also a valuable tool in strategic planning.

The resilience of estuarine and coastal ecosystems can be strengthened by proactive nature development measures. Such measures can also be implemented on land owned by port or waterway authorities and which are dedicated to future port or waterway development but not currently in use for such a purpose or land owned by other parties (government, nature conservation organizations or private landowners). Integrated management plans for Natura 2000 estuaries offer a framework for dealing with the management and protection to be applied to such areas.

Finally, it is important to emphasize that involvement of the public and NGOs through a participatory approach is fundamental for a successful planning process. Transparency and a qualitative approach should facilitate public involvement and appropriation, even if this will not necessarily prevent the risk of contentious actions.

*Guidelines for spatial planning*

- Land use planning should be based on a solid and well substantiated knowledge base that includes all necessary information, both on nature conservation objectives and on ports and port-related development objectives. Economic need for additional capacity on waterways and in ports is a crucial issue that should be clearly demonstrated through middle/long term strategic planning and the use of existing capacities should be optimised (including improved coordination of infrastructures and capacities between different European ports).
- Spatial planning should be carried out at the appropriate level (competent national, regional or local authorities, port authorities…).

[14] European Commission, (2009), Strategic goals and recommendations for the EU's maritime transport policy until 2018, Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, 13 p.

- Integrated spatial planning, submitted to strategic environmental assessment should be applied wherever possible as a way for anticipating difficulties and adverse environmental impacts and avoiding potential conflicts and delays in project development.
- For better integration of nature and port policies, strategic planning should be developed for the most accurate ecological unit (e.g. estuary, river basins,…).
- Spatial planning should make a clear distinction between the strategic level and the project level. Assessments at the strategic plan level can be simplified when the consideration of mere project-related details is avoided.
- Integrated spatial plans should find the right balance between economic and nature conservation objectives. They should be considered as instruments of reconciliation and integration of business and biodiversity goals.
- The national, regional and local competent authorities responsible for Natura 2000 site selection and management should work in close cooperation with the authorities in charge of spatial planning. All relevant stakeholders including port and waterway authorities, terminal operators, environmental NGOs and other public stakeholders should be involved from an early planning phase, with the objective of reconciling social and economic interests with nature conservation objectives in or nearby Natura 2000 sites.
- Port authorities and waterway administrations should be involved in all relevant planning exercises (including Natura 2000 management plans) as strategic planning will help to secure synchronized investments, to solve cross border issues, to identify less damaging alternative solutions and, where justified, imperative reasons of overriding public interest and to promote pro-active nature development.
- If a strategic plan or programme does not contain enough details to undertake a full appropriate assessment according to Article 6(3) of the Habitats Directive, the environmental report prepared for the Strategic Environmental Assessment (SEA) should help pave the way to make, at project level, an appropriate assessment and, if needed, to help prepare a derogation procedure following Article 6.4 of the Habitats Directive. In this case the SEA should already identify projects likely to have significant negative effects on Natura 2000 sites and which would need to be subject to an appropriate Art. 6(3) assessment during the project authorisation process.
- Cumulative effects of projects should best be identified and assessed already during the elaboration of spatial plans.
- Port and waterway authorities should aim for efficient land use by optimising space allocation of port industrial activities and making optimal use of different transport modes such as shipping, inland navigation and rail.
- Port and waterways authorities should consider the possibility of proactive nature development measures aimed at improving the resilience of estuarine ecosystem. The creation of temporary nature areas should be considered where land dedicated to port development is temporarily not used for such purpose. The management and protection of such land should then be dealt with in the context of integrated management plans.

### 3.2.3. Benefiting from partnerships and public participation

*Guidelines for public participation:*

- Developers of new projects should pre-assess the effects of the development and consult the competent nature conservation authorities on whether the plan is likely to have significant negative effects on the integrity of Natura 2000 site or its conservation objectives. Planning authorities should start consultation with competent authorities and non-governmental organisations (NGOs) early in the plan-making process.
- Given the complexity of environmental and zoning law, structured consultations and communication processes between various competent authorities, stakeholders and NGOs are recommended. Transport and environment administrations should be in regular communication and cooperate to ensure that the process runs efficiently at both plan and project levels. Port and waterway authorities, operators or users as well as environmental NGOs should be represented in implementation processes, including in transboundary conditions.
- Special consideration needs to be given to plans and projects that will have an impact across national borders. Neighbouring countries should inform each other and cooperate early on in the planning process.

## 3.3. Project development and maintenance activities

A widespread misunderstanding is that the EU nature directives are based on a “no-unless” approach. This is an interpretation based on the view that environmental policy objectives always take precedence over economic policy objectives. This approach is in contradiction with sustainable development principles, which balances environmental benefits and societal and economic requirements (see article 2.3 of the Habitat Directive). Early integral planning and the development of integrated projects are crucial, as they will promote a “yes, if” approach and pave the way for win-win solutions.

In the field of waterways and ports, the EU TEN-T status or other national priorities should help projects to qualify as being of overriding public interest. Nevertheless, if a plan or a project is being authorised on the basis of imperative reasons of overriding public interest (IROPI), then the Habitats Directive demands a justification of the arguments for IROPI.

Alternative solutions with less or no adverse effects must always be considered in sufficient detail beforehand and a plan or project with significant adverse effects on a Natura 2000 can only be authorised in the absence of such alternative solutions. Permitting procedures may cause legal uncertainty since permits may need to be reviewed, updated or eventually also be terminated. However a correct application of the provisions of the Habitats Directive and the integration of nature conservation objectives from a very early planning phase will reduce uncertainty.

The following guidelines propose recommendations on the concept of integrated projects, the correct use of the appropriate assessments and “significant impact” issues, the use of adaptive management and the assessment of compensation needed as a last resort.

### 3.3.1. Integrated projects and working with nature

In 2008, PIANC, the world association for waterborne transport infrastructure[15], published a position paper entitled "*Working with Nature*". It calls for an important shift in thinking in the approach to navigation development projects to help deliver mutually beneficial solutions. It promotes a proactive, integrated approach which focuses on:

- achieving the project objectives in an ecosystem context rather than assessing the consequences of a predefined project design;
- identifying mutually beneficial solutions rather than simply minimising ecological harm.
- "*Working with Nature*" thus considers the project objectives firstly from the perspective of the natural system rather than from the perspective of technical design. It is an approach which needs to be applied early in a project when greater flexibility is still possible. A proactive approach such as "*Working with Nature*" should not only be applied at project level but also to the development of strategic plans and programmes (see integrated planning).

If the design concept for a project has progressed before environmental issues are considered, the environmental impact assessment necessarily becomes an exercise of mitigation or damage limitation, potentially resulting in sub-optimal solutions and missed opportunities. "*Working with Nature*" is about more than avoiding or mitigating the environmental impacts of a pre-defined design. Rather, it sets out to identify ways of achieving the project objectives while working with natural processes and delivering environmental protection, restoration or enhancement outcomes.

A similar approach has also been tested within flood alleviation projects in the Netherlands and developed within the Interreg SAND project. It was called "*Integral Design*" and was based on different plans, which are integrated in a way that maximizes the benefits for all whilst delivering the overall objective in a cost-effective and efficient approach.

This general approach can be strongly recommended as it is in coherence with the principle that environmental damage should as a priority be avoided or rectified at the source. It is in line with the Habitats Directive. Appropriate assessment, however, still needs to be applied (article 6.3) if significant effect on a Natura 2000 site cannot be excluded. As a general rule prevention or avoidance measures are to be preferred to compensation.

*Guidelines for working with nature:*

- Project design should aim to be based on win-win strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives.
- Projects should be 'designed' using the 'working with nature' concept. This means that the relevant Natura 2000 conservation objectives should be considered together with the technical project objectives from an early stage in project design and development.
- As a general rule, damage prevention or avoidance measures should always be preferred to compensation measures.

[15] http://www.pianc.org

### 3.3.2. How to handle 'appropriate assessment' and 'likely significant impact'?

The European Commission has already published guidance documents to assist Member States and operators to understand and apply Article 6 of the Habitats Directive (see annex 1). The present guidelines specify recommendations for waterways and port-related activities.

Ecology and biodiversity depend on local conditions (variability and complexity of abiotic and biotic factors), as well as on evolution in space and time. The words “appropriate” or “significant” are not normative concepts and assessments have to consider local conditions (case-by-case basis). As highlighted by Stojanovic & al. (2006), the “fact that each port is unique in terms of its geography, hydrography and commercial profile means that a “one-size-fits-all” strategy of prescribed environmental management response may not be appropriate even though there are many issues in common”.

The same can be said for the management of estuaries, as ecosystem features are depending among others on the geographical location of the estuary. Therefore a site-specific analysis is always necessary. An "appropriate" assessment means that it is an assessment which takes into account all local factors and conservation objectives. It also has to be based on the best available scientific evidence.

### 3.3.3. The relationship between SEA, EIA and Appropriate Assessments (AA)

There are many similarities between the procedures for SEA and EIA, and the Appropriate Assessments carried out for plans or projects affecting Natura 2000 sites under the Habitats Directive. But this does not mean they are one and the same, as there are also some important distinctions. Therefore, an SEA or an EIA cannot replace, or be a substitute for, an Appropriate Assessment as neither procedure overrides the other.

They may of course run alongside each other or information pertaining to the Appropriate Assessment may form part of the EIA/SEA process but, in such cases, the Appropriate Assessment should be clearly distinguishable and identifiable in the SEA’s Environmental Report or in the EIA’s Environmental documentation, or should be reported on separately so that its findings can be differentiated from those of the general EIA or SEA.

One of the key distinctions between SEAs/ EIAs and Habitats Directive’s Appropriate Assessments, apart from the fact that they measure different aspects of the natural environment and have different criteria for determining ‘significance’, is how the outcome of the Assessment is followed. In this regard, the assessments under the SEA and EIA lay down essentially procedural requirements and do not establish obligatory environmental standards; on the contrary, the assessment under the Habitats Directive lays down obligations of substance, mainly because it introduces an environmental standard, i.e. the conservation objective of a Natura 2000 site and the need to preserve its integrity.

In other words, if the Appropriate Assessment can not ascertain that the plan or project will not adversely affect the integrity of a Natura 2000 site, the authority cannot agree to the plan or project as it stands unless, in exceptional cases, they invoke special procedures for plans or projects for which there are no less damaging alternative solutions and which are deemed to be of overriding public interest.

The SEAs/ EIAs on the other hand are designed to make the planning authorities fully aware of the environmental implications of the proposed plan or project so that these *are taken into account* in their final decision. The considerations above are summarised in the table in Annex 4.

*Guidelines for assessments:*

- The significance of the effects of a plan or a project is strongly dependent on the site's characteristics and conservation objectives (which will be outlined in the Standard Data Form, Special Area of Conservation designation acts, conservation priorities, management plan…).
- When a port or related waterway development project is proposed, in a first step a pre-assessment must be carried out. If this pre-assessment demonstrates that there will be no likely significant effect on Natura 2000 sites, the competent authority may remove the obligation of going through an appropriate assessment of its implications for the site in view of the site's conservation objectives, according to Article 6(3) of the Habitats Directive. The assessment of the risk of significant effects must be made on the basis of scientific criteria and in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project. Factors such as the extent, the magnitude, the complexity, the probability, the duration, the frequency and the possible reversibility of the impact should be considered. This exercise should be done by the competent authorities.
- If it cannot be excluded, on the basis of objective information, that a project will have a significant effect on a Natura 2000 site, either individually or in combination with other plans or projects then the project is to be subject to a proper Article 6(3) assessment.
- Following a thorough appropriate assessment that includes collecting all relevant data, and subject to the reversibility of actions, minor remaining uncertainties should however not block or restrain projects indefinitely. This needs to be judged on a case by case basis. In case of uncertainty on particular mechanisms of complex estuarine or coastal ecosystems port and waterway developers should assess the nature of the remaining uncertainties and manage them through targeted monitoring and adaptive strategies. Monitoring schemes should be designed in a way that they signal any unexpected developments at a stage where effective corrective measures can still be taken.
- The absence of adverse effects is sometimes related to predicted effects not exceeding specified threshold values; the monitoring of effects relative to the threshold is then important. The threshold values should always be justified on the basis of scientific criteria.
- In the context of an appropriate assessment, information should be provided on the full characteristics of the project or plan which may affect the site, the total range or area that will be affected, the characteristics of other projects or plans which may cause cumulative impacts with the project, any planned or existing nature conservation initiatives likely to affect the status of the site in the future, the relationship (e.g. distances…) between the project or plan and the Natura 2000 site, the requirements (e.g. EIA/SEA) of the authorisation body or agency.
- Information on the protected site should include: the conservation objectives of the Natura 2000 site, the conservation status and other key attributes of Annex I habitats or Annex II species on the site, the physical and chemical characteristics of the site that may be affected by the project, the dynamics of the habitats, species and their

ecology, aspects of the site that are sensitive to change, key structural and functional relationships that create and maintain the site's integrity, other conservation issues relevant to the site, including likely future natural changes taking place and the degree to which those changes need to be managed to deliver the site's conservation objectives.

- Measures to eliminate or reduce significant effects (mitigation) should be foreseen during the project design phase. If necessary, they can be completed during the appropriate assessment (design revision, complementary mitigation). The project can then possibly reach a level where it will have no adverse effects on the integrity of the site.

### 3.3.4. Compensation schemes and their follow-up

Important notice: The Commission has issued guidelines directly related to the provisions of Article 6.4 of the Habitats Directive which should be read in conjunction with the following section (see Annex 1 for references).

*Guidelines for compensation:*

- In instances where damaging developments are, in the absence of alternative solutions, to be allowed to proceed there will be a need for compensation measures to fully offset any loss or damage to the site. These should be precisely adapted to the type of impact predicted and should be focused on the coherence of the Natura 2000 network and the particular elements affected at site level. This requires that measures refer to the structural and functional aspects of the site integrity, the related types of habitat and species populations that are affected and the contribution of these elements to the overall coherence of the Natura 2000 network.
- Compensatory measures must be feasible and operational in protecting the overall coherence of the Natura 2000 network. The estimated timescale and any maintenance action required to enhance performance should be specified as early as possible in the project. Once the compensation scheme is agreed, the permits granted and a monitoring programme in place, unforeseen uncertainties should in principle not significantly hamper the core of a plan or project. Such possible new uncertainties should, however, trigger targeted investigations and if necessary extended monitoring and adaptive or corrective measures.
- 'Losses' should be quantified with respect to key habitats and species: according to current knowledge and expert judgement. Compensation measures must be designed on the basis of best scientific knowledge and should accomplish the ecological functions necessary to support the affected species and habitats.
- Environmental damage/ environmental benefit from compensation ratio should be assessed: there is wide acknowledgement that compensation/ damage ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that such measures will be 100% effective in restoring good structure and functionality within a short period of time.
- Appropriate compensation sites should be selected by considering the following:
  (a) Compensation within the Natura 2000 site if the necessary elements to ensure ecological coherence and network functionality exist within the site.
  (b) Compensation outside the Natura 2000 site if the same contribution to the ecological network is feasible. The new location can be another site designated as

Natura 2000 or a non-designated location. In the latter case, the area has to be designated as a Natura 2000 site itself.

- The compensatory measures must ensure the continuity of the ecological processes essential for maintaining the overall coherence of the Natura 2000 network. The compensation scheme should be 'effective' at the time the negative effects occur on the site concerned. Early implementation is of the essence. The application of specific mitigation measures to overcome possible interim losses may be necessary.
- All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures should be completed before implementation of the plan or project starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.
- Financing, monitoring and reporting: Compensatory measures imply that a sound legal and financial basis for long-term implementation, protection, monitoring and maintenance be secured in advance.

### 3.3.5. Addressing dredging and maintenance activities

In the case of ports situated in or near estuaries, it is common that the navigational access runs through designated Natura 2000 sites. For most ports dredging is a necessity to keep the waterways and shipping lanes accessible. Potential conflicts with the obligation to preserve the integrity of a Natura 2000 site may come up. Nevertheless, maintenance dredging activities such as continuous or periodic maintenance dredging can usually be designed in a way that they do not adversely affect the integrity of Natura 2000 sites or their conservation objectives.

There are possibilities to deal with dredged materials in an estuary-friendly way. If appropriate sediment placement strategies are applied (e.g. in case of relocation of sediments in a part of an estuary where there is a lack of sediments) dredging operations can even have positive effects on the conservation status of estuaries. Recent knowledge and best practices have shown that a well-thought out relocation plan can help rebuild valuable morphological structures inside estuaries with interesting environmental benefits.

The development of innovative dredging concepts accompanied by strict monitoring schemes can contribute to achieving both navigation objectives and Natura 2000 conservation objectives. In the context of finding appropriate solutions for sustainable maintenance dredging the concept of a sustainable dredging and sediment management scheme is favoured. Such schemes will help avoiding problems, conflicts and delays and, where possible, maximising potential positive effects on the conservation status of estuaries and coastal zones.

The use of sustainable dredging and sediment management practices will further mitigate the potential impact of maintenance operations in the navigation channels. This will not, however, automatically obviate the need for assessment under Article 6(3) of the Habitats Directive. Sustainable dredging strategies should provide the necessary background information for the competent authority to make a judgement on the likelihood of possible adverse effects on a Natura 2000 site.

As a recurring activity, maintenance dredging and relocation of sediments can be used in the context of a sustainable dredging and sediment management scheme for both achieving navigation objectives and contributing to Natura 2000 conservation objectives.

The following six steps are essential in the preparation and implementation of sustainable dredging and sediment management schemes:

- Understanding of the physical setting (morphology, hydrology, salinity, etc) of the area concerned.
- Collecting the necessary information on the dredging operation in order to assess the environmental impact in detail.
- Proceeding with the assessment of the impacts of the dredging operation on the natural environment (on estuarine morphology and hydrodynamics, on sensitive habitats and species, in the short and the long term).
- Selecting optimal practices, describing all possible solutions for mitigating adverse effects and, as a last resort, examining possible compensatory measures that would be undertaken if not all significant adverse effects can be avoided through the application of mitigation measures.
- Implementing a monitoring programme determining the achievement of environmental objectives.
- Ensuring stakeholder participation all along the process in order to avoid complaints and delaying of the procedure.

The assessment of dredging operations and disposal of dredged material in marine environments is regulated under international conventions such as the London Convention, OSPAR, HELCOM, the Barcelona and Bucharest Conventions.

*Guidelines for capital dredging*

- Capital dredging operations should be designed as part of sustainable dredging and sediment management schemes. Where significant effects on a Natura 2000 site cannot be excluded, also in combination with other plans or projects, they must be subject to an appropriate assessment according to Article 6(3) of the Habitats Directive.
- The application of smart dredging and relocation strategies should help mitigate adverse effects and where possible restore or develop valuable morphological structures and, thus, generate ecological benefits ("working with nature").
- Dredging and sediment relocation strategies should be designed in a way that their potential positive effects are maximized. They should be underpinned by effective monitoring schemes.

*Guidelines for recurring maintenance activities including maintenance dredging:*

- Recurring maintenance activities should be designed and performed in a way to ensure that they do not adversely affect the integrity of Natura 2000 sites or their conservation objectives. Where possible, their potential positive effects on the conservation status of estuaries and coastal zones should be maximised through the application of sustainable sediment management strategies.
- Recurring maintenance activities where applicable should be included in integrated Natura 2000 management plans, equivalent management plans or river basin management plans to make sure that they are being assessed and reviewed in a structured manner in the overall context of the conservation of the sites.
- Maintenance operations in or near a Natura 2000 site should be specifically designed for each estuary or coastal zone and underpinned by a monitoring scheme that

enables the detection and timely correction of unforeseen adverse effects on conservation objectives.

- If, having regard in particular to the regularity or nature of maintenance operations or the conditions under which they are carried out, such operations can be regarded as constituting a single operation, in particular where they are designed to maintain a navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of the Habitats directive.

  In that case, if such a project has been authorised before the expiry of the time-limit for transposing the directive, it will not be subject to the prior assessment of the implications of the project for the site concerned. Nevertheless, in a Natura 2000 site, the carrying out of maintenance works will be subject to a general obligation of protection under Article 6(2) of the Habitats Directive consisting in avoiding deterioration of natural habitats and species' habitats and significant disturbance that affects the species for which the site has been designated[16].

- Maintenance operations, at the time of each intervention in the navigable channel, may sometimes need to be regarded as constituting distinct projects for example because of changing techniques, conditions or regularity under which they are carried out. In such a case each of those projects must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications pursuant to Article 6(3) of the Habitats Directive.

- As the provisions of Article 6(2) always remain applicable, the Member States should review whether ongoing operations are likely to give rise to deterioration of habitats, or habitats of species and, where necessary, take appropriate steps to avoid such deterioration.

### 3.4. Dealing with uncertainties: adaptive management

In carrying out appropriate assessments for plans or projects in the sense of Article 6(3) of the Habitats Directive, it may be necessary to take recourse to the precautionary principle. The focus of the assessment should be on objectively demonstrating, with supporting evidence, including undertaking the necessary studies, and based on best available scientific knowledge, that there will be no adverse effects on the integrity of the Natura 2000 site. However adaptive management also helps to address situations when, because of science limits or uncertainty about the functioning of complex and dynamic ecosystems, it is not possible for the competent authorities to fully ascertain the absence of adverse effects.

When the absence of significant adverse effects of a plan or a project on a Natura 2000 site cannot be ascertained, the derogation scheme under article 6.4 of the Habitats Directive foresees that the plan or project can only be authorised in the absence of alternative solutions, if the plan or project is justified by imperative reasons of overriding public interest and if the necessary compensatory measures are undertaken to protect the overall coherence of the Natura 2000 network. If a plan or project falls under these provisions (which is likely for most port development projects), then it is essential that the different aspects are clarified at a very early stage in the plan or project development, as they are key elements for its design, financing, and, last but not least, permitting procedure.

[16] See also judgement of the Court of Justice of the European Union of 14 January 2010 in Case C-226/08 (Stadt Papenburg v Bundesrepublik Deutschland).

An adaptive approach for the implementation of a plan or project or a compensation scheme may be particularly useful to address cases where, due to uncertainty associated with different contributory factors (location, confidence, unexpected delays), it is impossible to define all the effects of the plan or project or of a compensation scheme in sufficient details and if such uncertainty cannot be factored in through increased ratios. In such a situation, a rigorous monitoring scheme and a pre-defined validated package of appropriated corrective measures must be foreseen. Such measures must allow to adjust mitigation and/or compensatory measures to the reality of the impacts and by that way, make sure that the initially unforeseen adverse effects are being neutralized.

Extensive guidance on the concept of imperative reasons of overriding public interest and on how to examine alternative solutions has already been published in existing guidance documents (see annex 1).

*Guidelines for adaptive management:*

- If significant negative impacts cannot be avoided even with mitigation measures, the decision to authorise the project is ultimately driven by the existence of imperative reasons of overriding public interest and the absence of less damaging alternative solutions according to the provisions of Article 6(4) of the Habitats Directive.
- In case of any remaining scientific uncertainty with regard to the effects of mitigation or compensatory measures, the measures must include a pre-defined and validated scheme to monitor the actual impacts and a framework, such as a Natura 2000 management plan, integral plan or a programme of measures, to adapt mitigation and compensation measures to the actual impacts.

*Guidelines for considering alternative solutions*

- Where negative effects are predicted, a range of alternative solutions of achieving the objectives of the plan or project should be identified and these alternatives should be assessed against their likely impact upon the conservation objectives of Natura 2000 sites.
- The competent authorities should not limit their consideration of alternative solutions to those suggested by the project or plan proponents. It is the competent authority's responsibility to consider alternative solutions.
- When assessing alternative solutions all relevant agencies and other bodies should be consulted. Detailed information on the alternative solutions and their impact on affected Natura 2000 site should be provided with indication of sources. The precautionary principle should be applied when assessing alternatives.

# Annex 1: European Commission Communications and guidance documents

**EC guidance documents related to the Birds and Habitats Directives**

- European Commission, (2000), Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities.

  http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

- European Commission, (2002), Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of articles 6(3) and (4) of the Habitats Directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities. http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

- European Commission (2007), Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission.

  http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

- European Commission (2007), Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 87 pp. http://circa.europa.eu/Public/irc/env/species_protection/library?l=/commission_guidance/english/final-completepdf/_EN_1.0_&a=d

**Main EC guidance documents related to the Water Framework Directive**

- European Commission, (2003), Common implementation strategy for the water framework directive (2000/60/EC), Transitional and coastal waters-Typology, Reference conditions and classification systems, Guidance Document No 5, Luxembourg: Office for official publications of the European Communities, 116 pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title

- European Commission, (2003), Common implementation strategy for the water framework directive (2000/60/EC), Identification and Designation of Heavily Modified and Artificial Water Bodies, Guidance Document No 4, Luxembourg: Office for official publications of the European Communities, pp.14.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title

- European Commission (2006), Common Implementation Strategy for the Water Framework Directive. Exemptions to the environmental objectives under the Water Framework Directive allowed for new modifications or new sustainable development activities (WFD Article 4.7), policy paper.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/environmental_objectives&vm=detailed&sb=Title

- European Commission (2006), WFD and Hydro-morphological pressures: Focus on hydropower, navigation and flood defence activities Recommendations for better policy integration, Policy Paper, 44pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/hydromorphology&vm=detailed&sb=Title

- European Commission (2006), WFD and Hydro-morphological pressures, Good practice in managing the ecological impacts of hydropower schemes; flood protection works; and works designed to facilitate navigation under the Water Framework Directive, 68 pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/hydromorphology&vm=detailed&sb=Title

**EC Policy documents related to maritime and ports policies**

- European Commission, (2006) Towards a future Maritime Policy for the Union: A European vision for the oceans and seas, Green Paper, 49pp. COM (2006) 27

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0275:FIN:EN:HTML

- European Commission, (2006), Motorways of the Sea: Shifting freight off Europe's roads, Luxembourg: Office for Official Publications of the European Communities, 6 pp.
  http://ec.europa.eu/transport/intermodality/motorways_sea/doc/2006_motorways_sea_brochure_en.pdf

- European Commission, (2007), An Integrated Maritime Policy for the European Union, 17 pp. COM (2007) 575

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF

- European Commission, (2007), Communication on European Ports Policy, 16 pp. COM (2007) 616.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0616:FIN:EN:PDF

- European Commission, (2009), Strategic goals and recommendations for the EU's maritime transport policy until 2018, Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, DG Transport and Energy, 19 p.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:PDF

**EC guidance documents related to ICZM and coastal areas**

- European Commission, (2002), Recommendation concerning the implementation of integrated coastal zone management (2002/413/EC).

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:148:0024:0027:EN:PDF

- European Commission, (2004b), Living with coastal erosion in Europe-Sediment and Space for Sustainability, EUrosion, Luxembourg: Office for official publications of the European Communities, 44 pp. http://www.eurosion.org/project/eurosion_en.pdf

**Other EC guidance documents**


- European Commission, (2004), Development of a Guidance Document on Strategic Environmental Assessment (SEA) and Coastal Erosion, Luxembourg: Office for official publications of the European Communities, 72 pp.

  http://ec.europa.eu/environment/iczm/pdf/coastal_erosion_fin_rep.pdf

- European Commission, (2006), Halting the loss of biodiversity by 2010-And beyond, sustaining ecosystem services for human well-being, Luxembourg: Office for official publications of the European Communities, 15 pp. COM (2006) 216.

  http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0216en01.pdf

- European Commission, (2007), Adapting to climate change in Europe-options for EU Action, Green Paper, 27 pp. COM (2007) 354.

  http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0354en01.pdf

- European Commission, (2007), Agenda for a competitive and sustainable European tourism, Communication from the Commission, COM (2007) 621final.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0621:en:HTML

- European Commission, (2010), Europe, the World's No 1 tourist destination – a new political framework for tourism in Europe, Communication from the Commission, COM (2010) 352 final.

  http://ec.europa.eu/enterprise/sectors/tourism/files/communications/communication2010_en.pdf

## Annex 2: Selected private initiatives involving the port sector

**1. Ecoports** (see www.ecoports.com)
Ecoports is a research and development project launched in 2002 and initially co-funded by the European Commission and 12 ports and port organisations. The main goal of Ecoports was to harmonise the environmental management approach of port administrations in Europe, through the establishment of an environmental management system as well as the exchange of experiences and the implementation of good practices in respect of port-related environmental issues.

**2. ESPO, Environmental Codes of Practice** (see www.espo.be)
In 1994, the European Sea Ports Organisation (ESPO) published its first European Environmental Code of Practice, which was intended to be an expression of the collective commitment of the port administrations to environmental improvement. It therefore made a series of recommendations on the integration of environmental protection policies into all aspects of their operations. In 2002, ESPO carried out a survey on the impact of the Birds and Habitats Directives on port development. The main findings and recommendations were published in 2007 in the ESPO Code of Practice on the Birds and Habitats Directives.

**3. Paralia Nature** (see www.imiparalianature.org)
The Paralia Nature project was set up in December 2000 as an informal platform for the discussion of the Habitats Directive and related issues and projects. It is intended to bring about a broad multidisciplinary cooperation between governments, ports, universities, NGOs and knowledge centres in terms of exchanging experiences and information.

**4. NEW! Delta project** (Interreg IIIB - North West Europe, see www.newdelta.org)
The NEW! Delta project, which was launched in July 2004, also focused on the implementation of the Birds and Habitats Directives. The project brought together 10 partners from 4 countries in North-West Europe (England, France, Belgium and The Netherlands) including port authorities, regional administrations and research institutions.

**5. SedNet** (5th RTD Framework Programme, see www.sednet.org)
The Sediment Network (SedNet) is a European network, whose purpose is to incorporate sediment-related issues and knowledge into European strategies to support environmental goals and to develop new tools for sediment management.

**6.TIDE** (Interreg IV B North Sea Programme,see www.tide-project.eu/)
The Interreg project TIDE was set up in September 2009. It aims at the integrated management of estuaries serving as shipping channels to important sea ports with strong tidal influence and considerable sediment transport rates. A partnership of port authorities, environmental agencies and Science from the Elbe, Scheldt, Humber and Weser estuaries will exchange experience and develop tools and pilot measures for an integrated estuary management.

## Annex 3: ESPO checklist on good practice for balancing Natura2000 with port and waterway development and operations (December 2009)

This checklist can be seen as an example that Member States may consider to adopt in order to provide guidance and legal certainty to the activities of port and waterway developers and operators.

**Spatial and integrated planning**

- Existing Port and waterway activities are thoroughly assessed, considered and weighed within all relevant levels of spatial planning.
- New developments and future growth of existing ports and waterways are an integral part of the relevant spatial planning processes.
- Port and waterways activities are thoroughly considered and weighed within a balanced and integrated Natura 2000 management plan.

**Planning of new port and waterway projects**

- Sustainable port development is a key element of a license for growth of port related activities (optimising port-industrial use and space, improving operation of scale, efficient use of transport modes).
- Effects of sea going shipping activities in or nearby ports are subject to international regulation schemes and treaties (UNCLOS, IMO, MARPOL). Sustainable shipping is promoted through voluntary schemes (e.g. Environmental Ship Index).
- Shareholders´, public and stakeholders' opinions are considered from the beginning using a well defined stakeholder process. Agreements on all relevant issues have been reached as far as possible using the best available scientific knowledge.
- If a significant effect can not be excluded in a pre-assessment, then the further steps of Art. 6 of the HD are followed (full assessment, alternatives, mitigation, compensation - see ESPO Code of Conduct and specific EU-guidelines).
- Competent authority shall approve and underpin the results of the stakeholder process and the port development assessments and incorporate and secure those (including decisions made during the process) in the relevant integrated plans.

**Maintenance dredging**

- A maintenance dredging strategy has been set up taking into account hydro-morphological and ecological aspects.
- Based on latest information and a feedback-process involving all relevant stakeholders, dredging activities are – in compliance with economical and legal requirements - aiming to achieve the least impact on Natura 2000 conservation objectives possible.
- A sustainable maintenance dredging strategy or scheme is part of an integral management plan. Based on general principles in compliance with conservation objectives, dredging is flexible according to the requirements of a dynamic tidally influenced estuarine, river or costal system.

- Dredging activities have been optimized according to the following order:
  - Technical feasibility, availability of dredgers
  - Safety, nautical requirements, navigability
  - Legally binding ecological requirements (BHD, WFD, etc.)
  - Administrative regulations (e.g. management plans, site specific objectives)
  - Full integration of long-term comprehensive hydro morphologic, sediment-related and ecological criteria
  - short-term and/or local criteria
  - cost-effectiveness
  - other non-binding aspects such as agreements with stakeholders

**Natura 2000 site management and maintenance measures**

- The aim should be to meet feasible conservation objectives for sites in balance with long term ports and waterways development.
- Port and waterways authorities should be actively involved in the setting up of management plans from the start.
- In dealing with uncertainties (ecosystem knowledge, cause-effect relationship), research and monitoring schemes should be included as part of the management plan.

# Annex 4: Comparison of procedures under AA, EIA and SEA

| | AA | EIA | SEA |
|---|---|---|---|
| Which types of developments are targeted? | Any **plan** or **project** which - either individually or in combination with other plans/projects - is likely to have a significant effect on a Natura 2000 site (excluding plans or projects directly connected to the management of the site for conservation). | All **projects** listed in Annex I.<br><br>For projects listed in Annex II the need for an EIA shall be determined on a case by case basis and depending on thresholds or criteria set by Member states (taking into account criteria in Annex III). | Any **Plans** and **Programmes** which are<br>(a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or<br>(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC. |
| Which impacts need to be assessed relevant to nature? | The Assessment should be made in view of the site's conservation objectives (which relate to the species/ habitat types ***for which the site was designated.***)<br><br>The impacts should be assessed to determine whether they will not adversely affect the integrity of the site concerned, or otherwise. | Direct and indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative significant effects on ….'fauna and flora'. | Likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors. |
| Who carries out the Assessment? | It is the responsibility of the competent authority to ensure that the AA is carried out. In that context the developer may be required to carry out all necessary studies and to provide all necessary information to the competent authority in order to enable the latter to take a fully informed decision. In so doing the competent authority may also collect relevant information from other sources as appropriate. | The developer. | The competent planning authority. |

| | | | |
|---|---|---|---|
| Are the public/ Other authorities consulted? | Not obligatory but encouraged ('if appropriate'). | Compulsory consultation to be done before adoption of the development proposal.<br><br>Member States shall take the necessary measures to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent.<br><br>Ditto for the public | Compulsory –consultation to be done before adoption of the plan or programme.<br><br>The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.<br><br>Member States must designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned. |
| How binding are the outcomes ? | Binding. The competent authorities can agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site. | The results of consultations and the information gathered as part of the EIA ***must be taken into consideration*** in the development consent procedure. | The environmental report, as well as the opinions expressed ***shall be taken into account*** during the preparation of the plan or programme and before its adoption or submission to the legislative procedure; |

# GLOSSARY

**Alternative solutions**: Different ways of achieving the objectives of a plan or project. The Commission services suggest that 'they could involve alternative locations, different scales or designs of development, or alternative processes (EC guidance on art. 6 (3) and (4), 2001).

**Appropriate Assessment (AA)**: The process under Article 6(3) of the Habitats Directive by which the potential effects of a plan or project upon a Natura 2000 site are assessed in view of the site's conservation objectives in order to ascertain whether the plan or project will not adversely affect the integrity of the site.

**Compensatory measures**: A requirement set out in Article 6(4) where damage to a European site has been justified in the absence of alternatives and for imperative reasons of overriding public interest (IROPI). Compensatory measures must be designed to protect the overall coherence of the Natura 2000 network. This normally entails the creation of appropriate habitat as close as possible to where the damage will occur and fully functioning before the damage occurs.

**Cumulative impacts**: Impacts that accumulate over space and time from multiple plans/projects.

**Deterioration**: physical degradation affecting a habitat, or a breeding site or resting place of a species. In contrast to destruction, such degradation may occur slowly and gradually reduce the functionality of the site in terms of quality or quantity and might over a certain period of time lead to its complete loss.

**Disturbance**: A temporary or permanent change in environmental conditions (e.g. by noise, source of light) that may have a negative effect on a natural habitat or a species. Disturbance may be detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability and may give rise to additional indirect effects (e.g. increased competition for food resources).

**Favourable Conservation Status:** The conservation status of a natural habitat will be taken as "favourable" when: its natural range and areas it covers within that range are stable or increasing; the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future; and the conservation status of its typical species is favourable (Article 1.e of the Habitats Directive).

The conservation status of a species will be taken as "favourable" when: viable population is maintained on a long-term basis; the natural range of the species is neither being reduced nor is likely to be reduced in the future; and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

**Habitat of Community Interest:** a natural habitat type in Annex I of the Habitats Directive.

**Imperative Reasons of Overriding Public Interest (IROPI)**: A requirement set out in Article 6(4) which, in limited circumstances, permits a plan or project to go ahead even after an AA has failed to ascertain that the integrity of a Natura 2000 site will not be adversely affected.

**Mitigation**: Measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

**Monitoring:** Collection and analysis of repeated observations or measurements to evaluate changes in condition and progress toward meeting a management objective.

**Natura 2000 site**: sites designated to form the Natura 2000 network, which include Special Protection Areas (SPA) and Sites of Community Importance (SCI) approved by the European Commission and declared as Special Areas of Conservation (SAC) by the Member States.

**Offset**: Biodiversity offsets are conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to aspire to no net loss of biodiversity.

**Precautionary principle**: where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection, lack of scientific knowledge shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Rio Declaration, 1992 & EC, 2000).

**Qualifying Interest**: a natural habitat type listed in Annex I or a species listed in Annex II of the Habitats Directive, a species listed in Annex I of the Birds Directive or regularly occurring migratory species not listed in Annex I, for which a Natura 2000 is designated.

**Site of Community Importance (SCI):** it is defined in the Habitats Directive (92/43/EEC) as a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or to the maintenance of biological diversity within the biogeographical region or regions concerned. SCIs are proposed to the Commission by the Member States and once approved, they must be designated as Special Areas of Conservation (SACs) by the Member States.

**Special Area of Conservation (SAC)**: site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.

**Special Protection Area (SPA)**: Protected area designated in accordance with the Birds Directive for species listed on Annex I of the Directive and/or regularly occurring migratory species, and included in the Natura 2000 network.

**Species of Community Interest:** a species listed in in Annex II and/or Annex IV or V of the Habitats Directive.

**Stakeholders**: People or organisations that will be affected by, or will influence a programme, project or action.

**Surveillance**: An extended programme of surveys systematically undertaken to provide a series of observations to ascertain the variability that might be encountered over time.

European Commission

Luxembourg: Publications Office of the European Union

2011  46 pp. 21,0 x 29,7 cm

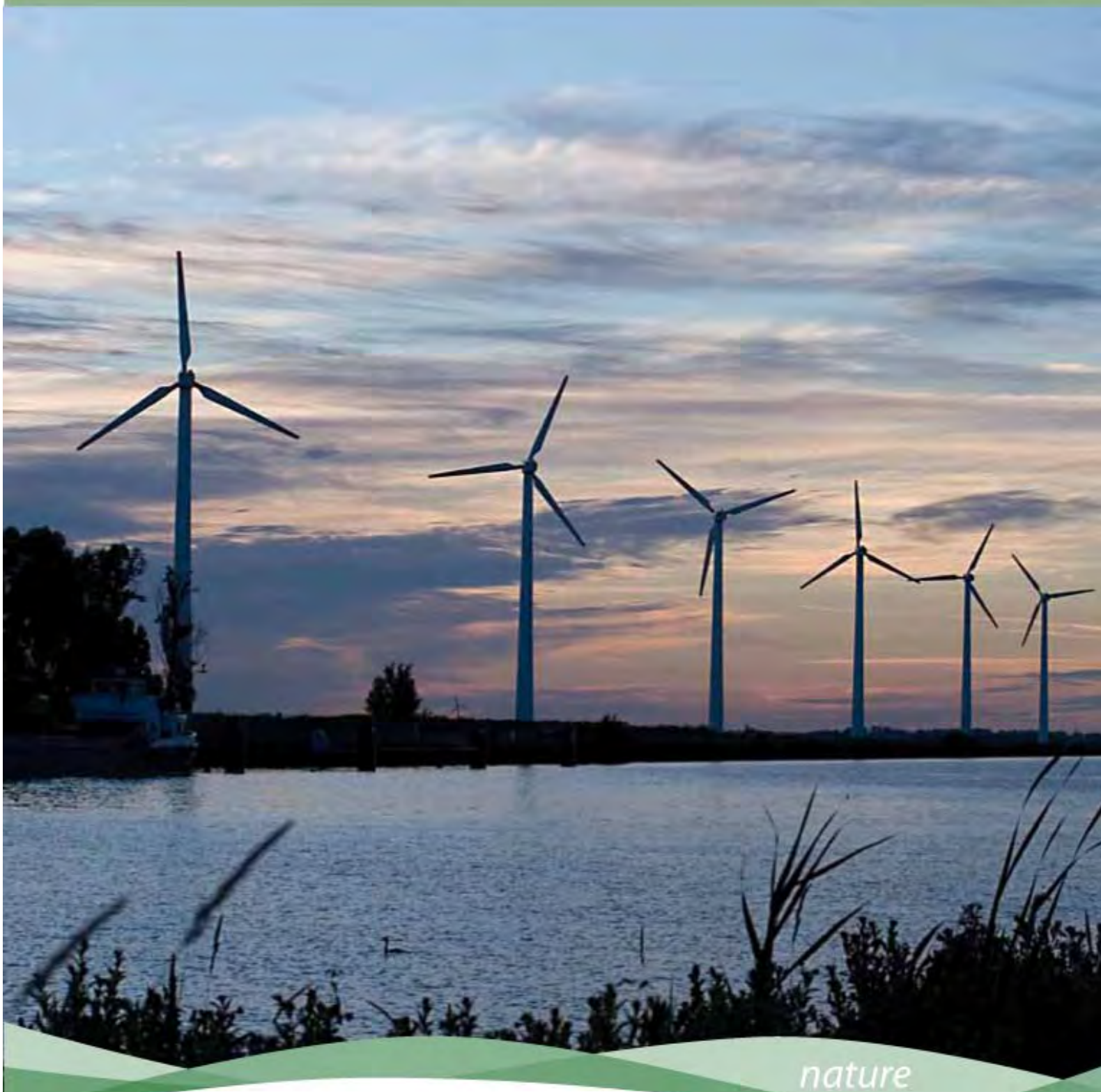
ISBN 978-92-79-19372-9
doi: 10.2779/44024

KH-31-11-028-EN-N

NATURA 2000

# GUIDANCE DOCUMENT

# Wind energy developments and Natura 2000



nature

*This document reflects the view of the Commission services and is not of a binding nature.*

*European Commission, October 2010*
*Reproduction is authorised provided the source is acknowledged*

Photo: istockphoto

This document has been prepared with the assistance of Ecosystems LTD (part of the N2K Group EEIG) under contract to the European Commission (contract N° 070307/2008/513837/SER/B2).

It has also greatly benefitted from discussions with, and information supplied by, experts from Member States and key stakeholder groups, within the framework of an ad hoc group on wind energy and nature conservation.

# TABLE OF CONTENTS

**PURPOSE OF THIS GUIDANCE ..... p 5**

**1. WIND ENERGY DEVELOPMENTS IN THE EU ..... p 7**

1.1 Wind energy in Europe – 20 years of sustained growth ..... p 7
1.2 The EU Policy Framework for promoting renewable energy sources ..... p 8
1.3 Wind power development: predictions for 2020 and beyond ..... p 9
1.4 Wind energy development in different Member States ..... p 10
1.5 Offshore wind power ..... p 11
1.6 Balancing wind farm developments with broader societal needs ..... p 12

**2. THE EU'S POLICY FRAMEWORK AND LEGISLATION ON NATURE AND BIODIVERSITY ..... p 15**

2.1 Introduction ..... p 15
2.2 The EU's commitment to halting biodiversity loss ..... p 16
2.3 The Habitats and Birds Directives ..... p 17
2.3.1 Overall objectives of the Birds and Habitats Directives ..... p 17
2.3.2 A general system of strict protection for species ..... p 17
2.3.3 Habitat protection provisions: the Natura 2000 Network ..... p 19
2.3.4 Managing and conserving Natura 2000 sites ..... p 20
2.3.5 New developments affecting Natura 2000 sites ..... p 21
2.3.6 Improving the ecological coherence of the Natura 2000 Network ..... p 22
2.4 The EU nature Directives and wind farm development ..... p 22
2.5 The SEA Directive and the EIA Directive ..... p 23
2.5.1 The SEA Directive ..... p 23
2.5.2 Environmental Impact Assessment ..... p 23
2.5.3 The relationship between SEA, EIA and Appropriate Assessments ..... p 24
2.6 Relevant international nature and biodiversity Conventions and Agreements ..... p 26

**3. POTENTIAL IMPACTS OF WIND ENERGY DEVELOPMENTS ON NATURE AND WILDLIFE ..... p 29**

3.1 Positive and negative impacts: the need for a case by case approach ..... p 29
3.2 Identifying potential impacts during different phases of wind farm development. p 31
3.3 An overview of potential impacts ..... p 31
3.4 Potential impact of wind farms on selected species and habitats ..... p 32
3.4.1 Potential impact of wind farms on birds ..... p 33
3.4.2 Potential impact of wind farms on bats ..... p 37
3.4.3 Repowering of windfarms ..... p 39
3.4.4 Potential impacts of wind farms on marine mammals ..... p 39
3.4.5 Potential impacts of wind farms on rare and vulnerable habitat types ..... p 41
3.5 Distinguishing between significant and insignficant effects ..... p 42
3.6 Cumulative effects ..... p 45

**4. THE IMPORTANCE OF STRATEGIC PLANNING IN WIND FARM DEVELOPMENTS ..... p 47**

4.1 Strategic planning: a way to ensure more efficient, integrated decision-making p 47
4.2 Marine spatial planning ..... p 48
4.3 Determining suitable locations for wind farm developments ..... p 48
4.3.1 Europe's wind energy potential ..... p 49
4.3.2 Grid connections and road access ..... p 51
4.3.3 Wildlife sensitivity maps ..... p 52
4.3.4 Wildlife sensitivity maps in context of art 12 (Habitats Directive and Art (Birds Directive) ..... p 52
4.3.5 Natura 2000 maps ..... p 54
4.4 Examples of strategic wind farm planning in different Member States ..... p 54

**5. STEP BY STEP PROCEDURE FOR WIND FARM DEVELOPMENTS AFFECTING NATURA 2000 SITES ..... p 63**

5.1 Introduction ..... p 63
5.2 Article 6 of the Habitats Directive: a step-by-step approach ..... p 64
5.3 When is an Appropriate Assessment needed? ..... p 67
5.3.1 Gathering sufficient information ..... p 68
5.3.2 Determining if there is a 'significant effect' ..... p 69
5.3.3 Looking at potential cumulative effects ..... p 70
5.3.4 Recording the screening decision ..... p 70
5.4. Purpose of Appropriate Assessment ..... p 71
5.5 Steps for Appropriate Assessment of wind farm plans and projects ..... p 71
5.5.1 Setting the baseline and gathering further information ..... p 73
5.5.2 Assessing the impacts on the Natura 2000 site ..... p 75
5.5.3 Assessing whether there are no adverse effects on site integrity ..... p 82
5.5.4 Considering how to mitigate adverse effects on the Natura 2000 site ..... p 83
5.5.5 Recording the results of the Appropriate Assessment ..... p 86
5.6 The derogation procedure of Article 6.4 of the Habitats Directive ..... p 86
5.6.1 The scheme of Article 6.4 ..... p 86
5.6.2 The absence of alternative solutions ..... p 87
5.6.3 Imperative reasons of overriding public interest IROPI ..... p 88
5.6.4 The adoption of all necessary compensatory measures ..... p 90

**ANNEXES ..... p 92**

Annex I: Recommendations and resolutions adopted by international conventions on the potential impact of wind farms on wildlife and habitats ..... p 92
Annex II: Bird species considered to be particularly vulnerable to wind farms ..... p 93
Annex III: Bat behaviour in relation to wind farms ..... p 97
Annex IV: Aquatic species listed in of the 'Habitats Directive' and recommended to be especially considered with reference to adverse impact from wind farms ..... p 99
Annex V: Some examookes of proposed or confirmed impacts of wind farm developments on species and spefic groups of species ..... p100
Annex VI: European and national guidance documents of relevance for impact assessments with reference to wind farms ..... p104
References ..... p109

# PURPOSE OF THIS GUIDANCE

## Background

In December 2008, the EU adopted an ambitious and far-reaching 'climate change and energy' package which, amongst others, commits the EU-27 countries to increasing the share of renewable energy to 20% of Europe's total energy production by 2020. As a clean, renewable source of electricity, wind energy is destined to make a significant contribution to achieving this 20% target.

Wind energy in Europe has been growing rapidly over the last decade. In 2008, it accounted for around 4.8% of the EU's total electricity consumption. This share is expected to at least triple by 2020. It is clear therefore that the number of wind farm installations across the EU is likely to increase radically in the short to medium term. It will be important to ensure that such a rapid expansion is sustainable in all respects and is done in accordance with EU environmental legislation, including the Habitats and Birds Directives.

Evidence to date shows that, whereas, in general, wind energy does not represent a serious threat to wildlife, poorly sited or designed wind farms can pose a potential threat to vulnerable species and habitats, including those protected under the Habitats and Birds Directives.

## Purpose of this Guidance document

The purpose of this document is to provide guidance on how best to ensure that wind energy developments are compatible with the provisions of the Habitats and Birds Directives. It focusses in particular on the procedures to follow under Article 6 of the Habitats Directive when dealing with wind farm related plans and projects which could affect a Natura 2000 site and provides clarifications on certain key aspects of this approval process. The Habitats Directive does not, a priori, exclude wind farm developments in or adjacent to Natura 2000 sites. These need to be judged on a case by case basis.

As such, the document is designed principally for use by competent authorities and developers, as well as consultants, site managers and other practitioners who are involved in the planning, design, implementation or approval of wind farms plans or projects. It may also be of interest to other organisations such as NGOs and international bodies. During the course of its preparation, the document benefitted greatly from discussions with, and information supplied by, experts from Member States and key stakeholder groups, within the framework of an ad hoc group on wind energy and nature conservation.

## Structure and Contents

The document is made up of 5 main sections:

- **Chapter 1** provides an overview of wind energy development in Europe and of the policy framework at EU level.

- **Chapter 2** introduces the key provisions of the EU's biodiversity policy and the Habitats and Birds Directives. It also explores the relationship between Strategic Environmental Assessments under the SEA Directive, Environmental Impact Assessments under the EIA Directive and Appropriate Assessments under the Habitats Directive.

- **Chapter 3** reviews the potential impacts wind energy developments might have on various species such as birds, bats, marine mammals, and habitat types, such as blanket bogs. The information presented here is derived from an extensive review of existing scientific literature and other recognised sources of information.

- **Chapter 4** examines the benefits of strategic planning for wind farm developments as a means to achieving a more efficient and integrated decision-making process that helps to avoid or minimise conflicts later on at the project level and, in particular, to encourage a appropriate siting of wind farms in areas of potentially low or no conflicts for wildlife. Various good practice examples are given of how this has been achieved in different parts of the EU.

- **Chapter 5** focusses specifically on the provisions of Article 6 of the Habitats Directive and offers a step-by-step guide to the procedures to follow when assessing wind farm plans or projects that might affect Natura 2000 sites in particular. It provides advice and guidance on how to carry out an Appropriate Assessment and how to ensure that there is a sufficiently sound scientific information base upon which to determine whether or not the project is likely to have an adverse effect on the integrity of a Natura 2000 site.

### Limitations of the document

This guidance document is intended to be bound by, and faithful to, the text of the Birds and Habitats Directives and to the wider principles underpinning EU policy on the environment and renewable energies. It is not legislative in character, it does not make new rules but rather provides further guidance on the application of those that already exist. As such, it reflects only the views of the Commission services and is not of a legally binding nature.

It rests with the EU Court of Justice to provide definitive interpretation of a Directive. Wherever relevant, existing case law has been included when clear positions have already been taken by the Court.

The document also does not replace the Commission's existing general interpretative and methodological guidance documents on the provisions of Article 6 of the Habitats Directive[1]. Instead, it seeks to clarify specific aspects of these provisions and place them in the context of wind farm development in particular. The present guide is therefore best read in conjunction with the existing general guidance and the two Directives.

Finally, the guidance recognises that the two nature Directives are enshrined in the principle of subsidiarity and it is for Member States to determine the procedural requirements arising from the Directives. The good practice procedures and proposed methodologies described in this document are not prescriptive in their intent, rather they aim to offer useful advice, ideas and suggestions based on an extensive review of existing experiences and good practices across the EU and beyond. For further reading, references to various national guidance documents and other sources of information are provided in the annexes.

[1] "Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". "Assessments of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC". "Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC".
http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

# 1. WIND ENERGY DEVELOPMENTS IN THE EU

- *In December 2008, the EU adopted an ambitious and far-reaching 'climate change and energy' package which, inter alia, commits the EU-27 countries to increasing the share of renewable energy to 20% of Europe's total energy production by 2020;*
- *As a clean, renewable source of electricity, wind energy is destined to make a significant contribution to achieving this 20% target. It will also help to substantially reduce greenhouse gas and air pollutant emissions, as well as freshwater consumption associated with conventional power generation in the EU;*
- *Wind energy has grown rapidly over the last decade. In 2009, it accounted for some 4.8% of the EU's total electricity consumption. This is expected to at least triple by 2020. This could imply an annual expansion in wind farms, both onshore and offshore, of more than 10 GW per year until 2020;*
- *A minority of Member States are currently responsible for the bulk of the EU's wind power. Even accepting the variations in wind resources, the availability of other renewable energy and different national priorities, wind energy is likely to grow siginifcantly in most if not all countries;*
- *The latest EU commitments towards renewable energy create a favourable legislative environment for wind power development whilst ensuring that it is done in accordance with EU environmental legislation.*

## 1.1 Wind energy in Europe – 20 years of sustained growth

Thanks to recent technological advances, the wind energy sector in Europe has undergone a rapid and sustained growth over the last 20 years. In 2009, some 4.8% of the EU-27's total electricity consumption was provided by wind energy.

An important driver behind this fast growth is the need for Europe to have a secure supply of energy that is not reliant on external sources of gas and oil. A second major driver is the significant contribution wind energy can make in reducing greenhouse gas emissions. As a clean, renewable resource, wind energy is already playing - and will continue to play - an important role in mitigating against climate change, while at the same time bringing benefits in terms of reductions in air pollutant emissions and cooling water consumption associated with many conventional power generation technologies.

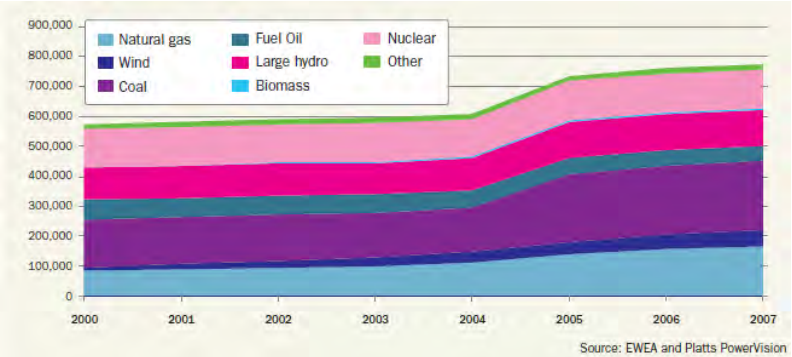



*Figure 1: Installed power capacity EU 2000-2007 (MW) - EWEA 'Pure Power', March 2008*

### 1.2 The EU Policy Framework for promoting renewable energy sources

Climate change and renewable energy are both high on the EU political agenda. The EU's renewable energy policy goes back to 1997 with the adoption of the Commission's White Paper entitled: '*Energy for the future: renewable sources of energy*'[2]. It recommended that the share of renewable energy in gross energy consumption be doubled to 12% by 2010. This was translated into law in 2001 through the adoption of Directive 2001/77/EC on the '*promotion of electricity from renewable energy sources*'[3] and Directive 2003/30/EC "*on the promotion of the use of biofuels or other renewable fuels for transport*"[4]. Directive 2003/87/EC established a trading scheme for greenhouse gas emission allowance.

In January 2008 the Commission proposed an ambitious and far reaching '*Climate Change and Energy Package*' that was agreed politically by the EU Heads of State in December 2008[5].

The package commits the EU Member States to the following targets:

- Cutting greenhouse gas emissions by at least 20% by 2020 compared to 1990 levels (rising to 30% if other developed countries make comparable efforts in the framework of a new global climate change agreement)[6];
- Increasing the use of renewable energy sources to 20% of Europe's gross final energy consumption by 2020, including a specific target of 10% renewables in transport;
- Cutting energy consumption by 20% of projected 2020 levels by improving energy efficiency[7].

As a follow up, in April 2009, Directive 2009/28/EC[8] *on the promotion of the use of energy from renewable sources* (the 'RES' Directive) was adopted which set mandatory national targets for each Member State to ensure the delivery of the overall EU target of 20% energy from renewable energy sources (see Table 1).

Under the RES Directive, each Member State is required to draw up a clear action plan to demonstrate how they intend to achieve their renewable energy targets. These *National Renewable Energy Action Plans* (NREAPs), to be adopted by 30 June 2010, contain details about national sectoral targets and support schemes, amongst others.

They should also provide an assessment of the role that different technologies will play in reaching the targets for that country and outline the measures that will be taken to increase the use of renewable energy e.g. by reducing administrative barriers and improving access conditions to electricity grids.

---

[2] COM (1997) 599 final
[3] OJ L 283; 27.10.2001, p 33
[4] OJ L 123; 17.05.2003, p.42
[5] http://ec.europa.eu/environment/climat/climate_action.htm
[6] Includes a revision of the Emissions Trading System
[7] In contrast to the other targets, this target is as yet only political, i.e. not legally binding.
[8] OJ L 140; 5.6.2009, p 16

*Table 1: Annex I of the RES Directive 2009/28/EC National overall share and targets for the share of energy from renewable sources in gross financial consumption of energy in 2020*

| | Share of energy from renewable sources in gross final consumption of energy, **2005** | Target for share of energy from renewable sources in gross final consumption of energy, **2020** |
|---|---|---|
| Belgium | 2,2 % | 13 % |
| Bulgaria | 9,4 % | 16 % |
| The Czech Republic | 6,1 % | 13 % |
| Denmark | 17,0 % | 30 % |
| Germany | 5,8 % | 18 % |
| Estonia | 18,0 % | 25 % |
| Ireland | 3,1 % | 16 % |
| Greece | 6,9 % | 18 % |
| Spain | 8,7 % | 20 % |
| France | 10,3 % | 23 % |
| Italy | 5,2 % | 17% |
| Cyprus | 2,9 % | 13% |
| Latvia | 32,6 % | 40 % |
| Lithuania | 15,0 % | 23 % |
| Luxembourg | 0,9 % | 11% |
| Hungary | 4,3 % | 13 % |
| Malta | 0,0 % | 10 % |
| The Netherlands | 2,4 % | 14 % |
| Austria | 23,3 % | 34 % |
| Poland | 7,2 % | 15 % |
| Portugal | 20,5 % | 31 % |
| Romania | 17,8 % | 24 % |
| Slovenia | 16,0 % | 25 % |
| The Slovak Republic | 6,7 % | 14 % |
| Finland | 28,5 % | 38 % |
| Sweden | 39,8 % | 49 % |
| United Kingdom | 1 3 % | 15 % |

***Renewable energy sources***

*Renewable energy sources come in a variety of forms: wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, biowaste and biogasses. They are also used in a variety of ways: to produce electricity, heating and cooling or fuel for transport.*

*Wind power is used specifically to generate electricity. Electricity is just one of several types of energy used in the EU. The 20% renewable energy target covers all forms of energy.*

### 1.3 Wind power development: predictions for 2020 and beyond

It is clear that the new EU targets will require a significant change in renewable energy development over a relatively short period of time.

According to the Commission's Renewable Energies Roadmap, 34% of all electricity consumption in 2020 is expected to come from renewable sources by 2020, and around 12% could be generated by wind power alone. This would entail a threefold increase in the current share that wind power has in the EU's electricity consumption (some 4.8% in 2008).

One of the reasons why wind power is expanding so rapidly is that wind power technology has evolved significantly in the past 20 years. Turbine size onshore has increased from less than 50 KW in the 1980s to more than 3 MW today. Rotor diameter has also increased from an average of 15m to 100m or more.

Nowadays, 3 bladed upwind, variable speed, pitch regulated turbines generating between 750 -3000 KW are predominant, representing around 90% of the EU market[9]. The cost of installing wind turbines has also dropped substantially over the years[10] which has not only made wind farm developments more affordable but also more attractive to investors.

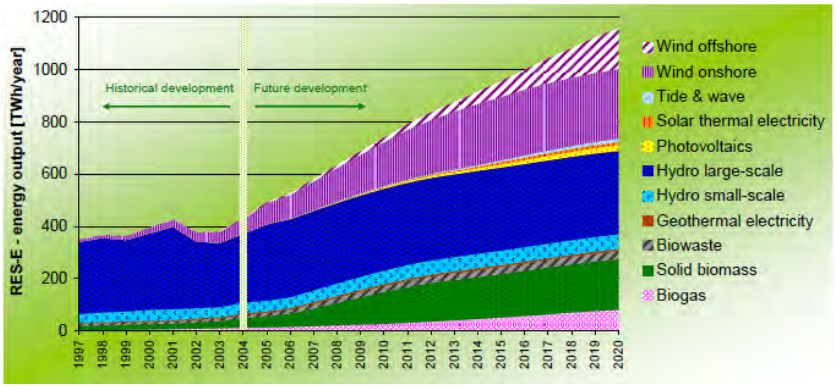



*Figure 2: Renewables growth: electricity projections by 2020*[11]

Overall, wind power capacity in the EU has increased more than a hundred fold in the past 12 years from 4,753 MW in 1997 to 74,767 MW in 2009 (EWEA). In 2009, over 39% of all new electricity generating capacity added to the European grid came from wind power.

In its 2nd Strategic Energy Review[12], the Commission estimates that wind power will expand even further in the short to medium term, and, according to some of the scenarios used for the impact assessment of the climate-energy package, the total capacity could exceed 161 GW by 2020. EWEA predictions are even higher, with a target of 230 GW by 2020, including 40 GW offshore.

### 1.4 Wind energy development in different Member States

Europe is now the world leader in wind energy technology and development. Eleven European countries had more than 1000 MW of wind power installed on their territory by the end of 2008 (Germany, Spain, Denmark, Italy, France, Portugal, Netherlands, Sweden, Ireland, Greece and UK) and five of them (Denmark, Spain, Portugal, Ireland, Germany) have more than 5% of their total electricity demand covered by wind power.

This does not mean that wind energy will play an equally important role in all countries. Wind resources differ significantly from country to country as does the availability of alternative renewable energy sources such as biomass or geothermal energy. The capability of current transmission networks and other generation plants to integrate large amounts of wind energy also varies and depends to some extent on historical developments. All these and other factors will be important in the strategic planning of wind farm development in the EU and in determining the contribution that wind energy will make in different Member States to reaching their targets under the RES Directive.

---

[9] Small and very small turbines are still also used to meet specific needs, for instance as a traditional part of rural electrification eg to power isolated homes, boats and telecommunication facilities. Micro generation may become more popular in urban areas but for the moment they represent only a small share the market.

[10] The average wind turbine in Europe costs 1.23 mil/MW onshore and 2-2.2 mi/MW offshore.

[11] Commission Communication COM(2006) 848 final, 10.1.2007 'Renewable Energy Road Map'

[12] COM (2008) 738 final, 13.11.2008

## 1.5 Offshore wind power

In contrast to onshore wind power, offshore wind power is still in its infancy and only accounts for about 2% of the total installed wind power capacity in Europe. Most of the development so far has been in the North Sea and in the Baltic Sea, mostly in shallow waters less than 30 m deep and less than 40 km from the shore.

Compared to onshore wind farms, offshore installations are more complex and costly to put in place. The technology is subject to greater requirements given the harsher and less accessible operational environment. There are also still significant bottlenecks to overcome in the supply chain (lack of installation vessels or harbour facilities, lack of skilled work force) and in gaining access to the electricity grid.

Nevertheless, considering that the average turbine size is expected to be significantly bigger offshore (ca 5 MW), the potential for offshore wind energy to grow as technology evolves is considerable.

In its Communication of November 2008[13], entitled '*Offshore wind energy: action needed to deliver on the Energy Policy Objectives for 2020 and beyond*', the Commission estimates the potential for wind power offshore by 2020 is likely to be some 30-40 times the capacity installed at that time (some 1,1 GW by end of 2007, which had grown to 2.06 by the end of 2009).

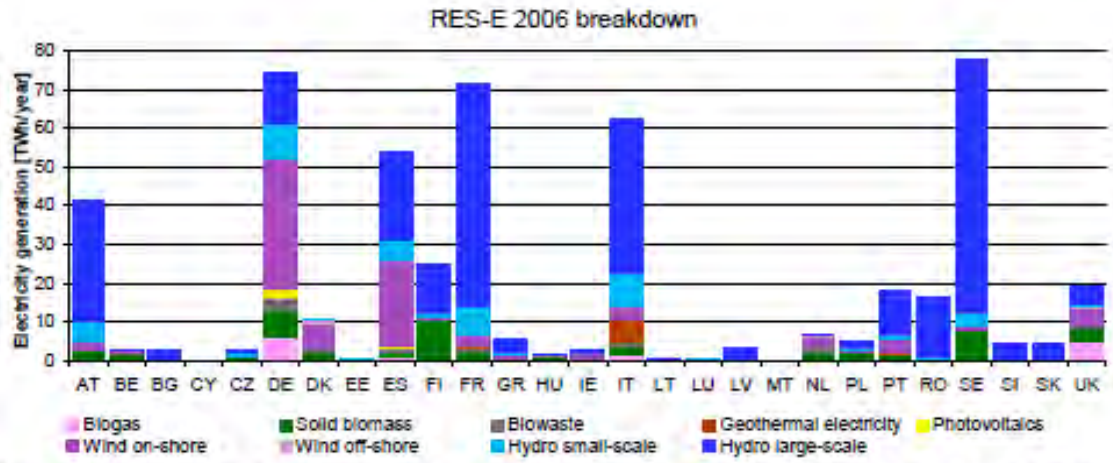



*Figure 3: promotion and growth of renewable energy sources and systems across EU[14].*

[13] COM (2008) 768 final

[14] From Commission's Renewable Energy progress report, COM(2009) 192 final

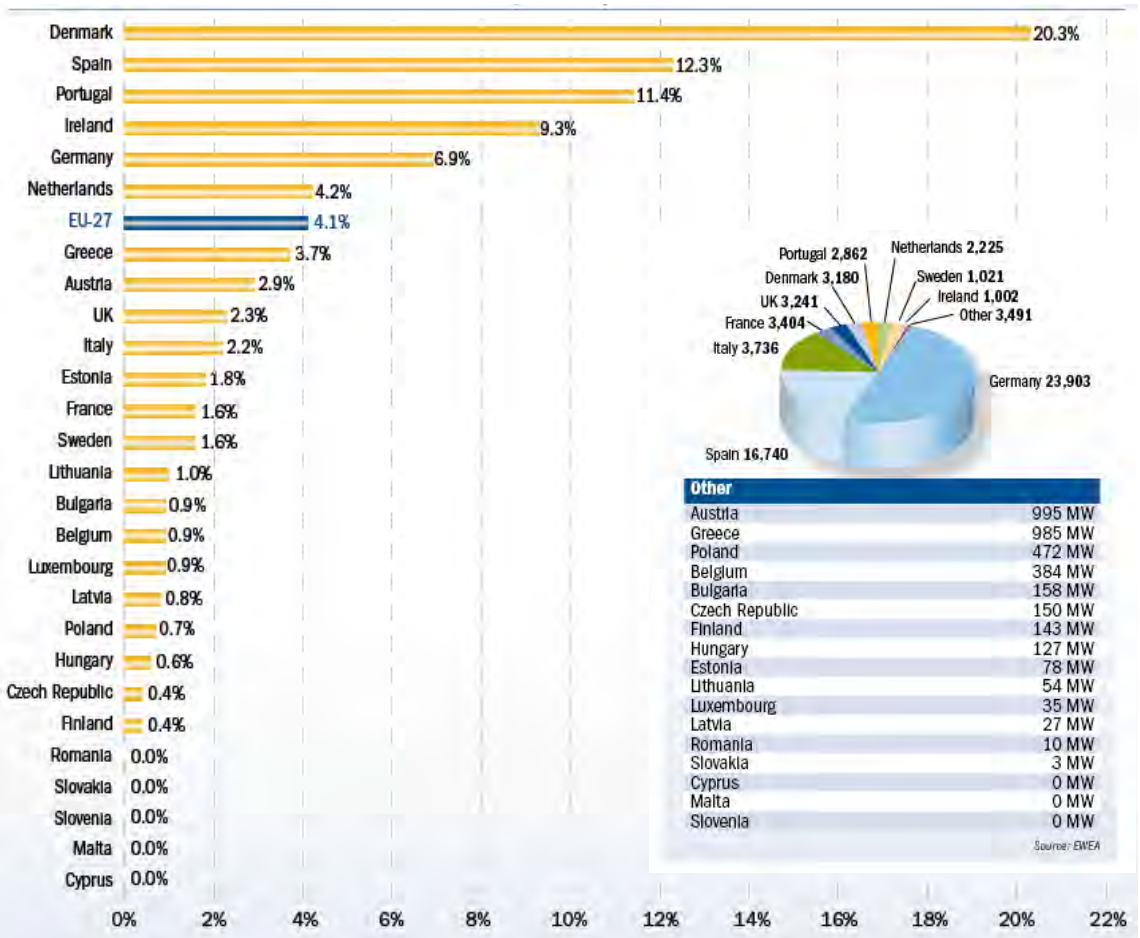



*Figure 4 (above): wind power's share of electricity demand (2008)*
*Figure 5 (right): End 2008 Member State share of total capacity of wind power (EWEA)*[15]

### 1.6 Balancing wind farm developments with broader societal needs

The rapid expansion of wind farm installations in the coming years will bring many benefits to society, not least in reducing greenhouse gases. In addition to the reduction of greenhouse gases, wind power helps economies to reduce energy dependency and their exposure to volatile or high fuel and carbon costs. Wind power is also a source of employment creation, technology development, social cohesion and exports.

But, like all developments, this expansion needs to be in balance with other broader social, economic and environmental concerns to ensure it grows in a sustainable manner and is publicly acceptable.

There are still a number of hurdles to overcome in order for wind energy to play a role that is commensurate to its potential. Amongst others, this means ensuring better access to the electricity grid, removing administrative barriers to the use of renewable energy over other

[15] EWEA Pure power : wind energy targets for 2020 and 2030, p26 and 23 (Dec 2009) http://www.ewea.org/fileadmin/ewea_documents/documents/publications/reports/Pure_Power_Full_Report.pdf

more traditional forms of energy, and improving the technology, especially for offshore developments.

From a social perspective, apprehensions over wind farm developments vary significantly and will need to be addressed on a case by case basis to ensure that local interests are properly considered. Typical concerns include the potential level of noise generated by wind farms, visual impacts, issues of safety, effects on the landscape, archeology, heritage, as well as possible interference with aviation or shipping navigation etc…

There is also a concern over the potential impact of poorly sited wind farms can have upon nature and wildlife which, in view of the scale of development foreseen, cannot be ignored. The EU's environmental legislation provides a common legal framework applicable across all Member States to address this concern. The mechanisms established through the EU's existing environmental legislation can ensure that wind energy is developed in a way that is both sustainable and minimises its impact on the natural environment.

These procedures and the potential impacts of wind farms on nature and wildlife are examined further in this guidance document. But it is important to bear in mind that potential conflicts with nature and wildlife are just one of a range of possible constraints that a wind farm developer may face depending on the local context. A clear distinction must therefore be made between these different constraints so that each can be analysed in its proper context and not mistakenly used as a reason for objecting to developments on other grounds.

This requires a clear understanding of the type of potential impacts of wind farms on nature and wildlife as well as the legal obligations that must be respected when planning and executing wind farm developments.

# 2. THE EU'S POLICY FRAMEWORK AND LEGISLATION FOR NATURE AND BIODIVERSITY

- *Like climate change and renewable energy, biodiversity conservation is a high political priority. The EU is committed to halting the decline in biodiversity in the EU and this commitment is now firmly embedded in all aspects of EU policy.*
- *The EU 'Habitats' and 'Birds' Directives are the cornerstones of the EU's biodiversity policy. They enable all Member States to work together to protect and ensure the survival of Europe's most endangered and vulnerable species and habitat types.*
- *Central to the two Directives is the creation of the Natura 2000 Network, an ecological network of sites spanning 27 EU countries. Nearly 26,000 sites are included in the Network so far, covering almost 18% of the EU's land area. There are additionally significant marine areas but this component of the Network is not yet complete.*
- *Wind farms likely to have an adverse effect on a Natura 2000 site must be subject to an Appropriate Assessment in light of the site's conservation objectives. Such developments may proceed under certain conditions where the procedural safeguards foreseen by the two nature Directives are respected.*
- *The two Directives also require that wind energy developments do not cause any significant damage or disturbance to species of Community interest (i.e. those covered by the Directives) or their key habitats in the broader countryside.*
- *New wind farm plans and projects may also be subject to the provisions of the SEA and the EIA Directives but these are distinct and different from the Appropriate Assessment undertaken under the Habitats Directive.*

## 2.1 Introduction

It is clear that the number of wind farm installations in the EU is likely to grow at a very significant rate in the short to medium term in some parts of Europe. Given that wind power is universally recognised as a source of clean, renewable energy and is, as such, also a major contributor in climate change mitigation, it will be important to ensure that its expansion is sustainable in all respects and is achieved without unnecessary damage to the natural environment and Europe's natural heritage.

Like any other industrial activities entailing the use of land or sea, wind energy development inevitably has an ecological footprint that still needs to be considered and addressed where relevant.

This chapter outlines the EU's key environmental laws and international commitments that need to be respected when developing wind farms in the EU. Chapter 5 provides further detailed guidance as regards developments affecting Natura 2000 sites in particular.

## 2.2 The EU's commitment to halting biodiversity loss

Like climate change and renewable energy, biodiversity conservation is high on the EU political agenda. It is identified as one of the key operational objectives of the Sustainable Development Strategy (SDS)[16] and the Lisbon partnership for growth and jobs.

The 6th Environment Action Programme (6th EAP)[17] sets out the framework for environmental policy-making in the EU for the period 2002-2012 and has 'nature and biodiversity' as one of four priority areas for action[18]. The detailed measures be undertaken are laid down in the European Commission's EU Biodiversity Action Plan adopted in 2006[19].

The EU Action Plan represents an important new approach for EU biodiversity policy as it is the first time that all the relevant economic sectors and policy areas are addressed in a single strategy document and apportioned a share of the responsibility in its implementation. It recognises that change will only happen if there is a concerted effort from all economic sectors to help deliver the biodiversity targets.

The EU Plan also stresses the important ecosystem services that nature provides, and upon which our economy and social wellbeing depends. Healthy ecosystems help purify the air and water, and regulate the climate. They provide basic goods such as food, fibre and wood. As such, they will have a major role to play in mitigating the effect of climate change in years to come.

The Commission plans to present a new EU biodiversity strategy by the end of 2010 on the basis of the Communication on an EU vision and target for biodiversity beyond 2010[20] and the EU Council Conclusions on biodiversity post-2010 adopted on 15 March 2010. This strategy should set a limited number of measurable sub-targets for different ecosystems, driving forces, pressures and responses, and ensure their integration into relevant internal and external EU sectoral policies. An innovative aspect of the 2020 biodiversity strategy will be the establishment of a biodiversity baseline that will enable assessment of progress towards reaching the target. The EU strategy[21] will be developed with a view to the global post-2010 biodiversity framework that is to be adopted under the United Nations Convention on Biological Diversity in October 2010.

**Biodiversity and climate change**

*The Intergovernmental Panel on Climate Change (IPCC) predicts that average surface temperatures across the globe will rise by 2–6.4°C by 2100 compared to pre-industrial levels. The impact on biodiversity and ecosystems is hard to estimate but is expected to be very considerable. Already studies show that many species are experiencing difficulties in adapting to the changing climate and that this is exposing them to an even greater risk of extinction.*

*Climate change also puts at risk the valuable ecosystems upon which society depends for important goods and services, such as flood prevention or carbon storage. Healthy ecosystems are an essential component of any climate mitigation strategy but, like wildlife, they are under significant pressure from habitat loss and degradation which is largely caused by urban sprawl, intensifying land uses and inappropriate development. The ability of ecosystems to assist us in mitigating against climate change will be determined by how effectively they are protected and managed.*

[16] COM (2001) 264 final; Renewed EU Sustainable Development Strategy adopted June 2006.
[17] Decision No 1600/2002/EC, OJ L 242, 10.9.2002,
[18] Others are climate change, environment and health, management of natural resources and waste
[19] COM/2006/0216 final. http://ec.europa.eu/environment/nature/biodiversity/comm2006/index_en.htm
[20] (COM(2010) 4 final, 19.1.2010)
[21] Further developments can be followed at http://ec.europa.eu/environment/nature/biodiversity/policy/index_en.htm

## 2.3 The Habitats and Birds Directives

The Birds and Habitats Directives are the cornerstones of the EU's biodiversity policy. They enable all 27 EU Member States to work together, within a common legislative framework, to conserve Europe's most valuable species and habitats across their entire natural range within the EU, irrespective of political or administrative boundaries.

The Directives have two main objectives:

- they protect species in their own right across the EU (through species protection provisions);
- they conserve the core areas for certain rare and endangered species (through habitat protection provisions leading to the establishment of the Natura 2000 Network)

In the case of the latter, it is important to note that the Natura 2000 Network is not a system of strict nature reserves where all human activities are excluded. Instead, the two Directives provide a common legislative framework, applicable in all EU countries, which ensures that human activities – *inter alia* wind energy activities – are undertaken in a way that does not adversely affect the integrity of Natura 2000 sites.

Article 6 of the Habitats Directive lays down procedural safeguards to be followed in the case of new developments. Its provisions are explained in greater detail in subsequent chapters. But first it is useful to understand the general purpose of the two Directives.

### *2.3.1 Overall objectives of the Birds and Habitats Directives*

The overall objective of the Birds Directive[22] is to maintain and restore the populations of naturally occurring wild bird species present in the EU (ca 500 species) at a level which will ensure their survival over the long term. The Habitats Directive[23] has similar objectives to the Birds Directive but covers species other than birds as well as habitat types. Its aim is to ensure the conservation of a further 1000 endangered wild animals and plants as well as 230 rare and threatened habitat types which are in danger of disappearing.

It should be noted that the Habitats Directive does not cover *every* species of plant and animal in Europe (ie not all of the EU's biodiversity). Instead, it focuses on a sub-set of around 1500 species - often referred to as species of Community interest (or species of European importance) - which are so rare and threatened that they need protection in order to ensure their long-term survival within the EU.

### *2.3.2 A general system of strict protection for species*

As regards species protection, both Directives require that Member States establish a general system of protection for all wild bird species in the EU and for species listed in Annex IV of the Habitats Directive throughout their natural range within the EU. These provisions apply both inside and outsite protected sites.

---

[22] Directive 2009/147/EC of the European Parliament and of the Council (codified version of Council Directive 79/409/EEC on the conservation of wild birds, as amended) – see http://ec.europa.eu/environment/nature/legislation/index_en.htm

[23] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, consolidated version reference 01992L0043 of 01.01.2007 - see http://ec.europa.eu/environment/nature/legislation/index_en.htm

The exact terms are laid down in article 5 of the Birds Directive and Article 12 (for animals) and Article 13 (for plants) of the Habitats Directive.

As some protected species are potentially vulnerable to wind farms, these provisions may also need to be taken into account by developers and planners when considering developments outside Natura 2000. This could apply for instance if a proposed development is situated along a major migration route as it could cause significant disturbance or damage to protected birds, bats or other species during their migration.

Whatever measures are applied to meet the strict protection provisions of the two Directives, they must be proportional to the assessed impact on the conservation status of the species concerned.

**Article 5 of Birds Directive**

*Member States should take the requisite measures to establish a general system of protection for all wild bird species throughout their natural range within the EU. In particular they should prohibit the following:*

- *deliberate killing or capture by any method;*
- *deliberate destruction of, or damage to, their nests and eggs or removal of their nests;*
- *taking their eggs in the wild and keeping of eggs;*
- *deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as this would have a significant negative effect on the birds;*
- *keeping the birds in captivity and their sale.*

**Article 12 and 13 Habitats Directive**

*Member States should take the requisite measures to protect the species listed in Annex IV throughout its natural range within Europe.*

*In the case of **protected animals** this means prohibiting the:*

- *deliberate killing or capture by any method;*
- *deliberate disturbance, particularly during breeding, rearing, hibernation and migration;*
- *deliberate destruction or taking of eggs in the wild;*
- *deterioration or destruction of breeding sites or resting places;*
- *the keeping, sale and transport of specimens the from the wild.*

*In the case of **protected plants** this mean prohibiting:*

- *the deliberate picking, collecting, cutting, uprooting or destruction of such plants in the wild;*
- *the keeping, transport of sale of such species taken from the wild.*

Derogations to these species protection provisions are allowed in some circumstances (e.g. to prevent serious damage to crops, livestock, forests, fisheries and water) provided that there is no other satisfactory solution and the consequences of these derogations are not incompatible with the overall aims of the Directives.

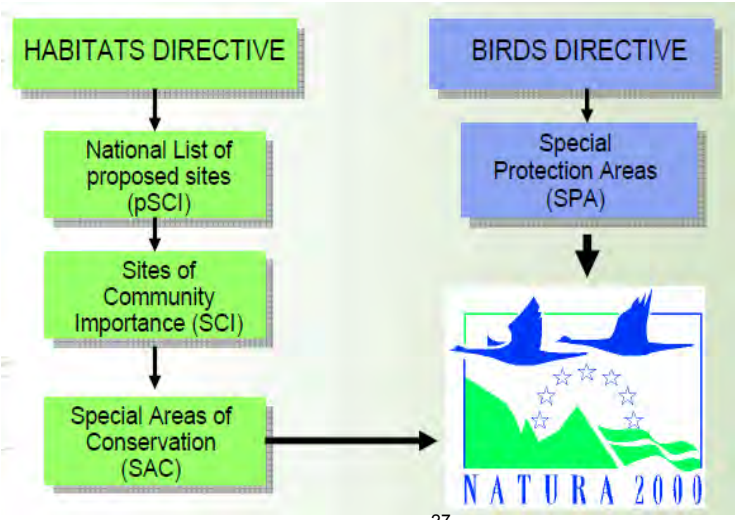
The conditions for applying derogations are set out in Article 9 of the Birds Directive and Article 16 of the Habitats Directive. With reference to wind farms, it is primarily reasons related to 'the interests of public health and public safety, or for 'other imperative reasons of public interest' (ref. Article 16(1c)) that might apply. The Commission has produced guidelines on the strict species protection provisions for animals protected under the Habitats Directive[24].

[24] Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

*2.3.3 Habitat protection provisions: the Natura 2000 Network:*

The two Nature Directives also require the protection of key sites for certain species and habitat types listed in the respective annexes. Together, these sites form part of the Natura 2000 Network which spans 27 EU countries.

- **Under the Habitats Directive**, core sites need to be protected for the habitat types listed in annex I and species in annex II[25]. The first step is for Member States to propose their national list of possible Sites of Community Importance (SCIs). It is important to note that the selection of SCIs must be done on scientific grounds only. Member States may not take economic aspects into account at this stage.[26]




  These proposed SCIs are then examined at a biogeographical level[27] to ensure that they offer sufficient coverage for the protected species and habitat types concerned before they are approved by the Commission. Member States then have six years to designate the approved SCIs as a Special Area of Conservation (SAC) by which time they must also establish the necessary conservation measures to maintain and restore the habitats and species at a favourable conservation status.

- **Under the Birds Directive**, core sites need to be classified for ca 190 species of birds listed in Annex I of the Directive. Member States must also classify sites for other regularly occurring migratory bird species not listed in Annex I, bearing in mind the need to protect their breeding, moulting and wintering areas and staging posts along their migration routes, eg wetlands of international importance. These sites are called Special Protection Areas (SPAs) and are included directly into the European Natura 2000 Network[28].

By December 2009, about 26,000 SCIs and SPAs were included in the Natura 2000 Network[29]. Together, they cover around 18% of the land area in the EU-27 with signficant additional marine areas[30]. At this stage, there were 1391 SCIs and 619 SPAs in marine waters but further sites will need to be protected to complete the marine component of the network. This should be achieved by 2012.

[25] There is considerable overlap between the species listed in annex II and those listed in annex IV but not all Annex IV species require specific site protection under Natura 2000 so they are not all listed in annex II.
[26] ECJ Ruling C-371/98, First Corporate Shipping LTD.
[27] The EU has 9 biogeographical regions, each with its own characteristic blend of vegetation, climate, topography and geology. Working at this level makes it easier to check species and habitat conservation trends under similar natural conditions, irrespective of national boundaries.
[28] In contrast to the Habitats Directive, there is no intermediary step of selecting sites according to biogeographical region in the case of SPAs. These are included directly into the Natura 2000 Network
[29] European Commission, http://ec.europa.eu/environment/nature/natura2000/barometer/index_en.htm
[30] There is sometimes considerable overlap between SPAs and SCIs so the figures are not cumulative

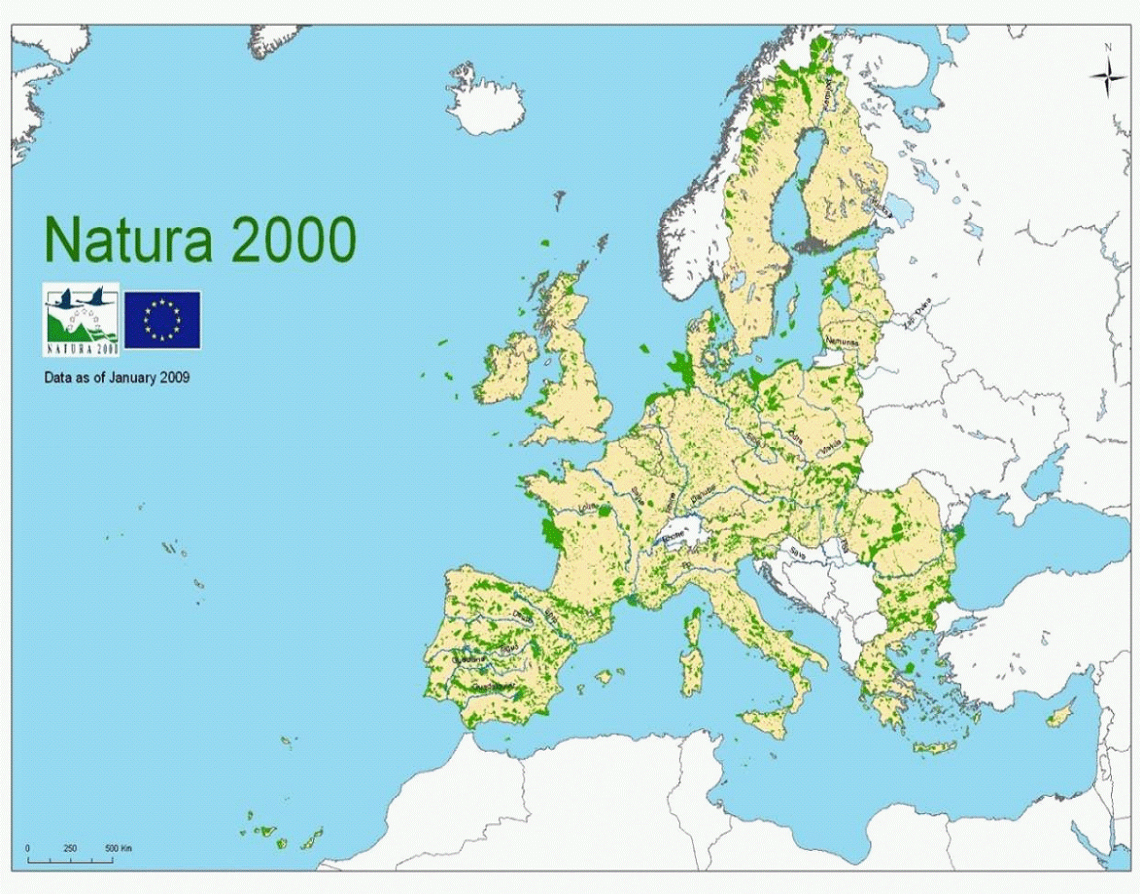



*Figure 6: the European Natura 2000 Network across EU-27, status January 2009*

### *2.3.4 Managing and conserving Natura 2000 sites*

Within Natura 2000 sites, Member States must:

- take appropriate conservation measures to maintain and restore the habitats and species *for which the site has been designated* to a favourable conservation status (Article 6.1).
- avoid damaging activities that could significantly disturb these species or deteriorate the habitats of the protected species or habitat types (Article 6.2);

The competent authorities in each country should identify the conservation measures for Natura 2000 sites at the latest 6 years after the adoption of the site as Site of Community Interest (or in the case of SPA immediately upon classification). These conservation measures are to be based on the status and ecological requirements of the habitats and species for which the site is designated Natura 2000. The ultimate objective is to ensure that the species and habitat types are maintained or restored to a favourable conservation status across their natural range.[31]

[31] The concept of Favourable Conservation Status is not mentioned in the Birds Directive but there are analogous requirements, i.e. all SPAs must still be subject to special habitat conservation measures in order to ensure the survival and reproduction of the Annex I birds in their area of distribution.

***What does favourable conservation status mean in practice?***

*The ultimate objective of the Habitats Directive is to ensure that the species and habitat types covered reach what is called a 'favourable conservation status' and that their long-term survival is deemed secure across their entire natural range within Europe.*

*In the case of the species covered by the Directive (ref Article 1(i)) this means that:*
- *populations are maintaining themselves over the long term and are no longer showing signs of continuing decline;*
- *their natural range is not being reduced;*
- *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.*

*In the case of a habitat type, a favourable conservation status (ref Article 1(e)) is achieved when:*
- *its natural range and the areas it covers within that range are stable or increasing; and*
- *the specific structure and function which are necessary for its long-term maintenance are present and are likely to continue to exist in the foreseeable future;*
- *the conservation status of typical species that live in these habitat types is favourable as well.*

To help decide which conservation measures should be undertaken on individual Natura 2000 sites, the Habitats Directive encourages the development of management plans which are specifically designed for the site in question or integrated into other development plans.

Management plans, where they exist, can be a useful source of information for developers since:
- they record the conservation needs of the habitats and species for which the site has been designated so that it is clear to all what is being conserved and why;
- they analyse the socio-economic and cultural context of the area and the interactions between different land-uses and the species and habitats present;
- they spell out the conservation objectives for the site;
- they identify practical management solutions that can help integrate conservation activities with other land-use practices.

### *2.3.5 New developments affecting Natura 2000 sites*

Whereas Article 6(1) and (2) of the Habitats Directive concern the day-to-day management and conservation of Natura 2000 sites, Articles 6(3) and 6(4) lay down the procedure to be followed when planning new developments that might affect a Natura 2000 site[32].

This stepwise procedure is examined in detail in chapter 5 but, in essence, it requires that a plan or project having a likely significant negative effect on a Natura 2000 site undergoes an 'Appropriate Assessment' to study these effects in detail and to see how they relate to the site's conservation objectives.

Depending on the findings of the Appropriate Assessment, the competent authority agrees to the plan or project as it stands if it has ascertained that it will not adversely affect the integrity of the site concerned.

[32] This applies to SCIs, SACs and SPAs and concerns not just plans or projects inside a Natura 2000 sites but also those that are outside but could have a significant effect on the conservation of species and habitats within the site. For instance a dam constructed upstream on a river that could alter or stop the regular flooding of an important wetland for birds within an SPA further downstream.

Or if it has ascertained that there will be an adverse effect it may require one or more of the following, depending on the degree of impact:

- specific mitigation measures are introduced to remove the negative effects;
- certain conditions are respected during the construction, operational or decommissioning phases of the wind farm, again to remove the likelihood of negative effects or to reduce them to an insignificant level where they no longer affect the integrity of the site;
- feasible alternatives are explored instead.

In exceptional circumstances, a plan or project may still be allowed to go ahead under certain conditions, in spite of being assessed as having negative effects on the site provided the procedural safeguards laid down in the Habitats Directive are followed. This may be possible, for instance, if the plan or project is considered to be of overriding public interest and there are no alternatives available. In such cases, compensation measures will need to be implemented to ensure that the overall coherence of Natura 2000 is protected (see Chapter 5).

#### *2.3.6 Improving the ecological coherence of the Natura 2000 Network*

In addition to designating core sites under the Natura 2000 Network, Article 10 of the Habitats Directive also requires Member States to endeavour to improve the ecological coherence of the network across the broader countryside by maintaining and, where appropriate, developing features of the landscape which are of major importance for wild fauna and flora, such as wildlife corridors or stepping stones, which can be used during migration and dispersal[33].

### 2.4 The EU nature Directives and wind farm development

As regards wind farm developments, there are two aspects of the EU Directives to bear in mind in particular, depending on the location of the development:

- *In and around Natura 2000 sites:* any wind farm development that is likely to affect one or more Natura 2000 sites has to undergo a step-by-step Appropriate Assessment procedure and, where necessary, apply the relevant safeguards for the species and habitat types of Community interest (explained in detail in chapter 5)

- *Anywhere within the EU*: the two Directives also require that Member States protect species of Community interest *throughout their natural range within the EU* (cf. Article 5 of Birds Directive and Article 12 of Habitats Directive – see above). Thus any wind farm development must also take account of its potential impacts on species of Community interest (covered by the two Directives) *outside* Natura 2000 sites as well.

[33] Kettunen et al. (2007) for guidance on the maintenance of landscape features in consistency with Article 10 of the Habitats Directive and Article 3 of the Birds Directive; available via http://ec.europa.eu/environment/nature/ecosystems/docs/adaptation_fragmentation_guidelines.pdf

## 2.5 The SEA Directive and the EIA Directive

Two other key pieces of EU environmental legislation are directly relevant to wind farm developments:

- Directive 2001/42/EC on the evaluation of the effects of certain plans and programmes on the environment (commonly referred to as 'SEA' Directive)[34]
- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, amended in 1997 (97/11/EC) and 2003 (2003/35/EC) – commonly referred to as the 'EIA' Directive[35].

### *2.5.1 The SEA Directive*

The purpose of the SEA Directive 2001/42/EC is to ensure that the environmental consequences of ***certain plans and programmes*** are identified, assessed and taken into account during their preparation and before their adoption.

In this respect, Member States are required to:

- prepare an environment report which identifies and assesses the likely significant environmental effects of the plans and programmes, and of any reasonable alternatives.
- provide certain authorities and the general public with an opportunity to express their opinion on the environmental report as well as on the draft plan or programme. Consultation not only helps to ensure that the information supplied for the assessment is comprehensive and reliable but also provides more transparency in the decision making process.

Ultimately, the SEA aims to encourage a more integrated and efficient approach to territorial planning where environment, including biodiversity considerations, are taken into account much earlier on in the planning process and at a much more strategic level. This usually translates itself into fewer conflicts further down the line at the level of individual projects. It also allows for a more appropriate siting of future developments away from areas of potential conflict with nature conservation.

A Strategic Environmental Assessment is mandatory for a variety of plans and programmes (i.e. prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use) which set the framework for future development consent of projects listed in the 'EIA Directive'. An SEA should also be carried out on any plans or programmes, which, in view of the likely significant effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.

### *2.5.2 Environmental Impact Assessment*

While the SEA process operates at the level of public plans and programmes, Environmental Impact Assessments (EIA) operate at the level of individual public and private projects. Thus, development consent for projects[36] which are likely to have significant effects on the environment should be granted only after an assessment of the likely environmental effects of the project has been carried out.

[34] OJ L 197, 21.7.2001, p. 30–37 –http://ec.europa.eu/environment/eia/home.htm
[35] OJ L 156, 25.6.2003, p. 17 –http://ec.europa.eu/environment/eia/home.htm
[36] The EIA Directive defines 'project' as the execution of construction works or of other installations, schemes, or interventions in the natural surroundings and landscape.

The EIA Directive distinguishes between projects requiring a mandatory EIA (so-called Annex I projects) and those where Member State authorities must determine, in a procedure called "screening", if projects are likely to have significant effects, taking into account criteria in Annex III of the Directive (so-called Annex II projects). Wind power developments are listed in Annex II.3.i of the EIA Directive[37].

***Environmental Impact Assessments process (EIA)***

*The typical EIA procedure includes the following stages:*

- *Screening (Article 4 and Annex III of the EIA Directive): to determine whether an EIA is required. Screening is required for any type of project listed in Annex II (including wind farms). The screening decision of the competent national authority is made available to the public.*
- *Scoping (Article 5): is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted by the developer to a competent authority. The scoping stage is an important feature of an adequate EIA regime, mainly because it improves the quality of the EIA.*
- *Preparation of an Environmental Statement or report (Article 5), presenting the following necessary environmental information: description of project, description of measures to avoid or reduce significant adverse effects, data required to identify and assess the main effects on the environment, an outline of the main alternatives studied by the developer, and an indication of the reasons for the preferred choice, taking into account the environmental effects identified.This should be made publicly available.*
- *Consultation: (Articles 6, 7 & 8) The public, the environmental authorities and Member States concerned must be informed and consulted before the decision on the request for development consent is taken. The results of consultations and the information gathered must be taken into consideration in the development consent procedure.*
- *Explanation of the Decision: (Article 9), When a decision to grant or refuse a development consent has been taken, the national authorities are obliged to make available to the public specific information, such as the content of the decision and any conditions attached thereto, the main reasons and considerations on which the decision is based, including information about the public participation process, a description, where necessary, of the main mitigation and compensatory measures.*

*The EIA should address direct and indirect effects on (Article 3):*

- *human beings, **fauna and flora,***
- *soil, water, climate and the landscape,*
- *material assets and the cultural heritage,*
- *the interaction between the factors mentioned in the above indents.*

*Both positive and negative effects should be considered.*

### *2.5.3 The relationship between SEA, EIA and Appropriate Assessments*

There are many similarities between the procedures for SEA and EIA, and the Appropriate Assessments carried out for plans or projects affecting Natura 2000 sites under the Habitats Directive. But this does not mean they are one and the same, there are some important distinctions too (see table). Therefore, **an SEA and EIA cannot replace, or be a substitute for, an Appropriate Assessment as neither procedure overrides the other**. They may of course run alongside each other or the Appropriate Assessment may form part of the EIA/SEA assessment[38] but, in such cases, the Appropriate Assessment should be

[37] The annex refers to *"installations for the harnessing of wind power for energy production (wind farms)"*.

[38] Doing an Appropriate Assessment at the level of a plan also does not remove the need to apply the Article 6(3)-(4) procedure to individual projects as well. Of course if the Appropriate Assessment of a plan results in a

clearly distinguishable and identifiable in the SEA's Environmental Report or in the EIA's Environmental documentation, or should be reported on separately so that its findings can be differentiated from those of the general EIA or SEA[39].

One of the key distinctions between SEAs/EIAs and Habitats Directive's Appropriate Assessments, apart from the fact that they measure different aspects of the natural environment and have different criteria for determining 'significance', is how the outcome of the Assessment is followed. In this regard, the assessments under the SEA and EIA lay down essentially procedural requirements and do not establish obligatory environmental standards. On the contrary, the assessment under the Habitats Directive lays down obligations of substance, mainly because it introduces an environmental standard, i.e. the conservation objectives of a Natura 2000 site and the need to preserve its integrity.

In other words, if the Appropriate Assessment determines that the plan or project will adversely affect the integrity of a Natura 2000 site, the authority cannot agree to the plan or project as it stands unless, in exceptional cases, they invoke special procedures for projects which are deemed to be of overriding public interest. The SEAs/ EIAs, on the other hand, are designed to make the planning authorities fully aware of the environmental implications of the proposed plan or project so that these *are taken into account* in their final decision.

*Table 2: Comparison of procedures under AA, EIA and SEA*

| | AA | EIA | SEA |
|---|---|---|---|
| Which type of developments are targeted ? | Any **plan** or **project** which - either individually or in combination with other plans/projects - is likely to have an adverse effect on a Natura 2000 site (excluding plans or projects directly connected to the management of the site) | All **projects** listed in Annex I.<br><br>For projects listed in Annex II the need for an EIA shall be determined on a case by case basis and depending on thresholds or criteria set by Member states (taking into account criteria in Annex III) | Any **Plans** and **Programmes** or amendments thereof which are<br>(a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or<br>(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC. |
| What impacts need to be asssessed relevant to nature? | The Assessment should be made in view of the site's conservation objectives (which are set in function of the species/ habitat types for which the site was designated. )<br>The impacts (direct, indirect, cumulative..) should be assessed to determine whether or not they will adversely affect the integrity of the site concerned. | Direct and indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative significant effects on ….'fauna and flora' | Likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors; |

development being zoned into areas of low or no potential conflicts with Natura 2000 sites then it is likely that fewer projects resulting from the plan will require an Appropriate Assessment at a project level.

[39] "Assessments of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC".

| | | | |
|---|---|---|---|
| Who carries out the Assessment? | It is the responsibility of the competent authority to ensure that the AA is carried out. In that context the developer may be required to carry out all necessary studies and to provide all necessary information to the competent authority in order to enable the latter to take a fully informed decision. In so doing the competent authority may also collect relevant information from other sources as appropriate. | The developer | The competent planning authority |
| Are the public/ Other authorities consulted? | Not obligatory but encouraged 'if appropriate' | Compulsory –consultation to be done before adoption of the development proposal<br><br>Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Ditto for the public. | Compulsory –consultation to be done before adoption of the plan or programme. The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure<br><br>Member States must designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned. |
| How binding are the outcomes ? | Binding. The competent authorities **can agree to the plan or project only after having ascertained that it will not** adversely affect the integrity of the site. | The results of consultations and the information gathered as part of the EIA ***must be taken into consideration*** in the development consent procedure. | The environmental report, as well as the opinions expressed ***shall be taken into account*** during the preparation of the plan or programme and before its adoption or submission to the legislative procedure. |

### 2.6 Relevant international nature and biodiversity Conventions and Agreements

The European Union and its Member States, as well as most other European countries are contracting parties to various relevant international environmental Conventions and Agreements. Thus, European and national legal frameworks on nature and biodiversity conservation must take full account of the commitments entered into under these Conventions and Agreements as well.

These Conventions have helped to shape the legal framework for biodiversity policy and legislation within the EU and also helped define the relationship between the EU and other countries. The following outlines the most relevant in the context of renewable energies - such as wind energy - and nature conservation in Europe. Several have also adopted

specific recommendations and resolutions on wind farms and wildlife. These are listed in annex I to this guide:

- The **Convention on Biological Diversity**[40] (CBD) is a global treaty, adopted in Rio de Janeiro in June 1992. It widened the scope of biodiversity conservation from species and habitats to the sustainable use of biological resources to the benefit for mankind. To date, 189 parties have ratified the convention.

- The **Convention on the Conservation of European Wildlife and Natural Habitats**[41] ('Bern Convention') came into force in 1982. It has played a significant role in strengthening the work on biodiversity conservation in Europe. It has been signed by 45 Member States of the Council of Europe, as well as the European Community and four countries in Africa. An important objective of the convention is the creation of the **Emerald Network**[42] of Areas of Special Conservation Interest (ASCIs). This operates alongside the EU Natura 2000 Network. A recommendation on effects of wind turbines on migratory species of mammals and birds was adopted in 2002.

- The **Convention on the Conservation of Migratory Species of Wild Animals**[43] (CMS, 'Bonn Convention') aims to preserve migratory species throughout their natural range. It entered into force in 1983 and has now been signed by more than 100 parties. Several agreements signed under this Convention are relevant to the management of conflicts between migrating animals and wind farms:
  - *Agreement on the Conservation of African-Eurasian Migratory Waterbirds*[44] (AEWA) calls for coordinated action throughout the migration routes or flyways. It came into force in 1999. The agreement covers 119 countries and 235 species of waterbirds. The European Community ratified AEWA in 2005.
  - *Agreement on the Conservation of Populations of European Bats*[45] (EUROBATS) concerns the protection of all 45 species of bats found in Europe. It entered into force in 1994. Currently 32 countries have signed up. Implementation of common conservation strategies and international experience-sharing are its main activities. Under this agreement, guidelines were published in 2008[46] for the consideration of bats in wind farm projects.
  - *Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea*[47] (ASCOBANS): this aims to co-ordinate measures to reduce negative impact of by-catches, habitat loss, marine pollution and acoustic disturbances among the ten parties. It was launched in 1991. A resolution on adverse effects of sound on small cetaceans, and with relevance for potential impact from wind farms, was adopted in 2006 (Annex I).
  - *Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and contiguous Atlantic area*[48] (ACCOBAMS) is a cooperative framework for the conservation of marine biodiversity in the Mediterranean and Black Seas. Its main

[40] http://www.cbd.int.
[41] http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp
[42] http://www.coe.int/t/dg4/cultureheritage/nature/EcoNetworks/Default_en.asp
[43] http://www.cms.int.
[44] http://www.unep-aewa.org
[45] http://www.eurobats.org
[46] Rodrigues et al. (2008), available via http://www.eurobats.org/publications/publication_series.htm.
[47] http://www.ascobans.org.
[48] http://www.accobams.org.

purpose is to reduce the threat to and improve knowledge about cetaceans in these seas. The agreement came into force in 2001.

- The **Convention of Wetlands of International Importance**[49] ('Ramsar Convention') is an intergovernmental treaty providing a framework for national action and international cooperation for the conservation and wise use of wetlands. It was adopted in 1971 and amended in 1982 and 1987. There are to date 158 parties and so far 1723 sites worldwide have been added to the 'Ramsar' list of wetlands of international importance. The Convention does not foresee ratification by supra-national bodies such as the European Union but all Member States of the EU are contracting parties.

- The **Convention for the Protection of the Marine Environment of the North-East Atlantic**[50] (OSPAR) guides international cooperation on a range of issues including the conservation of marine biodiversity and ecosystems, the impact of eutrophication and hazardous substances, and monitoring and assessment. It was launched in 1992, following of the merger of the previous Oslo and Paris Conventions (from 1972 and 1974). Several studies of potential impact of off-shore wind farms on the marine environment have been initiated under the auspices of this Convention.

- The **Convention on the protection of the marine environment of the Baltic Sea Area**[51] (HELCOM, 'Helsinki Convention') covers the Baltic Sea basin plus all inland waters in its catchment area. It was adopted in 1980 and revised in 1992. All countries around the Baltic Sea plus the EU are contracting parties.

- The **Convention for Protection against Pollution in the Mediterranean Sea**[52] ('Barcelona Convention') aims primarily to regulate and reduce the negative impact of all kinds of pollutants in the Mediterranean basin. It was set up in 1976 and last amended in 1995. Most countries bordering the sea have signed up to it.

[49] http://www.ramsar.org
[50] http://www.ospar.org.
[51] http://www.helcom.fi
[52] http://www.unep.ch/regionalseas/regions/med/t_barcel.htm

# 3. POTENTIAL IMPACTS OF WIND ENERGY DEVELOPMENTS ON NATURE AND WILDLIFE

- *Evidence to date indicates that appropriately sited and well designed wind energy developments are generally not a threat to biodiversity. However, there may be occasions where individual plans or projects can cause damage to protected wildlife and nature areas.*
- *Studies suggest that various species of birds, bats and marine animals may be particularly vulnerable. The type and degree of impact is very much dependent upon a range of factors, such as location and the type of species present. The potential impacts must therefore be examined on a case by case basis.*
- *Scientific studies and monitoring work undertaken in relation to existing and future wind farm developments are an invaluable source of information. Wind farm developers as well as planners, scientists and NGOs have a key role to play in building up the information base on the interactions between wind farms and wildlife.*
- *The benefits of such studies are manifold, not just for scientists but also for the industry itself: a better scientific knowledge base will ultimately lead to better and faster decision making.*

## 3.1 Positive and negative impacts: the need for a case by case approach

This chapter reviews the type of possible impacts that wind farms and their associated instrastructures could have on wildlife. The information contained therein has been sourced from a wide range of published scientific studies and reviews. Its purpose is to provide developers, relevant authorities and others with an overview of the types of potential impacts on wildlife they should pay attention to when preparing a wind farm development plan or project or when assessing the potential impacts of such plans or projects on wildlife and nature.

This does not imply that wind farm developments *in general* pose a problem for wildlife. There are clearly many cases where well designed and appropriately sited developments have no or only limited and largely insignificant impacts on biodiversity. There are also examples of where wind farms have delivered overall net benefits for biodiversity, especially in areas where the natural environment is already impoverished.

But, whilst well sited and designed wind farm developments are unlikely to pose a problem for biodiversity, this does not remove the obligation to examine, through EIA/SEAs and Appropriate Assessments, the potential effects that individual plans or projects can have and to ensure that, in the event that potentially significant impacts are detected, these are minimised or avoided altogether, especially when it could affect rare and threatened species and habitat types of Community importance.

For this to be possible, those concerned - be they developers, authorities, consultants etc - ought to be aware of the kind of threats to look out for. Since the main purpose of this guidance document is to clarify the provisions of Article 6 of the Habitats Directive in relation to wind energy development, this chapter focusses on reviewing the type of potential *negative* effects that may need to be taken into consideration as part of the Appropriate Assessment.

This does not mean that all wind farms will necessarily have such impacts - there are plenty of examples, especially in areas located away from highly sensitive wildlife zones, that show this is not the case and that with careful preparation, many potential problems can be designed out early on or effectively mitigated against (see chapter 5.5.4 for an overview of possible mitigation measures).

**Wind energy developmnents can bring local biodiversity benefits**

If planned properly, modern wind energy activities can not only avoid impacting on wildlife but can also on occasion actively contribute to biodiversity conservation. This is especially relevant for developments that are located in an already modified or severely impoverished natural environment as the following example illustrates:

***Black Law, Scotland – Bringing Degraded Land Back into Active Management***
Black Law wind farm (42 wind turbines with installed capacity of 97MW) is located on an exposed stretch of severely degraded upland moorland in South Lanarkshire, Scotland. Prior to development the site bore the scars of opencast mining and had been described as a major eyesore. As required by a stipulation of the planning conditions the developer, ScottishPower, devised and implemented a Habitat Management Plan for this brownfield site in consultation with Scottish Natural Heritage, RSPB Scotland, Lanarkshire Farmland and Wildlife Advisory Group and the University of Stirling.

The management plan covered 14.4km² in the vicinity of the turbines and involved the clearance of 4km² of non-native conifer plantation to allow the regeneration of blanket bog and typical upland vegetation. One of the mines was transformed into a shallow wetland and a 300m stretch of the Abbey Burn watercourse also restored. For the benefit of farmland birds, nestboxes were installed and 'sacrificial crops' were planted and left unharvested to provide a winter food source. Species targeted to benefit from the habitat improvement work included: otter, breeding waders, farmland birds, badger, bats, long-eared owl, black grouse, kestrel, barn owl, spotted flycatcher and merlin.

According to RSPB '*Black Law has taken a badly scarred site and vastly improved it. This will benefit a range of wildlife'*. ScottishPower '*agrees with RSPB that as long as we are careful in picking wind farm locations, perhaps not next to breeding site for golden eagle, for example or a migratory route, we should be able to accommodate their concerns*[53]*.*

**Beinn an Tuirc, Scotland – Integrating Protection and Development**[54]
The discovery of a pair of Golden Eagles at the site of a planned 30MW wind farm at Beinn an Tuirc in Scotland, did not prevent construction but instead inspired a considered approach to minimising the impacts of the development. Based on environmental assessment results, a means was found that accommodated the needs of the eagles without reducing the viability of the wind farm.

Firstly, some adjustment was made to the planned turbine locations to remove them from the eagles' core territory. Due to the large distances covered by Golden Eagles it was not possible to reposition the turbines outside the pair's entire territory, so an alternative habitat was created for them away from the turbines, dubbed a 'mitigation area'. The mitigation area was created by the clearance of 4.5km2 of non-native conifer plantation to allow regeneration of the traditional upland moor vegetation such as heather, blaeberry and cotton grass. This provided an attractive environment for Red Grouse – a key prey species of Golden Eagles – which, in turn, attracted the eagle pair to the new habitat.

Thus the mitigation area served two purposes: the habitat loss instigated by the turbines' arrival was offset and, by attracting the eagles away from the turbines, the risk of collision with blades was far reduced. Monitoring shows that the mitigation area habitat is developing well, and in 2008 two Golden Eagle chicks were hatched at the site.

[53] More information : http://www.scottishpower.com/search.asp?search=Black+Law&x=10&y=7
[54] Positive planning for onshore wind , RSPB and IEEP, March 2009 (Bowyer et al. 2009).

It is widely recognised, amongst others by the wind energy sector itself, that whereas the global benefits of switching to renewable energy are relatively straight forward to assess, the local interface between a particular wind farm development and the environment tends to be more complex. The effects are very much dependent on the wildlife present as well as on the location and design of the individual wind farm developments which is why it is essential to examine each plan or project on a case by case basis.

### 3.2 Identifying potential impacts during different phases of wind farm development

When assessing the potential impacts of wind energy developments on nature and wildlife it is important to bear in mind that these impacts may concern not just the wind turbines themselves, but also all associated installations such as access roads, site access (e.g. for maintenance works or during constuction), anemometer masts, construction compounds, concrete foundations, temporary contractors facilities, electrical cabling (e.g. overhead wires) for access to the grid, spoils, and/or possible a sub-station, control building etc…

They can also appear during any one of the phases of the wind farm's development from the initial construction phase to the actual operation and management and, on to the re-powering or decommissioning phases. As a result, the impacts may be temporary or permanent, on-site or off-site, cumulative and may come into play at different times during the project cycle.

All these factors should also be taken into consideration during the impact assessment and, where necessary, avoidance or mitigation measures should be introduced into the planning agreements and accompanying planning permits to eliminate, or at least minimise, the effects of the proposed plan or project on wildlife.

### 3.3 An overview of potential impacts

The type and scale of impact is very much dependant on the species involved, their ecology and state of conservation as well as the location, size and design of the wind farm plan or project. That is why it is important to examine each development plan or project on a case by case basis. As stated before, there is an increasing body of evidence to indicate that wind farm projects that avoid, or are located away from, areas of importance for wildlife generally do not have a major impact on biodiversity. But for this to be the case the developer must be aware of highly sensitive areas in the first place and of the potential impacts to look out for.

**Mitigating against potentially negative effects**

The potential risks of negative impacts mentioned in this chapter can sometimes be effectively mitigated against. Mitigation involves introducing measures into the plan or project to eliminate these potential negative effects or reduce them to a level where they are no longer significant. This means that they must be directly linked to the likely impacts and based on a sound understanding of the species/ habitats concerned.

In the case of wind farm plans or projects, an obvious mitigation measure is to adjust the location of the wind farm away from areas where it can cause conflicts with species and habitat types. But mitigation measures can also involve modifications to the size, design and configuration of the wind farms or the construction of turbines and associated infrastructures. Or they can take the form of temporal adjustments during the construction and operational phases. Further details, with examples of possible mitigation measures that have been used for wind farms so far, are given in chapter 5.5.4.

The type of impacts that may occur include the following:

- *Collision risk:* Birds and bats may collide with various parts of the wind turbine, or with associated structures such as electricity cables and meteorological masts. The level of collision risk depends very much on site location and on the species present, as well as on weather and visibility factors. Species that are long-lived, have low reproductive rates and/or that are rare or are already in a vulnerable conservation state (such as eagles, vultures and various species of bats) may be particularly at risk. Evidence to date indicates that wind farms that are located away from areas harbouring concentrations of wild animals or areas that are important for wildlife have relatively low rates of mortality.

- *Disturbance and displacement*: Disturbance can lead to displacement and exclusion, and hence loss of habitat use. This risk may be relevant for birds, bats and marine mammals. The species may be displaced from areas within and surrounding wind farms due to visual, noise and vibration impacts. Disturbance may also arise from increased human activity during construction work and maintenance visits, and/or as a result of opening up access to the site for others through the construction of new access roads etc.... The scale and degree of disturbance determines the significance of the impact, as does the availability and quality of other suitable habitats nearby that can accommodate the displaced animals.

- *Barrier effect.* Wind farms, especially large establishments with tens of individual wind turbines, may force birds or mammals to change direction, both during migrations and, more locally, during regular foraging activities. Whether or not this is a problem depends on a range of factors such as the size of the wind farm, the spacing of turbines, the extent of displacement of species and their ability to compensate for increased energy expenditure as well as the degree of disruption caused to linkages between feeding, roosting and breeding sites.

- *Habitat loss or degradation.* The scale of direct habitat loss resulting from constructing a wind farm and associated infrastructure depends on the size, location and design of the project. Whilst the actual land take may be comparatively limited, the effects may be more widespread where developments interfere with hydrological patterns or geomorphological processes. The significance of loss depends on the rarity and vulnerability of the habitats affected (e.g. blanket bogs or sand dunes) and/or of their importance as a feeding, breeding or hibernating place for species, especially for species of European conservation concern. Also, the potential role of some habitats as components in corridors or stepping stones important for dispersal and migration, as well as for more local movements between e.g. feeding and nesting sites, has to be taken into account.

### 3.4 Potential impact of wind farms on selected species and habitats

The following sections describe the type of potential impacts that wind farms can have on specific categories of species such as birds, bats and marine mammals as well as on certain vulnerable habitat types. The information is derived from a comprehensive analysis of the latest scientific literature. Overview tables are given in Annex II-IV of those species of birds, bats and marine animals that are considered to be particularly vulnerable to wind farms. Annex V provides more detailed information on the potential or confirmed impacts on certain species.

Whilst the knowledge base on the potential impacts that particular wind farms might have on certain species (particularly birds and bats) is growing fast and there is now an important body of research available, it has to be recognised that the evidence base remains low[55], and there is still a lack of long-term studies upon which to carry out risk and impact assessments.

An important part of the information will come from the studies and monitoring work undertaken in relation to existing and future wind farm developments. Like conservation NGOs and scientists, wind farm developers and planners have a key role to play in building the knowledge base on the biodiversity impacts of wind farms and how to avoid or mitigate them. The benefits of such cooperation and information sharing are manifold, not just for scientists but also for the industry itself: a better scientific knowledge base will ultimately lead to better and faster decision making.

### 3.4.1 Potential impact of wind farms on birds

The potential impact of wind farms on birds is the one that has been most studied. As outlined above, if there is an impact, it is likely to fall into a number of categories:

- ***Collision fatalities***

Injuries and mortalies tend to be related mostly to collisions with rotors or with other associated infrastructures such as overhead cables. Although there is increasing evidence that collision risks are generally low in most cases, there are note-worthy exceptions which must nevetheless be considered, especially for rare species such as large-sized raptors that already under threat and where wind farm fatalities may be an additional factor.

Significant collision mortality risks are primarily related to topographical bottlenecks where migrating or local birds fly through a relatively confined area, for example mountain passes or land-bridges between water-bodies. Other susceptible locations are slopes with rising winds where the birds gain lift and near wetlands or shallow seas that attract large numbers of feeding or resting birds. Flight corridors between feeding areas, roosting sites or breeding sites are also particularly susceptible[56]. However, there is also increasing evidence among various species of active avoidance behaviour[57].

Peaks in mortality may also be seasonal, for instance during spring and autumn migration when bird concentrations tend to grow significantly. Or it may be higher during the period of pre-nuptial display flights in spring, defence of breeding territories or whilst providing food for nestlings.

Other factors that could influence collision risks include the species flight height, flight type (migration or commuting flights to and from feeding areas through a windfarm), behaviour, weather conditions, topography and the scale and design of the wind turbines. However, potential increases in collision risk, e.g. during poor visibility, fog or rain, may also be partly offset by lower flight activity in such conditions[58].

Some species are more at risk than others, and effects are likely to lie somewhere in the continuum between the extremes of *additive* - increasing overall mortality - or *compensatory*

[55] E.g. Stewart et al. (2007).
[56] E.g. EEA (2009) and references therein.
[57] E.g. Hötker (2005, 2006), Petersen et al. (2006), Masden et al. (2009).
[58] E.g. Drewitt & Langston (2006) and references therein.

- replacing other causes of mortality. However, as some of the species found to be at particular risk are long-lived with low annual recruitment and high maturation age, it can be concluded that they might be susceptible to additional mortality[59]. Although more direct evidence related to wind farms is still scarce, there are nevertheless indications that raptors may be susceptible to the additive mortlity[60].

Special consideration must also be given to populations of scarce and vulnerable species already under threat from other human-induced factors such as habitat loss[61]. This include species listed in annex I of the Birds Directive, such as species of raptors and seabirds. There is also increasing concern (but as yet insufficient evidence) for night-migrating passerines[62].

**Wind farm developments and the risk of collision fatalities amongst raptors**

There has been a particular concern over the potential effects of collisions between various species of raptors and inappropriately sited wind farms. For instance, significant levels of mortality have been recorded for e.g. Eurasian Griffon Vulture (*Gyps fulvus*), Egyptian Vulture (*Neophron percnopterus*) and Common Kestrel (*Falco tinnunculus*) at wind farms in Spain[63] and for White-tailed Eagle (*Haliaeetus albicilla*) in Germany and Norway and for Red Kite (*Milvus milvus*) in Germany[64].

At the same time, some of these species, such as White-tailed Sea Eagle and Red Kite, have increased in numbers in large parts of Europe during the last decades, due to the removal of historical threats and problems related to e.g. reduced exposure to toxic elements and illegal persecution. Nevetheless, considering that many of these species are long-lived, with late maturity and a low annual recruitment, any additional factors affecting the adult mortality should nevertheless still be treated seriously.

Even if current studies indicate that mortality due to wind farm fatalities is low compared to other factors and may not have affected general population trends so far, the potential collision risk still needs to be studied on a case by case basis and future risks should also take account of the potential cumulative impact of the expected large expansion of wind farm establishments during the next 10-20 years[65].

Primarily, appropriate siting of wind farms is an issue of location and avoiding key areas for raptors. This has not only to do with high densities of raptors, but also with seasonality - often with enhanced risks in spring and in relation to breeding and in autumn - as well as weather conditions and topography of the landscape. On the basis of today's knowledge and experience, whilst it is not possible to make conclusive comments, several studies have recommended in areas where rapters are present, avoiding locations on the top of hills with gentle slopes (where uplift wind conditions may be poor and make manoeuvrability more difficult for soaring raptors)[66]. But because local conditions differ widely between sites decisions should be taken only after assessments based on careful case-by-case analyses.

[59] E.g. Sæther & Bakke (2000) for general conclusions.

[60] E.g. a demographic study of Golden Eagle *Aquila chrysaetos* in the Altamont Pass Wind Resource Area in California indicated that mortality caused by collision was additive to other lethal agents (Hunt & Hunt (2006), and a population model for Egyptian Vulture (*Neophron perconpterus*) showed that population size and time to extinction decreased when wind farm mortality was added (Carrete et al. 2009).

[61] E.g. Drewitt & Langston (2008).

[62] E.g. Sterner et al. (2007), Drewit & Langston (2008) see also annex V.

[63] E.g. Barrios & Rodrígues (2004, 2007), Lekuona & Ursúa (2007), Carrete et al. (2009).

[64] Hötker et al. (2006), also Follestad et al. (2007) and Bevanger at al. (2008) for White-tailed Eagle along the coast of Norway.

[65] E.g. with reference to Red Kite and Germany (Rasran et al. 2009).

[66] E.g. de Lucas et al. (2008) for European Griffon Vulture.

Collision mortality is usually measured through carcass search but this may lead to an under-estimate, especially for small birds, because corpses may be overlooked or quickly removed by scavengers. Using models may help to get more accurate estimates, although they are very dependant on reliable field data and correct assessments of avoidance by birds[67]. Recently, collision risk per megawatt (MW) has been proposed as an indicator. In view of the increasing size of wind turbines this may turn out to be a more relevant or useful measure[68].

Monitoring and assessing offshore mortality due to collision is even more difficult than for onshore locations, due to the obvious fact that carcasses are hardly ever found. Instead, techniques such as radar, thermal animal detection systems (TADS) and acoustic detection have been tested[69]. An alternative approach to overcome this problem is to assess 'sensitivity indices' for the species concerned[70].

- ***Disturbance and displacement***

Bird disturbance, leading to displacement or exclusion, and hence loss of habitat use, is a matter which may be of concern both for onshore and offshore wind developments. Such sub-lethal effects can lead to loss of body condition which is in some respects more insidious than direct mortality for a population as a whole as there may be a delay before any population-level impact is detected[71].

Disturbance can be caused by the sight, noise or vibration of the wind turbines themselves and/or by other activities related to wind farm maintenance, involving for instance vehicle, boat or helicopter usage. Also, associated road infrastructure may make the site easier to access which can in turn increase overall disturbance. Effects are variable and dependant on the individual species, seasons and sites involved. They also depend on the importance of the site for that species and the availability of other suitable habitats in the vicinity that can accommodate the displaced birds.

Breeding birds have been considered to be less affected than feeding or roosting birds[72], although recent studies suggest that this may not always be the case[73]. Some waders for instance are site-faithful, implying that their attachment to a location may outweigh any potential response to change. Hence, the true impact may not be evident until new recruits replace the old birds[74]. But again this needs to be considered on a site by site basis.

Thus, more long-term follow-up studies are needed regarding the potential for different species to habituate and recover. The first systematic reviews indicated local population declines over time for various species (e.g. among waterfowl and waders at staging and wintering sites) and no conclusive evidence of habituation[75], while more recently published

[67] Band et al. (2007), Chamberlain et al. (2006).
[68] E.g. Drewitt & Langston (2008).
[69] E.g. Desholm et al. (2006).
[70] E.g. Garthe & Hüppop (2004), Desholm (2009).
[71] Langston & Pullan (2003).
[72] E.g. Hötker et al. (2005, 2006).
[73] E.g. Pearce-Higgins et al. (2009)
[74] E.g. Drewitt & Langston (2006)
[75] Stewart et al. (2004). In a review of studies lasting over longer than one season, there were as many cases of birds occurring closer to wind farms over the years (indication of habituation) as well as birds found further away (indication of lack of habituation or even increased tendancy to disturbance; Hötker et al. 2006).

long-term studies indicate that various species may habituate, both at onshore and offshore locations[76].

On the basis of current knowledge it is evident that disturbance leading to displacement may need to be considered in impact assessments of wind farms, depending on the species present as well as the location. Also it should be remembered that even if areas affected around single wind farms may be small in relation to the total availability of habitats for breeding, foraging, staging or wintering, the cumulative effect of a series of wind farms may be significant.

- ***Barrier effect***

There is a potential risk that wind farms located along migration routes or flyways, or, at a more local level, along regular flight routes between feeding areas and resting or breeding sites may pose a barrier to species movement. Avoidance of wind farms has been documented among a wide range of bird species, particularly waterfowl and passerines. Responses are highly species-specific. During daylight, they may occur in a distance interval of 100-3000 m, whereas at night the distances are likely to be closer[77].

Although the short-term benefit of avoidance is obvious in that the risk of injury or mortality due to collision is eliminated, detours may involve increased expenditures in terms of energy and time which might in theory, in the long-term, affect fitness related parameters such as survival and reproductive capacity. However, reviews of available literature suggest that the barrier effect has not been proven to significantly impact on the fitness of bird populations[78], although the potential for cumulative impacts, e.g. if several wind farms are located along the migration route, must not be neglected[79].

The risk of causing barrier effects may also be influenced by the design of the wind farm – for instance, its size and/or the alignment of the turbines or the spacing between them. Altering the design of the wind farm may therefore be a potentially important mitigation measure.

- ***Habitat loss and degradation***

Loss of, or damage to, bird habitats, depends on local circumstances and the scale of land-take required for the wind farm and associated infrastructures. Direct habitat loss may also be additive to disturbance exclusion.

Onshore infrastructure including turbine bases, substations and access roads etc could, if placed inappropriately, involve the direct loss of breeding or feeding habitats for certain birds[80]. Offshore, direct habitat loss may be comparatively small-scale. However, increasingly large wind farms, especially on bird feeding areas such as sandbanks in shallow waters, may give cause for concern for certain species, especially in periods of high bird concentrations during spring or autumn migrations[81].

---

[76] E.g. Petersen & Fox (2007), Madsen & Boertmann (2008).
[77] E.g. Drewitt & Langston (2006) and references therein.
[78] E.g. Drewitt and Langston (2006)
[79] Masden et al. (2009).
[80] E.g. Pearce-Higgins et al. (2009).
[81] 2-5% of the total development area around Danish off-shore wind turbines (Fox et al. 2006), although indications of recent recovery (Petersen et al. 2007).

Some studies have indicated the benefits of avoiding developments within buffer zones around e.g. nesting, roosting or foraging sites[82]. Although these are often purely indicative figures they may nevertheless be of interest to developers and others as they may provide some idea, for instance, of the area that might be covered by an impact assessment or areas to pay particular attention to when preparing a development plan or project.

### *3.4.2 Potential impacts of wind farms on bats*

The concern over the potential impacts of wind farms on bat species has increased in recent years, particularly in relation to the risk of collision with rotors or turbine towers, and barotrauma caused by rapid air-pressure reduction near moving turbine-blades[83].

Bats have a low annual reproductive output and a long life expectancy, so they may be susceptible to even small additional mortality. An overview of the kinds of impacts (except barotrauma) related to siting and operation of a wind farm is given in Table 3, and species level details are summarised in Annex IV.

A typical year in the life of bats involves a period when they are active (April – October/November) and a period when they are usually less active or in hibernation (November – March). Bats mostly commute or migrate between summer roosts and hibernation sites. Timing varies for each species according to geographical location and from one year to the next depending on weather conditions but several studies have shown that there is a peak in mortality in late summer and autumn during dispersal and migration, and that migrating species may be particularly susceptible[84]. A common assumption has been that bats use echolocation to avoid wind turbines but they may not do so for energy-saving reasons when travelling over long distances in open areas[85].

The highest collision rates have been found in wind farms near forests but bat collisions have also been reported from turbines in open areas and even at offshore wind farms. Potential siting in important hibernation areas where large numbers of bats forage before and after hibernation should be carefully evaluated, and are best avoided if it is determined that this will result in a significant negative impact.

A variety of landscape features important for concentrations of various bat species should also be considered with reference to collision risks. This should include linear landscape elements such as woods[86], hedgerows and watercourses, wetlands, marshlands and wet meadows with adjacent shallow marine or freshwater lake areas[87]. These may be used as habitat corridors for movement between feeding, breeding and roosting areas.

[82] E.g. Bright at al. (2006, 2009), LAG-VSW 2007).

[83] E.g. Cryan & Barcley (2009). Barotrauma involves tissue damage to air-containing structures caused by rapid or excessive pressure change; pulmonary barotrauma is lung damage due to expansion of air in the lungs that is not accommodated by exhalation (Baerwald et al. 2008).

[84] Rodrigues et al. (2008) and references therein.

[85] Keeley et al,(2001).

[86] E.g. a 200 meters zone along forest edge has been recommended (Rodrigues et al. 2008); see also Mitchell-Jones & Carlin (2009) for recommendations to minimise harm; e.g. by adjustments of the location of turbines in relation to surrounding tree-lines, location of roosting sites etc.

[87] E.g. Brinkmann et al. (2006), Ahlén (2008), Rodrigues et al. (2008).

*Table 3: Overview of possible impacts on bats (extract from the Eurobats guidelines for consideration of bats in wind farm projects)*[88]

| **Possible impacts on bats related to siting** | | |
|---|---|---|
| **Impact** | **Summer time** | **During migration** |
| *Loss of hunting habitats during construction of access roads, foundations etc..* | *Small to medium impact, depending on the site and species present at that site.* | *Small impact.* |
| *Loss of roost sites due to construction of access roads, foundations etc..* | *Probably high or very high impact, depending on the site and species present at that site.* | *High or very high impact, e.g. loss of mating roosts.* |
| **Possible impacts related to operating the wind farm** | | |
| **Impact** | **Summer time** | **During migration** |
| *Ultrasound emission.* | *Probably a limited impact.* | *Probably a limited impact.* |
| *Loss of hunting areas because the bats avoid the area.* | *Medium to high impact.* | *Probably a minor impact in spring, a medium to high impact in autumn and hibernation period* |
| *Loss or shifting of flight corridors.* | *Medium impact.* | *Small impact.* |
| *Collision with rotors.* | *Small to high impact, depending on the species* | *High to very high impact.* |

Habitat loss and degradation can occur if the wind turbine is sited in or near a forest occupied by bats, as well as in more open landscapes used for foraging. Not only does the removal of trees for the installation of the wind tubine and associated structures lead to potential loss of habitat for bats but it may also create new linear features which attract bats to forage right next to the wind turbine.

Various hypotheses have been proposed for why bats may actually be attracted to wind turbines[89]. A widely accepted explanation is that insects may concentrate around wind turbines, both at onshore and offshore locations, attracted by the heat radiation from the wind turbine. In certain weather conditions bats, as well as several species of insectivorous passerine birds, may be attracted to these concentrations of insects[90].

The timing of the construction of the wind farm has also a potentially important impact for certain species of bats if it interferes, for instance, with their foraging behaviour or if it occurs at times of migration and dispersal. This requires local knowledge about bat species and an understanding of their annual life cycle[91].

[88] Rodrigues et al. (2008).
[89] E.g. Kunz et al. (2007a), Cryan & Barcley (2009).
[90] E.g. Ahlén et al. (2007, 2009).
[91] Rodrigues et al. (2008)

### *3.4.3 Repowering of wind farms*

There is still only limited evidence about how risks related to collision fatalities may change with reference to repowering, i.e. to replace existing turbines with fewer but larger and more power-effective ones. So far, experiences both in Europe and North America indicate that repowering reduced the collision risk among birds but increased the risk for bats[92]. Increased height of the turbine tower does not seem to have any effect on birds, but the risk for bats may increase, i.e. nocturnally migrating bats may fly at a lower height than birds, and newer and larger turbines may interfere with the airspace used by bats.

### *3.4.4 Potential impacts of wind farms on marine animals*

Marine mammals (seals and cetaceans) may be affected by offshore wind farms in several ways. Marine noise pollution has attracted much attention as it has the potential to displace animals, interfere with normal behaviour and, at very high levels, cause physical damage. During the construction phase, noise and vibration from pile driving and other works may affect the animals over a large area[93].

Monitoring of seals and harbour porpoises *Phocoena phocoena* at the Nysted and Horns Rev wind farms, Denmark, showed that pile driving temporarily expelled animals from the wind farm areas. Later in the construction phase and during operation the abundance of seals in the area was unaffected. For harbour porpoises, a substantial but short-lived effect of pile driving was observed. At Horns Rev, a slight decrease in porpoise abundance was found during construction and no effect during operation. At Nysted, a clear decrease was found during construction and operation, and this effect still persisted after two years of operation, but with indications of a slow, gradual recovery[94].

During operation, sound and vibration continue to be emitted into the water body, potentially disturbing the communication and foraging behaviour of the animals. Harbour porpoises and other cetaceans rely heavily on echolocation for navigation and foraging. Long term impacts seem to vary between different sites. The operational noise of wind farms will be clearly audible to some marine mammals, but, unlike pile-driving, the impact of this noise is expected to be small and localised[95], although it is difficult to make generalised statements on the basis of the still limited number of studies undertaken.

For various species of fish such as Atlantic salmon, operational noise may be detectable on some kilomete distance. It can have potentially lethal effects on early life stages and could risk masking intraspecific communication, although behavioural and physiological stress is expected to occur only in the very close surroundings[96].

Different mitigation measures have been proposed to reduce the potential damage caused by noise from pile driving[97] (see section 5.5.4 for details).

---

[92] E.g. Hötker (2006), Barclay et al. (2007), Smallwood & Karas (2009).
[93] E.g Thomsen et al (2006), Nedwall et al (2007), Diedrichs et al (2008)
[94] E.g. Inger et al (2009) for a recent overview.
[95] Madsen et al. (2006)
[96] E.g. Keller et al. (2006), Thomsen et al. 2006).
[97] See also IUCN report 'Greening Blue Energy: Identifying and managing the biodiversity risks and opportunities of off shore renewable energy Edited by Dan Wilhelmsson *et al. http://data.iucn.org/dbtw-wpd/edocs/2010-014.pdf*

**Some wind farm related effects of potential relevance for marine mammals**

- Intense noise during piling-driving, drilling and dredging operations;
- Increased vessel activities during exploration, construction and maintenance operations;
- Increased turbidity and re-suspension of polluted sediments due to construction;
- The presence of structures (including artificial reef effects causing habitat alterations) and, potentially, changes to prey and food webs;
- The continual operational noise and vibrations emanating from the wind turbines;
- Electromagnetic impacts due to cabling that may impact navigation (this may be of particular concern for elasmobranchs);
- Effects on prey, such as changes to fish behaviour.

*Extracted from proceedings of the ASCOBANS/ECS Workhop, April 2007 (Evans 2008)*

Another possible impact of wind turbines on marine biodiversity is the so called 'reef' effect. Underwater constructions may function as artificial reefs, and the foundations may be colonised by algae and epifauna. This may alter the characteristics of local species composition and biological structure at a local level[98].

The reef effect may in certain circumstances increase diversity although some studies have also indicated a risk that they may contribute to the spread of invasive alien species[99]. However, it should be borne in mind that a change in habitat or species communities may still have an adverse effect on the conservation objectives of the site. If so it doesn't matter how much one increases the diversity the effect will still be adverse.

Temperature increase around cables has also attracted attention, with reference to the impact on benthos as well as increased risk of botulism infection. However, the impact should normally be negligible as cables are generally buried at a maximum depth of 3 metres in the seabed. Most benthic animals dwell in the upper 5-10 cm in open waters and the top 15 cm in intertidal area where temperature increase is small, provided that the burial depth of the cable is sufficient (although some animals will burrow deeper)[100].

Finally, the transmission of electricity through cables within the wind farm and to shore can create electromagnetic fields that may also interfere with short- and long-range orientation systems. Disturbance effects could be particularly pronounced in elasmobranchs (sharks and rays) that are highly sensitive to magnetic fields. However, except for a few metres around cables and other devices, field strength is well below that of the earth's geomagnetic field. Studies so far have judged the impact to be small although available results are not entirely conclusive.[101]

[98] E.g. Petersen and Malm (2006), see also Maar et al. (2009) for a specific study of the substantial impact on local dynamics following from the settling by blue mussels (*Mytilus edulis*) on wind farm foundations in the southern parts of the Baltic Sea.

[99] E.g. Inger at al. (2009). - Nevertheless and for Natura 2000 sites applies that any potential reef effect has to be analysed within an Appropriate Assessment procedure (ref. Article 6(3) of the Habitats Directive, see Chapter 5). Any potential reef effect, even if resulting in overall increase in e.g. species richness at the site, must not affect the integrety and conservation status of habitats or species for which the site has been designated.

[100] Data from studies at Nysted Offshore Wind Farm, Denmark, referenced by OSPAR (2008).

[101] E.g. Petersen & Malm (2006), Meissner & Sordyl (2006)

### *3.4.5 Potential impacts of wind farms on rare and vulnerable habitat types*

Wind farms that are placed on or near certain rare and fragile habitat types such as blanket bogs or raised mires, wetlands, sand dunes and shallow sand banks can potentially cause the loss or deterioration of these habitats. The concern is not just over the direct loss of an area of habitat, but over potential damage caused, during construction and operation, to the habitat's structure and ecological functioning. Such damage may have a significant impact over a much larger area than the direct land-take.

Peatlands in particular can be damaged by the inappropriate siting of wind farms or their associated infrastructures, such as new or improved access roads. The damage is often caused because developments have not taken sufficient account of the underlying hydrology of the peatland. So, whilst the actual amount of peat lost may be small, the damage caused to the natural drainage system of the peat (for instance through drainage ditches etc…) may have repercussions over a much wider area and can ultimately lead to the deterioration of a more significant area of peatland and other related habitats, such as streams and other water courses located down-stream[102].

**Wind farm construction on sloping peatlands and deep peat – the Derrybrien case**

In October 2003, a major bog slide occurred on the southern side of Cashlaundrumlahan Mountain in Galway County on Western Ireland The cause of the bog slide was traced back to the construction works being carried out on a new wind farm on the peatland. It was found that two of the wind turbines and a proportion of the access roads which had been built across the peat had disrupted the bog's hydrology and consequently destabilised the peat layer[103].

A similar landslide occurred in August 2008, at the site of another wind farm development project in the Stacks Mountains in County Kerry, Ireland. Again, it was found that the landslide was linked to the inappropriate siting of the access roads on the peatland leading up to the wind farm.

The Derrybrien case was later taken to the European Court of Justice following an independent investigation into the construction of the wind farm. In July 2008, the European Court of Justice[104] ruled that '*Ireland has failed to take measures to ensure that checks are made to ascertain whether proposed works are liable to have significant effects on the environment in accordance with Article 2(1) of the EIA Directive'*. Wind farm developers have since been urged to carry out full scale peatland risk assessments when developing project proposals for wind farms on peatlands.

Peatlands are also an important carbon store and sink and are, as a result, an important part of Europe's climate change mitigation strategy. Wind farms sited on peatlands which hold large stocks of carbon have the potential to greatly increase overall carbon losses which would undermine the expected carbon savings associated with the wind farms as well as damage rare habitats of European importance. Impacts on the carbon sequestration processes of an 'active' or growing peatland can also occur if peat growth is arrested due for instance to hydrological changes related to the development. These changes may occur during construction or may develop over the life-span of the wind farm. The Scottish Government has developed a method to determine potential carbon losses and savings associated with wind farm developments on peatland taking into account peat removal, drainage, habitat improvement and site restoration[105].

[102] E.g. Lindsay (2007) for an overview of impacts on hydrology from wind farms developments and associated structures such as access roads. See also Fagúndez (2008) and Fraga et al. (2008) with reference to impact on blanket bog vegetation in Spain.

[103] Lindsay & Bragg (2004); for a more consice overview, see Bragg (2007).

[104] ECJ ruling C-215/06.

[105] Nayak et al. (2008); see also Grieve & Gilvear (2008) and Azkorra et al. (2008) for site-specific studies in Scotland and Spain, respectively.

Other dynamic habitat systems, such as sand dunes, wetlands or partially submerged sand banks are also vulnerable to any changes in their structure and functioning. This could be caused for instance by soil compaction, clearance of vegetation, drainage, reprofiling, etc.. which may lead to severe erosion and habitat degradation over a wider area. The scale of damage or deterioration to the habitats depends on the size of the development and on the precise location of the wind farms and their associated infrastructures.

### 3.5 Distinguishing between significant and insignificant effects

Identifying the species and habitats that are likely to be affected by wind farm developments is only the first step of any impact assessment. After that, it is necessary to determine whether the impact is significant or not. The legal procedure for determining 'significance' in any plans or projects specifically affecting Natura 2000 sites is described in chapter 5.

Here, some of the general principles involved in determining the level of 'significance' in the case of wildlife (irrespective of whether it is in a protected area or not) are explained in brief to help further with the general understanding of this concept.

Significance will vary depending on:
- Magnitude of impact
- Type
- Extent
- Duration
- Intensity
- Timing
- Probability
- Cumulative effects

Clearly, the assessment of significance needs to be done on a case-by-case basis, in function of the species and habitats affected. The loss of a few individuals may be insignificant for some species but may have serious consequences for others, like some populations of eagles and vultures or other threatened species.

Similarly, the displacement of animals may significantly reduce the fitness, and ultimately the survival rate of certain species, but have only a limited impact on other species, which may, for instance, have enough alternative habitats in the vicinity. Hence, population size, distribution, range, reproductive strategy and life-span will all influence the significance of the effects.

The assessment of significance should also be considered over an appropriate geographical scale. For migratory species that travel over very long distances, the impact at a specific site may have consequences for the species over a larger geographical area. Likewise, for resident species with large territories or changing habitat uses, it may still be necessary to consider potential impacts on a regional, rather than a local scale.

A common means of determining the significance of effects is through the use of key indicators (e.g. identified using the approach shown in Figure 7). Some indicators, such as amount and percentage of habitat lost, may be more significant for particularly rare habitat types or habitats with a limited distribution than for others because of their status.

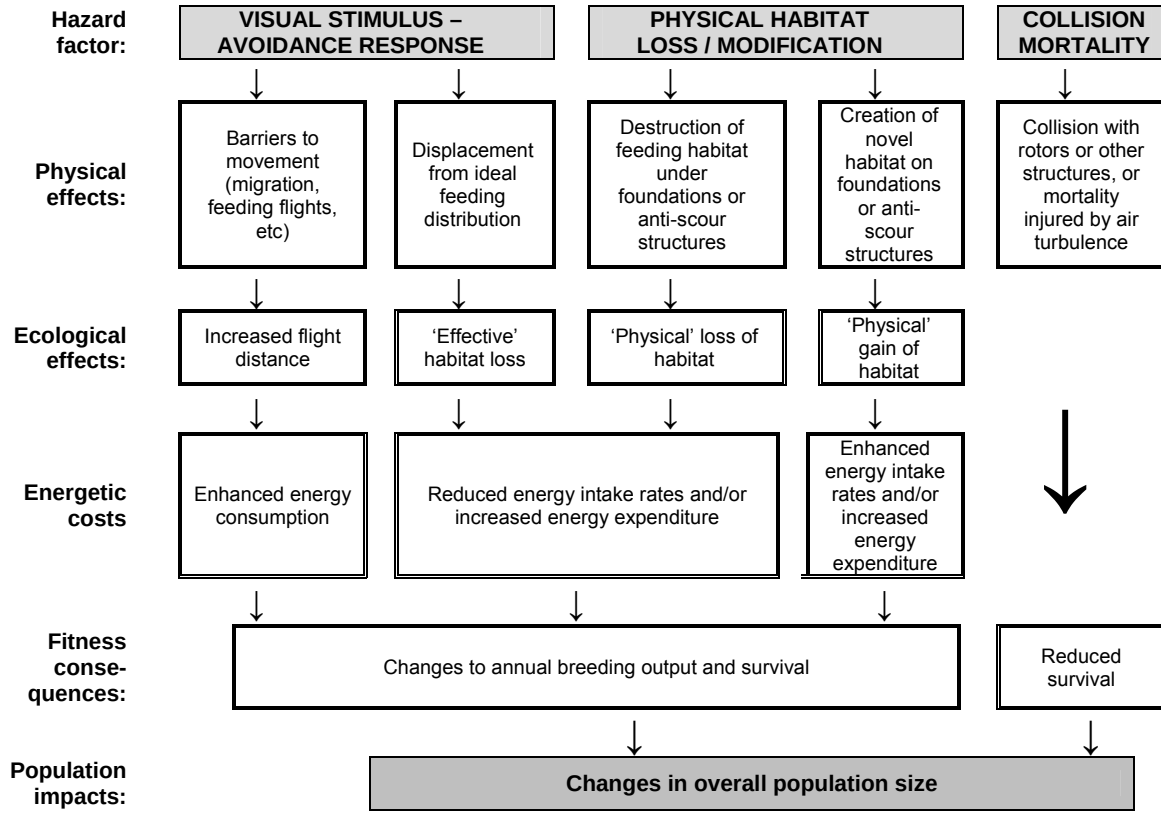



*Figure 7: Flow diagram describing how three major hazard factors (shaded boxes) caused by wind farms affect birds and how they may affect survival and reproductive output, and eventually cause changes to the overall population size. The boxes with a heavy solid frame indicate potentially measurable effects, and the double framed boxes indicate processes that need to be modelled. Although the diagram focusses on birds in the offshore environment, the approach can be more widely applied. From Fox et al. (2006).*

The flow chart in Figure 7 describes the interconnectivity of factors that could potentially and *significantly* influence for example a bird population. It demonstrates how *physical effects* such as barriers to movements, displacement from feeding areas, modification of habitats and mortality due to collisions cause *ecological effects* such as increased flight distances and changed access to habitats. This leads to *costs in terms of changes in energy expenditure and food intake*, potentially affecting fitness related parameters such as survival and reproductive output and thus the overall *population size*[106].

It is clear that any impact assessment should be based on the best available data. This may be data from dedicated field surveys or various types of predictive population models. In special cases such data may also be available from comprehensive, "research type" monitoring programmes.

The examples below shows how such a programme was carried out for some of the first major offshore wind farms in Denmark.

[106] The process is elaborated in more detail by Fox et al. (2006)It is presented as a ”model approach” and not used on a regular basis by the planning authorities in Denmark.

**Offshore wind farm establishments in Denmark: impacts and environmental monitoring**

Together with Germany and the United Kingdom, Denmark is one of the leading countries in the large-scale establishment of offshore wind farms in Europe. By the end of 2009, ten offshore wind farms were in operation; with a total of 305 turbines and a total capacity of 646 MW. 79% of the turbines are concentrated in three large establishments: two at Horns Rev in the North Sea, 15-30 km from the western coast of Jutland, and the other at Nysted in the Baltic Sea around 10 km S the town of Nysted on Lolland Island. Each covers an area of 20-35 $km^2$.

Screening work was initiated in 1999, the EIAs were approved in 2001 and construction started in 2002. The first two wind farms were operational by 2003. As part of this process an ambitious research and monitoring programme was launched for these two wind farms.

The studies undertaken so far have included:

- Benthic fauna and flora (with particular emphasis on the establishment of artificial hard-bottom substrates at turbines foundations).
- Distribution of fish (incl. effects of electromagnetic fields).
- Numbers and distribution of feeding and resting birds.
- Migrating birds (incl. risks for collision).
- Behaviour and reactions by marine mammals (seals and porpoises).
- Coastal morphology.

Results of the monitoring work up to the end of 2006 can be very briefly summarised as follows

- Abundance and biomass of the benthic fauna have changed, with local biomass increases of 50-150 times, primarily related to the increased habitat heterogeneity related to the introduction of hard bottom substrates onto seabeds that almost exclusively consisted of sandy sediments.
- Despite this there were no indications of attraction related to 'reef effects'. An interesting finding was that sand eels (*Ammodytes* spp.), which are sensitive to changes in the composition of sediments and an important prey for piscivorous fish as well as for birds, were not affected.
- For marine mammals, clear pile driving effects were recorded, a decrease in porpoises was recorded during construction and, so far there are indications of only a slow recovery at one of the farms. Harbour seals and grey seals on the other hand showed no general changes in behaviour;
- Very low collision rates, but clear indication of avoidance responses, were recorded for various bird species, including Eider ducks. Displacement effects, up to at least 2 km were, found for some waterbirds.

A variety of new and advanced monitoring technologies have also been tested and applied, e.g.:

- Hydroacoustic equipment for fish surveys.
- A special setup and fishing gear to study impact of electromagnetic fields.
- Acoustic monitoring of marine mammals, using stationary data-loggers, combined with remotely controlled video monitoring and tagging of animals with satellite transmitters; complemented by spatial modelling of the distribution of marine mammals on the basis of field survey data.
- Improved radar and infra-red video monitoring techniques for monitoring of bird movements.

Overall, the Danish studies have increased our knowledge of the short-term impacts on various species and marine habitats of large offshore establishments. In addition to the improved knowledge about environmental impacts, the Danish experiences have also contributed to enhanced know-how about monitoring methodologies. As such it provides a very useful example of how a scientific framework can be applied in the spatial planning of other future large-scale projects[107].

[107] The Danish Energy Authority, DONG Energy, Vattenfall and Danish Forest & Nature Agency) published an overview (until 2006) "Danish offshore wind – key environmental issues", http://ens.netboghandel.dk.

**Monitoring programme for the wind farms of Beauce, France**

In 2006, a four year monitoring programme was launched to analyse the impacts on birds and bats of a series of six wind farms in the Beauce Region of France. Whilst the accompanying EIAs found little or no immediate risk to wildlife (Beauce is a region dedicated to mainly intensive agriculture with resulting lower nature values), the region decided anyway to launch a four year monitoring programme to monitor any possible effects on grassland birds and bats in order to help better orientate future wind farm developments within the region.

The monitoring programme is being undertaken by a partnership of two wind farm developers, two nature conservation associations, two consultancies specialised in ecology as well as the Regional Council, the Agency reponsible for the environment and wind energy (ADEME) and the Ministry for Ecology and sustainable development (DIREN).

Together they agreed on a 4 year monitoring programme (2006-2010) to study in particular:
- any loss of habitats for, or any changes in the population structure of small grassland species (birds and bats);
- any change in the reproduction behaviour of buzzards or the way in which they use the habitats;
- fluctuations in migration patterns and the behaviour of migration birds and bats as a result of the configuration of the wind farms;
- changes in behaviour of birds in their wintering habitats and whethere they are any perturbations caused by the presence of the wind farms.

The monitoring is based on the BACI approach (Before After Control Impact) and is intended to demonstrate how to carry out a good monitoring programme to help guide the furture orientation of wind farm developments in a particular region (in this case Beauce). The final results of the study will be available at the end of 2010 but first results are already showing some useful results[108].

For instance, in the case of migrating birds, it has been found that (70-99%) circumvent the wind farms, changing direction or altitude some 500 m beforehand. Parks with dense clusters of wind farms are avoided altogether whereas birds do seem to occasionally cross those that are more open in aspect - ie where the wind turbines are in parallel lines or perpendicular to the migration route.

## 3.6 Cumulative effects

Cumulative effects may arise when several wind farms and their associated structures are present within an area or along a flyway corridor, or as the result of the combined impacts of wind farms and other types of activity (e.g. forestry or other industrial developments). The cumulative effect is the combined effect of all developments taken together but this does not mean that it is simply a sum of the effect of one wind farm plus the effect of a second wind farm. It may be more, it may be less.

For instance, the first wind farm may give rise to a small but acceptable level of bird mortality, which lies well within the capacity of that bird population for regeneration and hence has little effect on the overall population level. But the level of bird mortality occasioned by several wind farms taken together may exceed the capacity of the population for regeneration, in which case the bird population would go into decline. In this case, whereas the impact of the first and second projects, each on their own, is not discernable,

[108] http://volkswind.fr/documents/suivi_ornithologique_des_parcs_eoliens_en_beauce_2006_2009.pdf

the impact of both taken together could cause the bird population to collapse. This influences the planning decision for both project proposals.

The key is to determine at what point do accumulated habitat loss (including effective habitat loss due to exclusion), barrier-effect induced increases in energy costs and collision mortality, acting in concert, pose a significant impact.

It also depends on the cumulative impact of that project combined with other developments (not only wind farm projects) in a given area. The effect of a single plan or project may be insignificant but when combined with other plans or projects the cumulative effect may turn out to be significant. Habitat fragmentation may also need to be considered during the assessment of cumulative effects as this can have a deleterious impact on population structure and dynamics among a wide range of species.

# 4. THE IMPORTANCE OF STRATEGIC PLANNING IN WIND FARM DEVELOPMENT

- *Planning wind farm developments in a strategic manner over a broad geographical area is one of the most effective means of minimising the impacts of wind farms on nature and wildlife early on in the planning process. It not only leads to a more integrated development framework but should also reduce the risk of difficulties and delays at later stages at the level of individual projects.*
- *Evidence to date illustrates that wind power does not have to threaten wildlife but appropriate siting is critical and must be a first goal of the planning process.*
- *A recent EEA report investigated Europe's wind potential and concluded that even if all Natura 2000 and other areas designated for nature protection were theoretically excluded from wind energy development, there would still be enough wind energy available to supply 3-7 times the total estimated energy demand in 2020 and 2030.*
- *Developing wildlife sensitivity maps at the strategic planning stage enables areas to be identified where wind farm development might be considered a low, medium or high risk in terms of nature and wildlife. Several Member States have demonstrated how this can be done with success.*
- *Such wildlife sensitivity maps will also help to avoid potential conflicts with the provisions of article 5 of the Birds Directive and 12&13 of the Habitats Directive as regards the need to protect species of EU importance throughout their entire natural range within the EU (ie also outside N2000 sites).*

## 4.1 Strategic planning: a way to ensure more efficient, integrated decision-making

Strategic planning is a useful tool for ensuring that a rapid deployment of wind energy over a large area can be achieved whilst simultaneously protecting vulnerable wildlife from inappropriate development[109]. Strategic planning not only helps to identify the most appropriate locations and scales for expansion in function of wind energy capacity, grid access etc. but also helps to avoid and reduce the impacts on the natural environment at a very early stage in the planning process.

Evidence from Germany, Denmark, Spain and the UK illustrates that wind power does not have to threaten wildlife but appropriate siting is critical and must be a first goal of the planning development process from a conservation perspective. Despite the range of concerns, most threats can be minimised by avoiding sites with sensitive habitats and key populations of vulnerable species. Good site location will also help developers avoid costly investments in inappropriate sites.

Drawn up by public authorities, these land use or sectoral plans usually cover a broad geographical area, be it at the level of a municipality, region or country. This scale, combined with the spatial nature of the plans, enables strategic decisions to be made about the capacity and location of wind developments over a broad area.

[109] 'Positive planning for onshore wind: expanding onshore wind energy capacity while conserving nature ', report by IEEP commissioned by RSPB, March 2009 (Bowyer et al. 2009).

They also provide an opportunity to explore various alternative, and potentially less environmentally damaging, options as well as to consult early on with industry and other interested bodies.

The whole process should ideally result in a more integrated and sustainable form of spatial planning which takes on board wider societal concerns at an early stage. This in turn should provide the industry itself with a more transparent and stable framework for growth and expansion.

### 4.2 Marine spatial planning

Existing planning frameworks have a largely terrestrial focus. Challenges that emerge from the growing competing uses of the sea, ranging from maritime transport, fishing, aquaculture, leisure activities, off-shore energy production and other forms of sea bed exploitation must be addressed. Therefore, maritime spatial planning can be a fundamental tool for the sustainable development of marine areas and coastal regions, and for the restoration of Europe's seas to environmental health (EC 2007e).

Marine spatial planning provides a mechanism for stakeholder involvement, which is particularly important as multiple organisations have competencies in the planning and management of activities in the marine environment (WWF/Wildlife Trusts 2004).

In 2008 the European Commission launched a Communication on Maritime Spatial Planning (MSP), which focus on achieving common principles in the EU (COM(2008) 791 final). Maritime Spatial Planning is considered a key instrument for the Integrated Maritime Policy in the EU. It helps public authorities and stakeholders to coordinate their action and optimises the use of marine space to benefit economic development and the marine environment. This Communication aims to facilitate the development of MSP by Member States and encourage its implementation at national and EU level. It sets out key principles for MSP and seeks, by way of debate, to encourage the development of a common approach among Member States.

### 4.3 Determining suitable locations for wind farm development

A crucial first step in developing a spatial vision for wind farm development that is compatible with nature conservation interests is to determine within a given area both:

- the capacity for wind farm development - for instance in function of wind speed, access to grid, and other physical or economic constaints - and

- their suitable location in function of other land-uses and restrictions and other societal constraints, including nature conservation interests.

With the benefit of geographical Information systems (GIS) data collected on these aspects at a strategic level can be used to develop useful overlay maps which can help authorities to identify, within a given region, potentially low-risk areas – ie areas of high value for wind farm development but that also present little or no risk from a nature conservation perspective or potential high-risk areas that are best avoided or where mitigation measures and more substantial impact assessments are likely to be required.

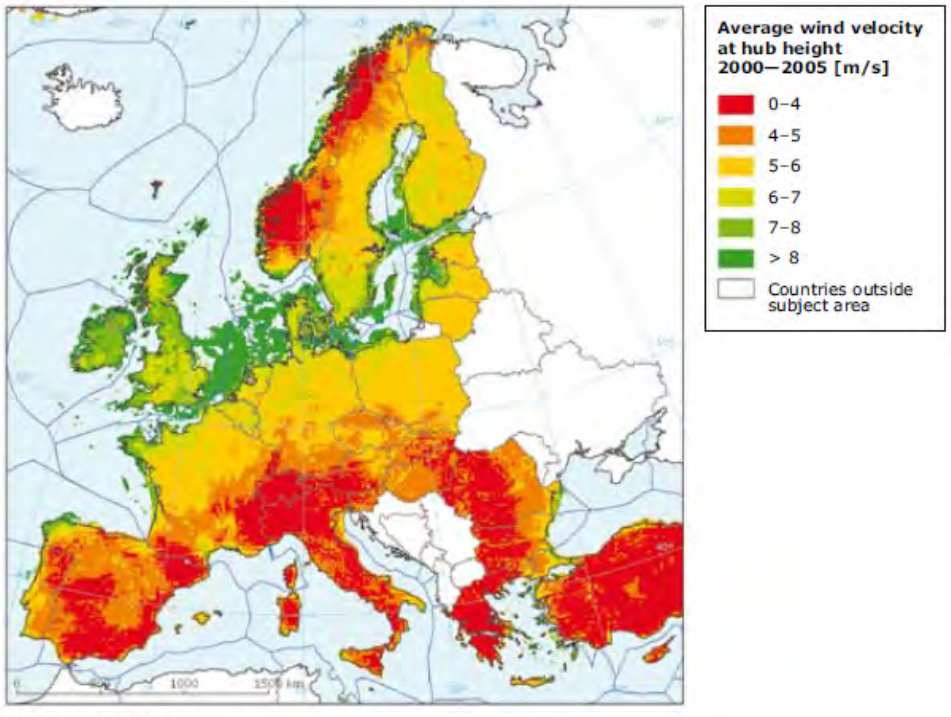
These aspects should be investigated as part of the initial development plan proposal and should also be further developed through the Strategic Environmental Assessment[110] or Appropriate Assessment, where this is required, and/or through consultation with developers and other interested parties. This will not only ensure that the final result is more integrated and acceptable to all concerned but should also reduce the risk of unforeseen difficulties and delays at later stages.

*4.3.1 Europe's wind energy potential*

In its recent report entitled '*Europe's onshore and offshore wind energy potential*'[111] The European Environment Agency (EEA) analysed in detail the local wind resources across the EU (based primarily on wind speed) in order to provide a Europe-wide resource assessment of onshore and offshore wind potential in a geographically explicit manner and to help Member States identify the most suitable locations for wind energy generation.

It confirms that the wind energy resources in Europe are potentially immense, but they do also vary significantly across the EU due to variations in topography and meteorology (Figures 8,9). According to the EEA report, onshore wind energy potential is concentrated in particular in agricultural and industrial areas of north-western Europe.

Likewise, the largest offshore potential can be found in low depth areas in the North Sea, the Baltic Seas and the Atlantic Ocean with some local opportunities in the areas of the Mediterranean and Black Seas.




**Source:** EEA, 2008.

*Figure 8 Wind field data after correction for orography and local roughness (based on estimated average wind speed of 80 m onshore, 120 m offshore – from EEA technical report N°6/2009 (EEA 2009).*

[110] See chapters 3 and 6

[111] EEA technical report N°6/2009 of June 2009 (EEA 2009).

From a Member State perspective the unrestricted potental for onshore wind energy also highlights very significant differences between countries.

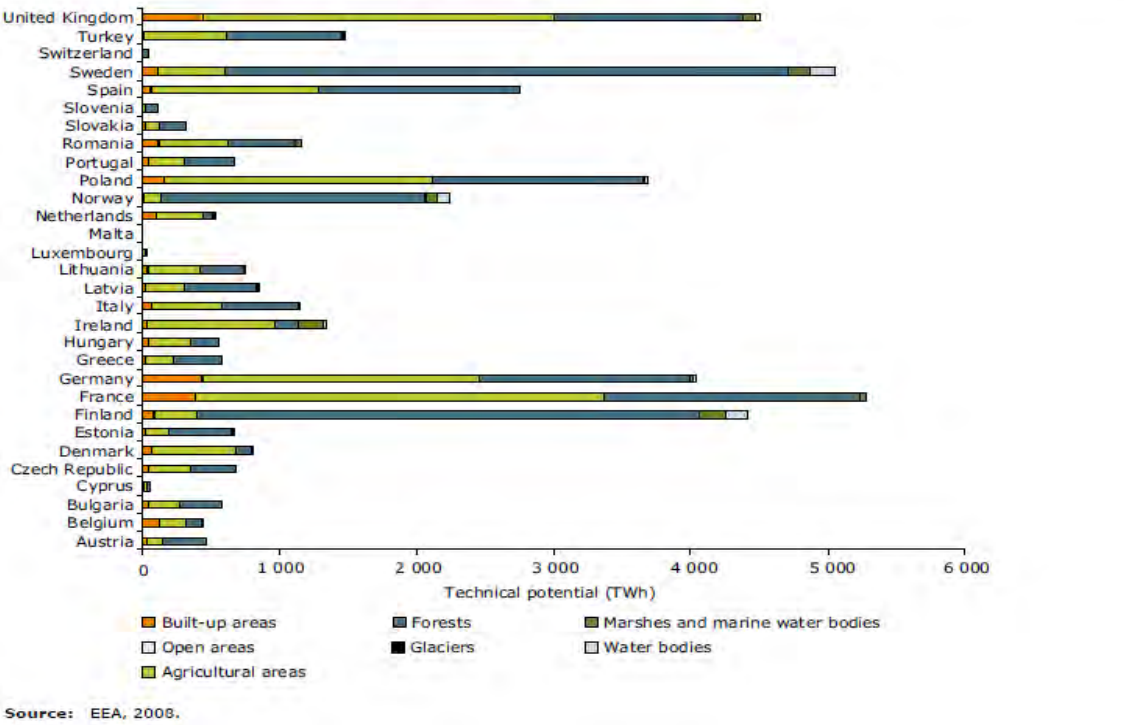



*Figure 9: Unrestricted technical potential for onshore wind energy up to 2030, based on estimated 80 m average wind speeds 2000-2005 from EEA – from EEA technical report N°6/2009 (EEA 2009).*

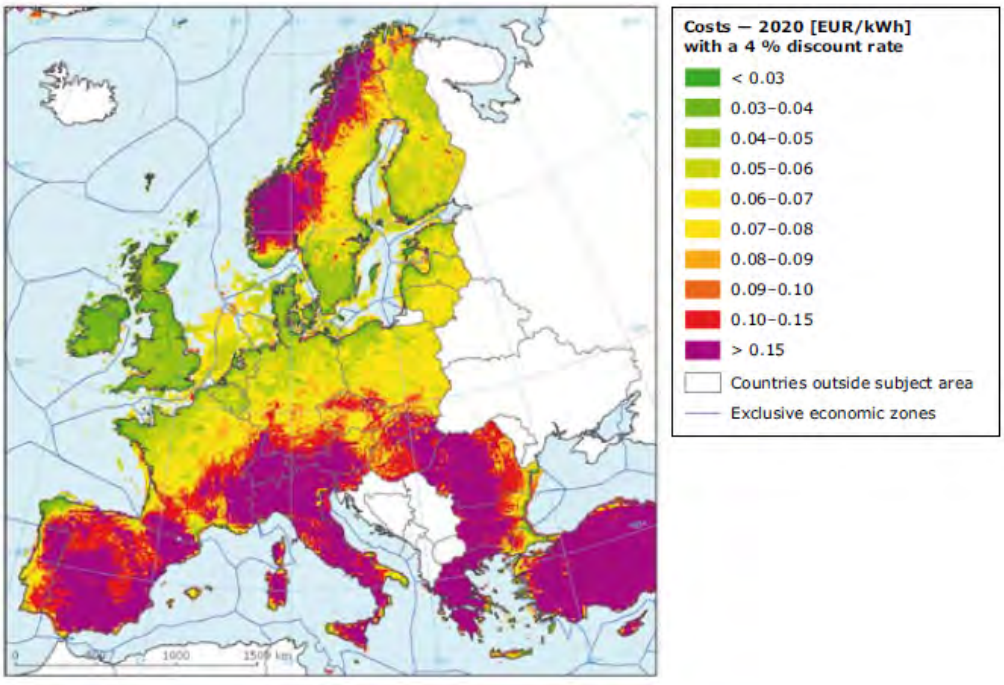



*Figure 10: Generation cost for wind energy in Europe (to 2020) at 4% interest rate*

However, raw unrestricted 'technical potential' is only part of the equation. There are also cost considerations and potential socio-environmental constraints to take into account. In the case of the former, the EEA has estimated the 'economically competitive potential' of wind energy development based on the forecasted costs of developing and running wind farms in 2020 and 2030 relative to projected average energy generation costs derived from the Commission's baseline scenario[112]. Again there are marked differences between different regions and countries of the EU.

The EEA also made an analysis of wind energy potential where all Natura 2000 and other protected areas are excluded from the calculations. As explained before there is no automatic presumption against wind farm development in Natura 2000 sites but such developments must respect the procedural safeguards laid down in the Habitats Directive.

The EEA's exercise illustrates that if all Natura 2000 and other areas designated for nature protection were theoretically excluded from wind energy developments, and assuming that the excluded areas are spread equally over all land cover classes, this would have only a limited impact on wind energy potential (a decrease of ca 13.7% of onshore technical potential).

To put this in perspective, the total economically competitive EU wind energy potential was estimated to be equivalent to 3-7 times the total energy demand by 2030 and 2020.

It must however be noted that the assumption that the wind potential is equally distributed between protected and non-designated areas is not necessarily appropriate. The actual effect, especially at a particular regional or national level, of a complete exclusion of wind energy development in protected areas could therefore be more or less severe than the EEA study seems to suggest. Nonetheless, the EEA study clearly demonstrates the value of undertaking such a spatial analysis as part of a strategic assessment of wind farm development.

### *4.3.2 Grid connections and road access*

Grid connection and road access are both crucial issues for the location of wind farms. Consequently, the relationship between wind farm developments and existing grid or road infrastructures is also a key aspect of spatial planning. As both associated infrastructures are capable of having a significant impact on nature and biodiversity values, this is also best considered early on during the planning stages.

For offshore wind farms, an international perspective to grid access is strongly encouraged as it might provide more efficient and coordinated solutions, with reference to the onshore grid systems as well as underwater cables. By mapping the grid connections and capacities available, optimised locations can be determined, and the need for new grid connections and additional impact can be minimised[113].

[112] In the EEA report 'technical potential' refers to the highest potential level of wind energy generation, based on overall resource availability and the maximum likely deployment density of turbines, using existing technology or practices. 'Economically competitive potential' describes the proportion of technical potential that can be realised cost-effectively in the light of projected average energy costs in the future.

[113] COM(2008) 768 final/2; 12.12;2008

### *4.3.3 Wildlife sensitivity maps*

Analysing the capacity and means for a region to develop wind farms is only part of the equation. A strategic development plan should also consider other land-uses and restrictions or other societal constraints at a very early stage in the planning process.

Wildlife sensitivity maps are useful tools in helping to place wind farm developments in areas that are compatible with nature conservation requirements. Sensitivity maps can be developed for selected categories of species (eg species of birds, bats, marine mammals of European importance) or for valuable wildlife in general over a pre-determined area – for instance an entire region.

When wildlife sensitivity maps are then super-imposed over the wind capacity maps for instance, areas of 'low or no risk' can be identified as well as areas of potential 'higher-risk' where particular species of conservation concern are to be found either year-round or seasonally (eg during migration). They can also highlight potential cumulative impacts of wind farm developments in a particular region and assist in establishing the likely carrying capacity of that region as regards the number of wind farm developments it can sustain.

The public resources spent for the development of these kinds of maps are likely to be more than compensated for in terms of smoother and less complicated and time-consuming site-related assessments - costs which are normally borne by the developer.

However, sensitivity maps can only provide a broad orientation of areas of potentially high-, medium- (where mitigation measures may be possible), and low risk areas (where the impact is expected to be limited or low). As such they are not a substitute for Environmental Impact Assessments (EIA) or Appropriate Assessments (AA) at project level. These may still need to be undertaken for individual wind farm development projects.

Comprehensive species surveys within the EIA or AA at individual site level will be able to determine more precisely for each site what the specific nature values and risks of impact are. In this context, the strategic level maps can already help to indicate the required level of assessment that would be needed for more detailed and stringent baseline studies at individual project level.

### *4.3.4 Wildlife sensitivity maps in the context of Art 12 (Habitats Directive) & Art 5 (Birds Directive)*

The other significant advantage of wildlife sensitivity maps over larger scales is that they help pre-empt any potential conflicts with Articles 5 of Birds Directive and 12&13 of Habitats Directive. As explained in chapter 3, these provisions aim to ensure the protection of species of European Importance across their entire natural range in the EU, i.e. also outside Natura 2000 sites. Wind farm developers or planners must therefore be able to demonstrate that they have taken the necessary precautions to avoid compromising this species protection regime.

Distribution maps of species of EU interest can help planners and developers, for instance, to avoid areas outside Natura 2000 that are particularly important for these species, such as bottleneck migration routes for birds and bats.

In general there is a clear need for more detailed surveys and research into the spatial distribution of vulnerable species across the EU. This is best done at a supranational level so that the entire natural range of the species can be covered. Two new EU funded initiatives are currently underway (INSPIRE[114] and GMES[115]) which, although not yet fully developed, demonstrate the importance of geographical information and the value of Member States pooling their resources. In due course they should become powerful tools for developing the overlay maps mentioned above that include several variables.

**Plans or projects outside the Natura 2000 sites**

The establishment of the Natura 2000 Network is at the heart of both the Birds and Habitats Directives and is a fundamental to achieving the overall objective of maintaining and restoring the habitat types and key habitats of species listed in the Directives to a favourable conservation status in their natural range. But the Natura 2000 Network is only part of the equation.

Both Directives also require that Member States establish a general system of protection for all wild bird species in the EU and for species listed in Annex IV of the Habitats Directive *throughout their natural range within the EU* – ie also outside Natura 2000 sites. The specific articles that lay down the species protection provisions are Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive (described further in chapter 3).

As birds, bats and whales have all been found to be vulnerable to wind farms, these provisions will also need to be taken into account by developers and planners irrespective of whether their wind farm developments are to be located in a Natura 2000 site or not. In particular, information on population size and seasonal fluctuations on a local and regional level will be useful in order to be able gauge the significance of any potential impacts of a proposed wind farm plan or project in that region. This could be supplemented by data on local and regional movements and migration patterns both in the diurnal and seasonal perspectives.

The measures to be taken under these species protection provisions are not limited to the prohibition of various activities. They also include the need for preventive measures in order to anticipate threats and risks related to disturbance. For wind farms, this might include the refusal of individual projects on the grounds that their proposed location could lead to significant disturbance to migratory birds or bats, for instance a key location along a species migration route, or could lead to the destruction of breeding sites and resting places for bats or whales.

Or it could simply mean that certain safeguards or mitigation measures are introduced into the permit. This might involve, for instance, shutting down the wind farms at times when there is a high risk of disturbance (eg in Germany, one wind farm turns its turbines off for a couple of hours around dusk during August and September when there is a peak migration/dispersal period amongst local bat popualtions). Whatever measures are applied, they must be proportionate in relation to the assessed impact on the conservation status of the species concerned.

Although there is no formal obligation to carry out an Appropriate Assessment under the EU nature legislation, in contrast to what is required for Natura 2000 sites, the potential impact on species of EU importance should nevertheless be analysed during the SEA and EIA processes, keeping in mind that derogation provisions need to be interpreted narrowly and not lead to outcomes that go against the objectives of the two nature Directives. **In this respect, the development of wildlife maps could help to provide planners and developers with a useful tool to identify areas at risk.**

These issues are elaborated on in greater detail in the the Commission's guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC' [116].

[114] More information about INSPIRE available under http://www.ec-gis.org/inspire

[115] More information about GMES available under http://www.gmes.info/

[116] Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

### *4.3.5 Natura 2000 maps*

Wind farm plans or projects should also be overlaid on maps showing all the Natura 2000 sites within the area in question. However, it should be noted that such maps only give the boundaries of the sites included in the Natura 2000 Network. They do not show which parts within the Natura 2000 area are occupied or used by the different species and habitat types of EU importance for which it has been designated. This more detailed information if often essential for determining the risk of negative effects. It may sometimes be found within the Natura 2000 management plan for the site.

Nevertheless, the Natura 2000 map will allow planners and developers to identify at a very early stage in the process where additional planning procedures are likely to apply (for instance, under article 6 of the Habitats Directive) and whether more detailed site level mapping may be needed at project level.

Offshore, the situation is rather more complex as there is still a major gap in the designation of marine Natura 2000 sites. This is partly due to poorer scientific knowledge about species and habitats, including marine mammals in the marine environment. In this respect, it will be important to ensure that Member States designate marine protected areas under the Habitats and Birds Directives as soon as possible in order to remove legal uncertainties about the potential suitability of a given marine site for wind farms.

**The Natura 2000 online viewer:**

With the assistance of the European Environment Agency, the European Commission has developed a public Natura 2000 viewer which makes it possible to explore Natura 2000 sites in every part of the EU at the press of a button. Built on state of the art GIS technology, the public viewer is an interactive and user-friendly tool that allows the user to view Natura 2000 sites over different types of backgrounds (street maps, satellite imagery, bio-geographical regions, Corine Land Cover, etc.) and to quickly locate related information on species and habitats of interest such as the Natura 2000 Standard Data Forms.




The Natura 2000 v*iewer is available under* http://natura2000.eea.europa.eu/

## *4.4 Good practice examples of planning wind farm developments strategically to ensure appropriate siting from a conservation perspective*

Experience in several countries has already shown that in practice wildlife sensitive maps are a very useful part of the strategic planning process. The examples presented below demonstrate this and help to illustrate further the different approaches for creating and using wildlife sensitivity maps. They concern both onshore and offshore plans.

**Scotland: Strategic Locational Maps for onshore wind farms in respect of natural heritage**

*Scotland is likely to see a rapid expansion in wind energy in coming years in response to the region's ambitious target of 50% of Scotland's electricity coming from renewable energy sources by 2020. To plan for this increase in an efficient and proactive manner, the Scottish government has adopted a strategic approach to wind farm development. It requires planning authorities to develop spatial frameworks for windfarms identifying areas which are afforded significant protection, broad areas of search and other areas where criteria will apply.*

*To assist planning authorities in this process, Scottish Natural Heritage (the statutory body responsible for nature conservation and biodiversity) has adopted a strategic locational guidance note for onshore wind farms in March 2009 which includes a series of sensitivity maps (SNH 2009a). The aim of these is to 'guide wind development towards the locations and the technologies most easily accommodated within Scotland's landscapes and habitats without adverse impact, and which safeguards elements of the natural heritage which are nationally and internationally important'.*
*As such, it offers a strategic view of the sensitivities of the natural heritage across Scoland and a broad steer over which parts of the country are most suited to wind farm development.*

*Altogether 5 maps have been developed. Maps 1 and 2 describe sensitivity associated with landscape and recreation interests, covering designated areas and wild land issues respectively. Maps 3 and 4 describe sensitivity arising from biodiversity and earth science interests, covering designated areas and non designated habitats and species respectively. The final map, Map 5, combines these sensitivities into three broad zones representing relative levels of opportunity and constraint:*

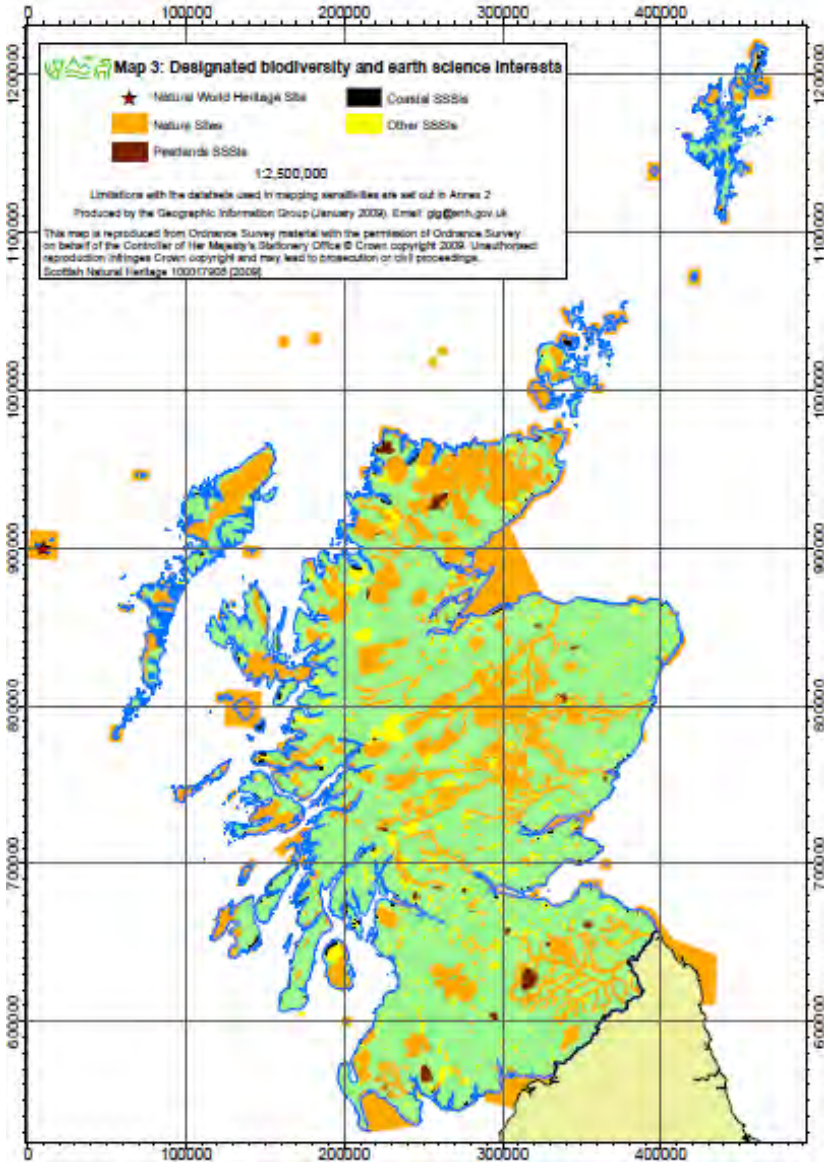
- ***Zone 1:*** *Lowest natural heritage sensitivity - identifies areas at the broad scale with least sensitivity to wind farms, with the greatest opportunity for development, within which overall a large number of developments could be acceptable in natural heritage terms, so long as they are undertaken sensitively and with due regard to cumulative impact.*
- ***Zone 2:*** *Medium natural heritage sensitivity - identifies areas with some sensitivities to wind farms. However, by careful choice of location within these areas there is often scope to accommodate development of an appropriate scale, siting and design (again having regard to cumulative effects) in a way which is acceptable in natural heritage terms.*
- ***Zone 3****: High natural heritage sensitivity (including Natura 2000 sites) - identifies areas of greatest sensitivity to wind farms, which place the greatest constraint on their development, and where, in general, proposals are unlikely to be acceptable in natural heritage terms. There may, however, be some sites in this zone where wind farm development of appropriate scale and careful design could be accommodated if potential impacts on the natural heritage are fully explored and guarded against by employing the highest standard in siting and design.*

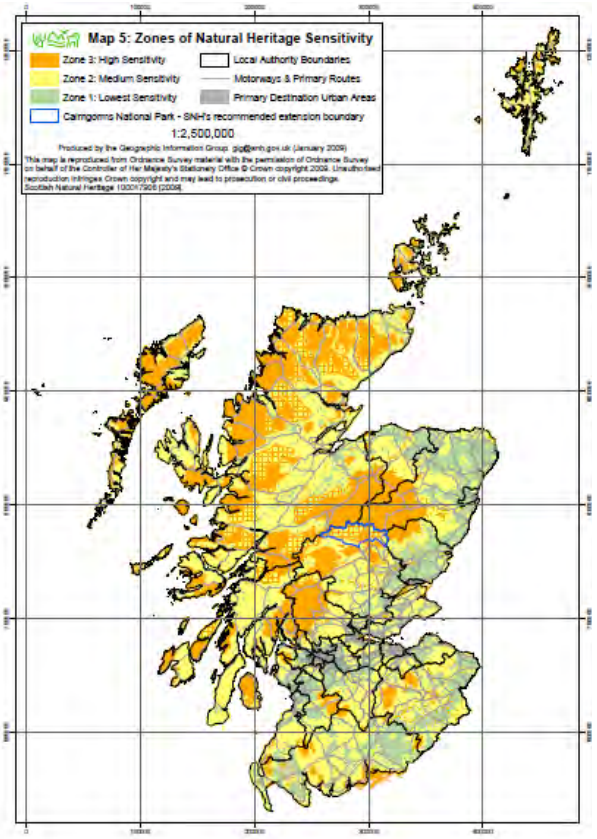
*Map 4 on sensitive bird areas was developed jointly by SNH and the conservation NGO, RSPB. It focuses on species listed in annex I of the Birds Directive that are present in Scotland and provides data at 2kmx 2km resolution.*

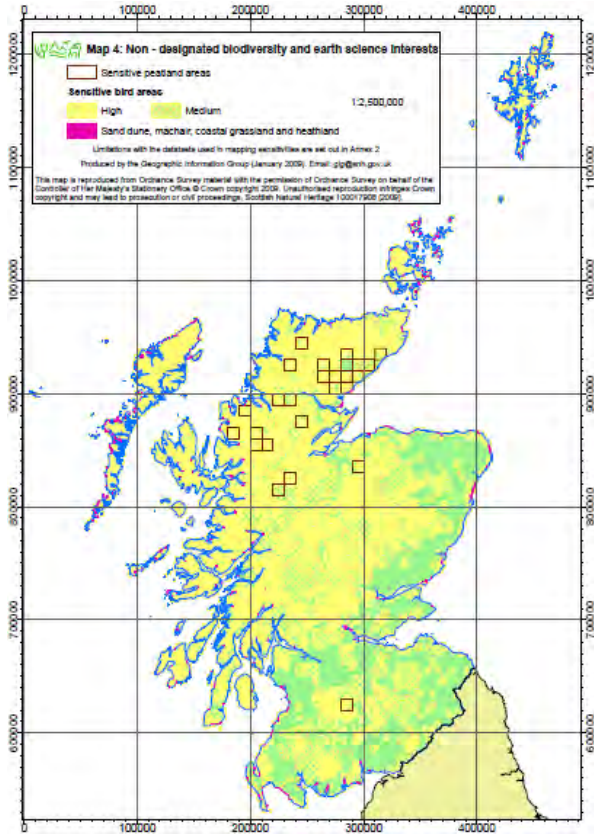
*Overall the maps provide a broad overview of where there is likely to be greatest scope for wind farm development and where there are the most significant constraints, in natural heritage terms. There are however a number of caveats to bear in mind. As they are drawn at a strategic scale, they cannot be relied upon to provide guidance on the acceptability of any particular proposal in any given location. This is because the broad scale does not allow the presence of important species and habitats to be presented in detail which means that some areas may have a higher sensitivity than indicated in these overview maps.*

*Scotland faces particular challenges in relation to the extensive area of peatland landscapes, which are highly sensitive to hydrological disruption arising from wind farms and its ancillary developments. Notwithstanding, the maps are to be used as information tools alongside the detailed guidance but they have no status as a planning tool.*

*More details available on SNH website. The SNH 'Strategic Locational Guidance for Onshore Wind farms in respect of the natural Heritage' is available from [http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind](http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind) The RSPB bird sensitivity map (Bright et al 2006) and the research report is available from [www.rspb.org.uk/Images/sensitivitymapreport_tcm9-157990.pdf](www.rspb.org.uk/Images/sensitivitymapreport_tcm9-157990.pdf). More recently a similar study has been done for England (Bright at al. 2009), [https://www.rspb.org.uk/Images/EnglishSensitivityMap_tcm9-237359.pdf](https://www.rspb.org.uk/Images/EnglishSensitivityMap_tcm9-237359.pdf).*



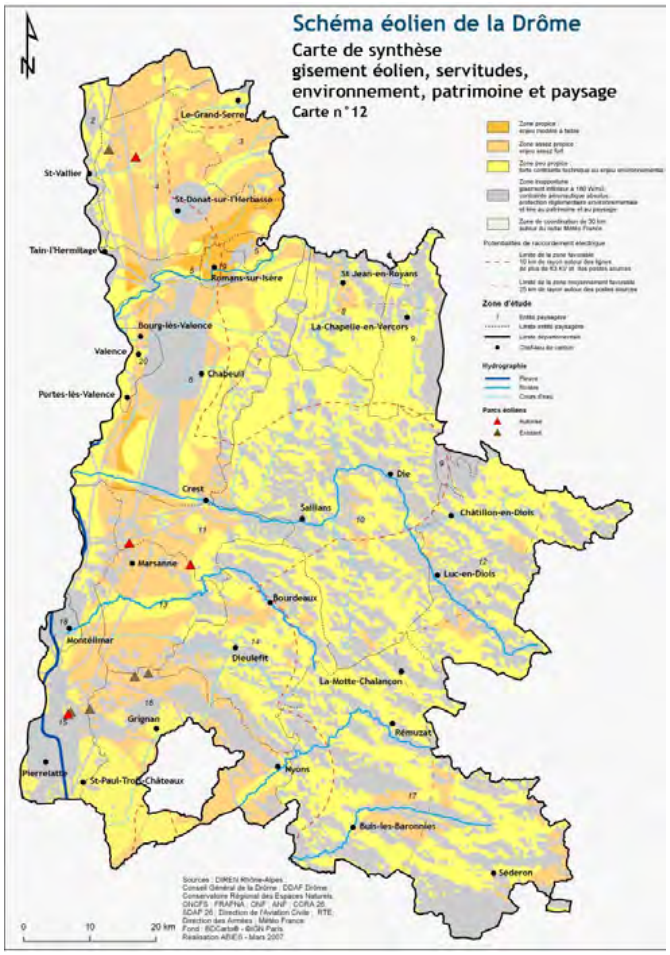

Map 5: Zones of Natural Heritage Sensitivity
Zone 3: High Sensitivity
Zone 2: Medium Sensitivity
Zone 1: Lowest Sensitivity
Cairngorms National Park - SNH's recommended extension boundary
Local Authority Boundaries
Motorways & Primary Routes
Primary Destination Urban Areas
1:2,500,000


Map 4: Non - designated biodiversity and earth science interests
Sensitive peatland areas
Sensitive bird areas
High
Medium
Sand dune, machair, coastal grassland and heathland
1:2,500,000
0
100000
200000
300000
400000
600000
700000
800000
900000
1000000
1100000
1200000

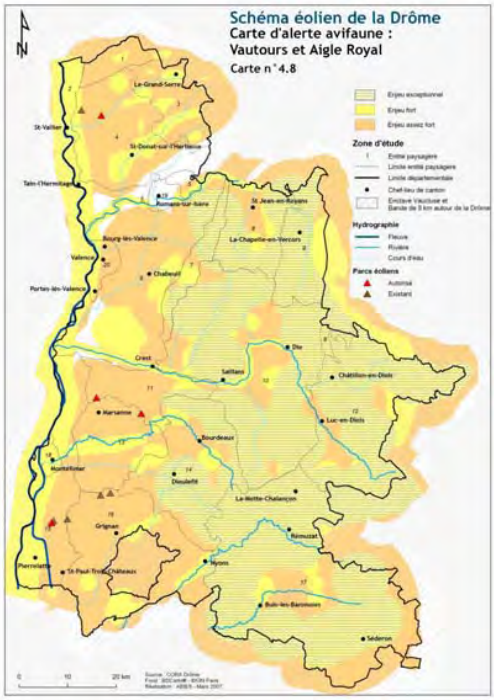
**Regional spatial plan for wind energy development in Drôme Region, France**

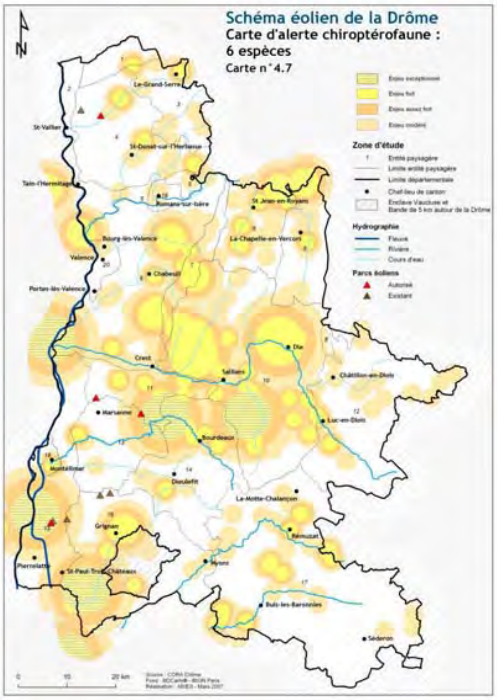
In 2005, the regional authorities of the Drome Region in France decided to develop a wind energy plan for the entire region. The aim was not only to analyse the potential benefits and constraints of wind development across the region but also to offer decision makers and wind farm developers a series of practical tools and important sources of information to help them prepare their development proposals in a way that is both cost effective and in keeping with the environment.

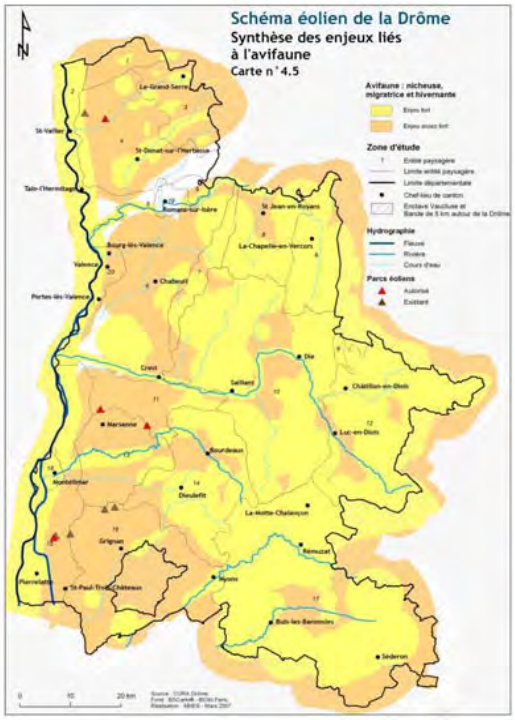
In this respect, detailed zonation maps were prepared in close consultation and dialogue with all interest groups. Each one identified different areas of high, medium or low potential in terms of wind resources, relevant public utilities and access to grid connections. A synthesis map was also prepared to demarcate areas of particular environmental sensitivity such as areas of importance for birds or bats or areas of high nature value. This synthesis map is based on, and accompanied by, more detailed wildlife sensitivity maps for certain species of particular conservation concern: bats, vulture and the golden eagle. These detailed maps are intended to provide an early warning system of potential conflicts with these important species so that wind farms can be planned in function of this knowledge.
*More detailed information, including the complete report on the Drome wind energy plan is on:* *http://www.drome.equipement.gouv.fr/rubrique.php3?id_rubrique=146* *Further french case studies and monitoring results on interactions between wind energy and biodiversity is available from* *http://www.eolien-biodiversite.com*

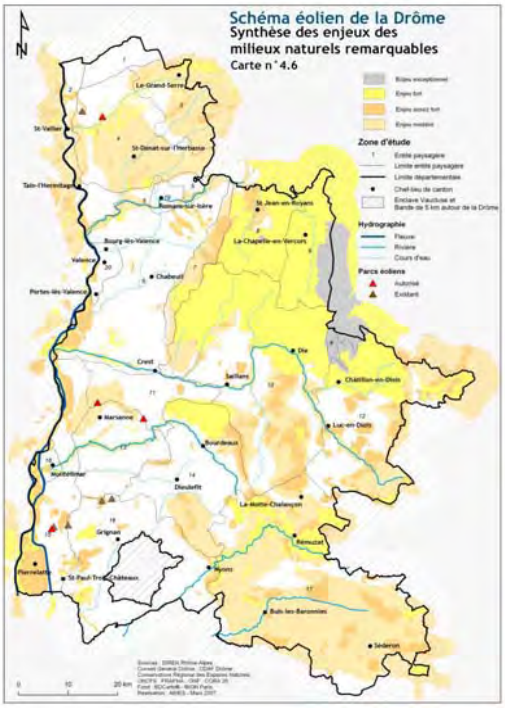



*Synthesis map combining wind potential, public utilities, environmental concerns, heritage features and landscape. The zones are categorised as: areas deemed favourable for wind farm development (dark orange), areas moderately favourable but with some constraints (light orange), areas of low potential both for technical reasons and environmental reasons (yellow) and inappropriate areas eg poor wind capacity and high environmental constraints (grey areas).*



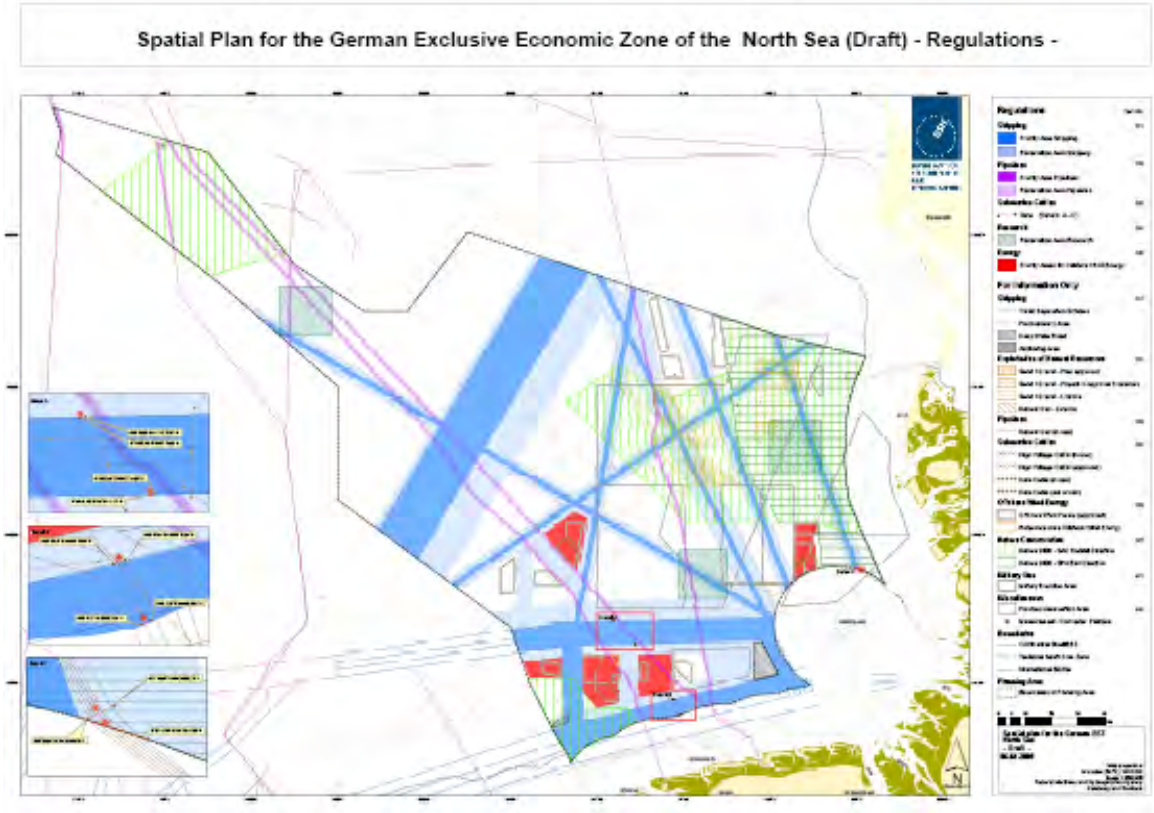

*Map 1: alert map for vultures and golden eagle. May 2: alert map for bat species.*
*Map 3: synthesis map of areas of remarkable nature value.*
*Map 4: synthesis map of areas of importance for breeding, migrating and overwintering bird species*

**Spatial planning in the German EEZ of the North Sea.**

*The German EEZ of the North Sea attracts a lot of activities such as shipping, fishery, , exploitation of raw materials, energy production (especially wind energy) and marine scientific research; all of which take place within a geographically limited marine area which also harbour important bioresources and nature values.*

*After major efforts in terms of surveys and research to identify marine sites of high nature value and potential conflict areas with reference to other activities and developments, including wind farms, the German Cabinet approved Europe's first maritime spatial plan in September 2009. In this plan areas and zones for various activities and infrastructure have been identified, including sites designated for protection within the Natura 2000 network with reference to habitats, marine mammals and birds[117].*

*A similar plan is in preparation for the German EEZ of the Baltic Sea.*

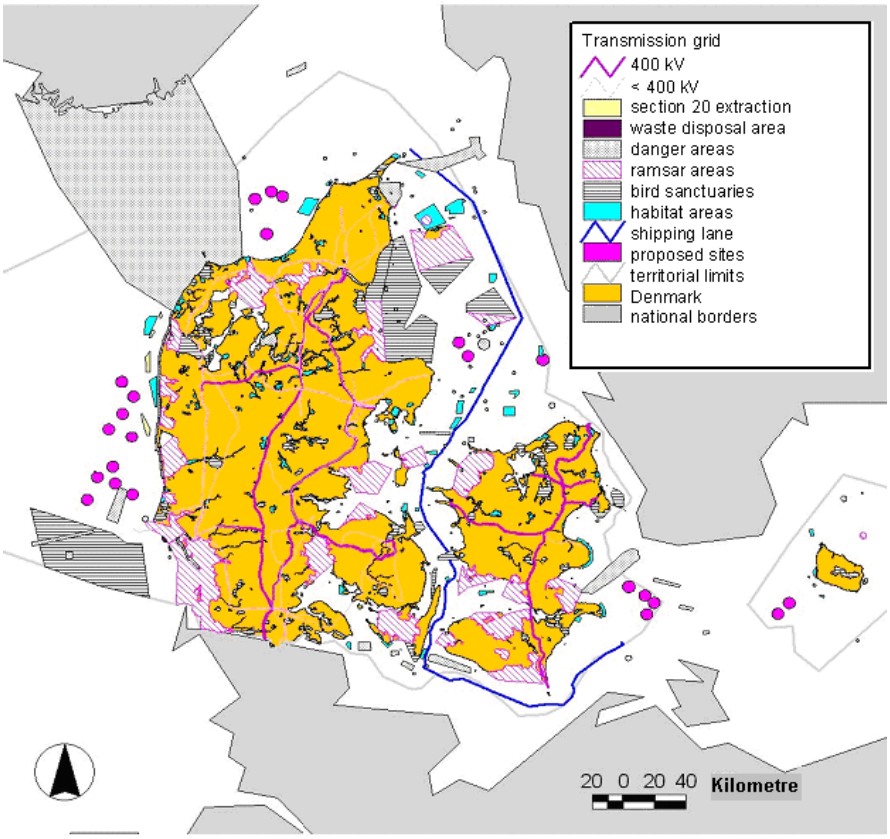



[117] http://www.bsh.de/en/Marine_uses/Spatial_Planning_in_the_German_EEZ/index.jsp for further information about the work approach (with links to maps etc).

**Locational mapping of offshore wind farms in Denmark**

*For Denmark, an offshore wind turbine action plan from 1997 was updated in 2007, within the framework of a long-term national energy policy with the goal to have a share of renewable energy covering at least 30% of the gross energy demand by 2025[118]. For wind energy, a proposal of 23 offshore wind farm locations (within 7 larger areas) with an installed capacity of 4,600 MW in total was proposed, corresponding to a total energy production of 18 TWh or just over 8% of the total energy consumption and 50% of the electricity consumption in Denmark.*

*Locations have been selected within the frame-work of strategic planning approach, taking into account, inter alia, wind conditions, nature values (incl. Natura 2000 designations), visibility, and grid connections. The map below illustrates the proposal of 23 wind farm locations in the Danish EEZ, taking into account various kinds of planning constraints (incl. bird sanctuaries, Ramsar areas and habitat areas) within a strategic planning approach[119].*




[118] Future Offshore Wind Power Sites – 2025, submitted by The Committee for Future Offshore Wind Power Sites under The Danish Energy Authority, April 2007; http://www.ens.dk/graphics/Publikationer/Havvindmoeller/Fremtidens_%20havvindm_UKsummery_aug07.pdf.

[119] From "Future Offshore Wind Power Sites – 2025", submitted by The Committee for Future Offshore Wind Power Sites under The Danish Energy Authority, April 2007; http://www.ens.dk/graphics/Publikationer/Havvindmoeller/Fremtidens_%20havvindm_UKsummery_aug07.pdf.

# 5 . STEP-BY-STEP PROCEDURE FOR WIND FARM DEVELOPMENTS AFFECTING NATURA 2000 SITES

- *Paragraphs 3 and 4 of Article 6 of the Habitats Directive set out a series of procedural and substantive safeguards that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site.*
- *The first step is to determine whether a plan or project should undergo an Appropriate Assesment (AA). If it cannot be excluded that there will be a significant effect upon a Natura 2000 site then an Appropriate Assessment must be undertaken.*
- *The purpose of the AA is to assess the implications of the plan or project in respect of the site's conservation objectives, individually or in combination with other plans or projects. The conclusions should enable the competent authorities to ascertain whether or not the plan or project would adversely affect the integrity of the site concerned.*
- *The Appropriate Assessment should focus on the species and habitats that have justified the site's designation as a Natura 2000 site and should also consider all the elements that are essential to the functioning and the structure of that site. The appraisal of effects must be based on objective information.*
- *The outcome of the AA is legally binding. If it cannot be ascertained that there will be no adverse effects on the integrity of the Natura 2000 sites, even after the introduction of mitigation measures or conditions in the development permit, then the plan or project cannot be approved unless the conditions of Article 6 (4) are met.*

## 5.1 Introduction

The previous chapter outlined the benefits of strategic and proactive planning as a means of avoiding potential impacts of wind farm developments on nature and wildlife at an early stage in the planning process, for instance through the appropriate siting of wind farm developments away from areas of potential conflict with wildlife and nature.

The present chapter looks specifically at what happens when Natura 2000 sites are likely to be affected either at the planning level or at the individual project level. It provides guidance on the procedures to follow in accordance with Article 6(3)-(4) of the Habitats Directive and offers practical advice on how to apply these requirements in the case of wind farm developments in particular.

The chapter is based largely on the guidance that already exists on article 6 of the Habitats Directive. It is strongly recommended that the following three guidance documents are read in conjunction with the present document[120]:

- Managing Natura 2000 sites: the provision of Article 6 of the 'Habitats' Directive 92/43/EEC
- Assessment of plans and projects significantly affecting Natura 2000 sites: methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC.

[120] available at http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

- Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC: clarification of the concepts of alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, Opinion of the Commission.

Because Natura 2000 concerns Europe's most valuable and endangered habitat types and species, it is only logical that the procedures for approving such developments are sufficiently rigorous to avoid undermining the overall objectives of the Birds and Habitats Directives – that of safeguarding Europe's most vulnerable wildlife and nature.

Particular attention is therefore given to the need for decisions to be taken on the basis of sound scientific information and expertise. Delays during the decision making process are often caused by the lack of information or poor quality assessments that do not allow the competent authorities to make a clear judgement on the potential impacts of the proposed plan or project.

As explained in chapter 3, the assessments must cover not only the impacts related to the wind turbines but the whole wind farm development including associated infrastructures and installations such as access roads, site access (e.g. for maintenance works or during constuction), anemometer masts, construction compounds, concrete foundations, temporary contractors facilities, electrical cabling (e.g. overhead wires) for access to the grid, spoils, and/or possible a sub-station, control building etc.

### 5.2 Article 6 of the Habitats Directive : a step-by-step approach

Article 6 of the Habitats Directive is one of the most important articles in the Directive as it determines the relationship between conservation and land-use. Paragraphs (3) and (4) set out a series of procedural and substantive safeguards that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site. The proposed development does not have to be located within the Natura 2000 site in order to trigger the need for an AA as plans and projects outwith the site may also carry the likelihood of adverse effects.

***ARTICLE 6 (3) and (4) OF THE HABITATS DIRECTIVE***

- *6(3). Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*
- *6(4). If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*
- *Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.*

This Article 6 procedure is designed to:

- Fully assess the impacts of plans or projects that are likely to have a significant negative effect on a Natura 2000 site by means of an Appropriate Assessment;
- Ascertain through the Appropriate Assessment, whether the impact will adversely affect the intergrity of the site and, if this is the case, whether the plan of project can still be approved if certain mitigation measures or planning conditions have been introduced that remove or minimise the adverse effects on the site to a non-significant level;
- Provide a mechanism for approving, in exceptional circumstances, plans or projects that have an adverse effect on a Natura 2000 site even after the introduction of mitigation measures when these plans or projects are considered to be of imperative overiding public interest but where no suitable alternative solutions exist (cf Art 6.4)

The procedures laid out in Article 6(3) and 6(4) is best carried out in stages. Every stage determines whether a further step in the process is required. For instance if, after stage one, it is concluded that there will be no significant effects on the Natura 2000 site, then the plan or project can be approved without the need for further assessment:

- **Stage one: Screening** – this initial evaluation is intended to determine whether a plan or project has to undergo an Appropriate Assessment. If it cannot be excluded, on the basis of objective information, that there will be significant negative effects upon a Natura 2000 site, then an Appropriate Assessment should be undertaken.

- **Stage two: Appropriate Assessment** – once it has been decided that an Appropriate Assessment is required, detailed information should be gathered on the site's ecological features and conservation objectives, and on the potential impacts of the plan or project on these conservation objectives. This will enable an assessment to be made on whether or not the plan or project, alone, or in combination with other plans or projects, will have an adverse impact on the integrity of the Natura 2000 site. The burden of proof is on demonstrating that there will be no adverse affects on the integrity of the site.

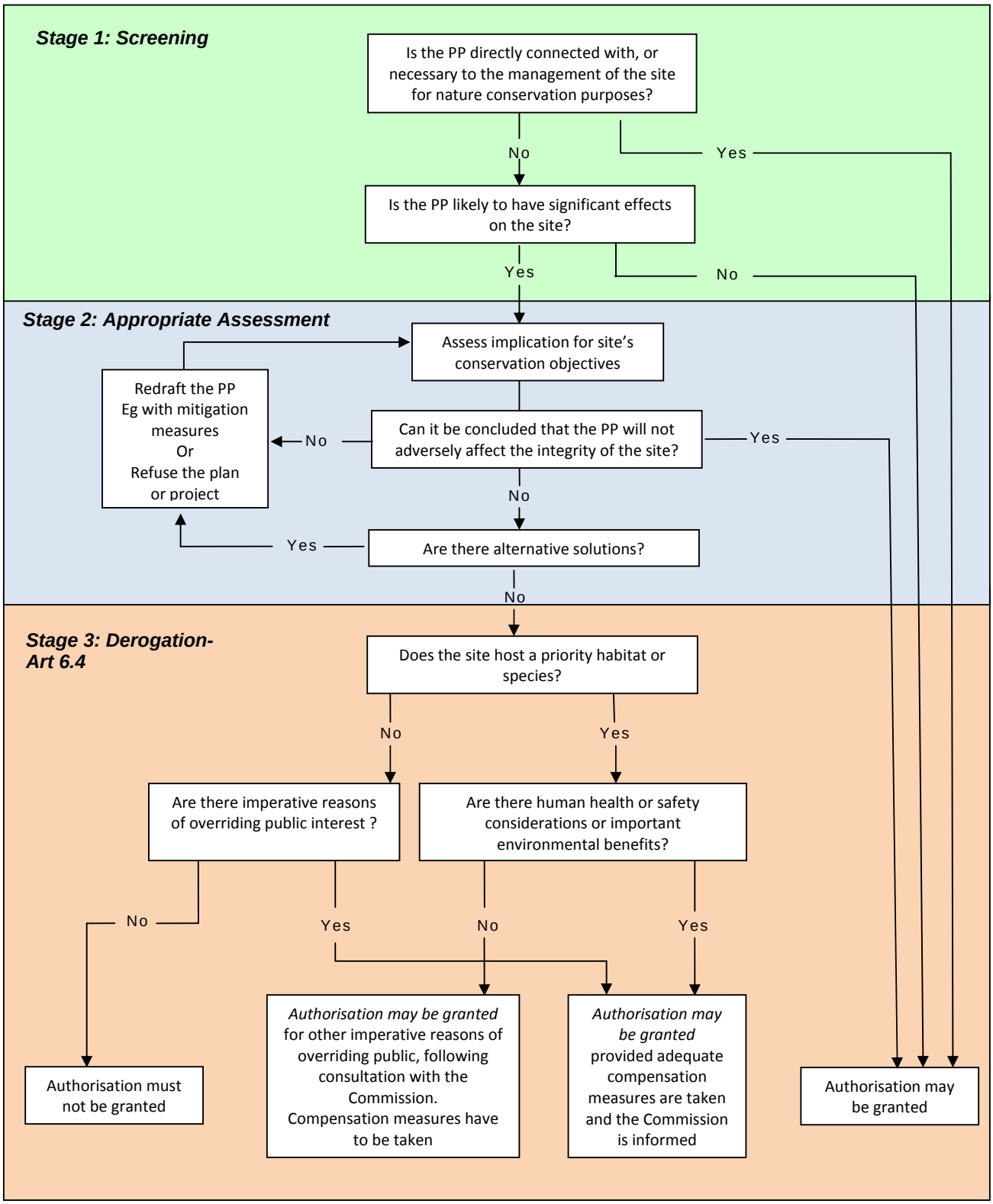
  In practice, the Appropriate Assessment is often an iterative process, allowing for improvements to the plan or project in order to avoid adverse effects on the integrity of the Natura 2000 site. Thus, depending on the assessment's findings, the authorities should consider if mitigation measures can be introduced or whether restrictions should be applied to the permit in order to avoid or reduce the effects to a non significant level.

  The authorities will also have to examine viable alternatives to the plan or project. But at the end of the day, the plan or project can only be authorised if it has been demonstrated that there is no adverse effect on the integrity of the site. If these cannot be ruled out, then the authorities must refuse its authorisation or apply the derogation test (Stage 3) under Article 6.4.

- **Stage three: derogation procedure in the absence of alternative solutions and for imperative reasons of overriding public interest:** If no alternative solutions exist and the adverse effects cannot be removed through mitigation, then, in exceptional cases, the authorities can decide if the plan or project should still be allowed to proceed on the grounds of imperative reasons of overriding public interest (IROPI). If so, then appropriate compensation measures must be identified and implemented to ensure that the overall coherence of Natura 2000 is protected.

The following flow chart (figure 11) demonstrates how these stages are applied and how decisions are reached on the authorisation or rejection of a plan or project.

**Figure 11 :Flow chart of Article 6(3) and (4) procedure (based on Commission Art 6 methodological guide**



It is clear from the above that this decision-making process is underpinned by the precautionary principle. The emphasis should be on objectively demonstrating, with reliable supporting evidence, that there will be no adverse effects on the Natura 2000 site. For this reason, the lack of scientific data or information on the potential risk or significance of impacts cannot be a reason to proceed with the plan or project.

Subsequent sections examine each of the stages in turn and provide advice on how they should be carried out in the context of wind farm developments in particular.

## STAGE 1: SCREENING

### 5.3 When is an Appropriate Assessment needed ?

The first step is designed to determine whether or not an Appropriate Assessment is actually needed. If it can be determined with certainty that the plan or project is not likely to have a significant effect, either individually or in combination with other plans or projects, then the plan or project can be approved without further assessment.

If there is any doubt, then an Appropriate Assessment will need to be undertaken so that these potential effects are studied in full before a decision is taken on whether to approve the plan or project. It is ultimately for the competent authority to decide, in the light of screening, whether or not an AA is required.

**Screening is required for :**

- Both *plans* that serve as a framework for development consents and individual *projects*. This ensures that the potential impacts on Natura 2000 are taken into account at both the strategic planning level and at the level of each individual project[121].
- Plans or projects affecting sites classified under the *Birds Directive* and sites designated or proposed to be designated under the *Habitats Directive.* They are both part of the Natura 2000 network.[122]
- Plans or projects both *inside* and *outside* the Natura 2000 site if they are likely to have a significant effect on the Natura 2000 site. For instance, a wind farm development located outside a Natura 2000 site could still have a significant effect on certain species for which the site is designated (such as bats) because they cause the species to be displaced from their habitual breeding or foraging areas within the site.

[121] Case C-6/04: 20 October 2005

[122] **For Potential SPAs** (IBA) Article 6(3)-(4) is not applicable but Article 4(4) of the BD is applicable. Areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive. [Commission/France, Basses Corbières, C-374/98]

**For potential pSCIs** (eg marine sites): The MS are required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level. [Dragaggi, C-117/03. [Bund Naturschutz, C-244/05].

[122] Case C-98/03 paragraph 32: "…In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site."

[122] Case C-201/02 para.53: "….the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive (85/337), so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations…"

*5.3.1 Gathering sufficient information*

The screening exercise is carried out by the authority responsible for the adoption of the plans or approval/rejection of development applications. Most often they will seek the assistance of, and base their evaluation on, the information received from, the developers, environmental authorities or contracted experts.

The collaboration of other relevant authorities, especially those responsible for nature conservation, in the screening of plans and projects may also be crucial, as they can provide useful information which should be taken into account at this stage.

To carry out the screening exercise, sufficient information should be gathered on both the wind farm plan or project and on the Natura 2000 site(s) that might be affected. In the case of the plan or project, this information should include data on the location of the wind farm and associated infrastructures in relation to Natura 2000 site(s) in the area as well as details on the scale and design of the wind farms and its associated infrastructures. It should also include details of all activities that will be undertaken during each stage of the project's cycle – i.e. during the construction, operation and decommissioning /repowering phases.

As regards the Natura 2000 site, information should be gathered on the species and habitat types for which it has been designated, their conservation state and on the overall conservation objectives of the site. Part of this information can be found in the Natura 2000 Standard Data Forms or in the site designation or management plans where available.

It is worth recalling that the initial screening undertaken here is not the same as a full-scale Appropriate Assessment – it only requires sufficient information to be able to decide if there is likely to be a significant effect or not.

***Natura 2000 Standard Data Form***
*The Standard Data Forms which have been compiled for each site contain information about the surface area, representativity and conservation status of the habitats present in the site, as well as the global assessment of the value of the site for the conservation of the natural habitat types concerned. For the species present in the site, information is provided on their populations, status (resident, breeding, wintering, migratory) and on the site's value for the species in question.*

***Conservation status of habitats and species***
*According to the provisions of Article 17 of the Habitat Directive, the EU 25 Member States (i.e. excluding Romania and Bulgaria) reported, in 2008, on the conservation status of all the species and habitats listed in the annexes of the Habitats Directive which occur in their territory. On the basis of this, the Commission produced a consolidated report on the conservation status of each species and habitat type at a biogeographical and EU level. These reports provide useful contextual information*[123]

***Natura 2000 Management plans***
*Some sites have a Natura 2000 management plan with important elements such as the conservation objectives for the site, the species and habitats, theirs status, threats, etc, which can be useful for the screening stage and for the Appropriate Assessment.*

[123] *All reports are available at: http://biodiversity.eionet.europa.eu/article17 and http://ec.europa.eu/environment/nature/knowledge /rep_habitats/index_en.htm*

**Pre-screening by developers: preparing the ground for a smoother decision making process**

It is strongly recommended that developers already gather information on the Natura 2000 sites before starting to design their plan or project (i.e. even before the screening stage) so that they can be aware of the possible sensitivities regarding nature and wildlife and can take these into consideration during the preparation of their development proposal. This could, for instance, influence the choice of location for the wind farm as well as its actual design so that only the most appropriate sites are taken forward.

It is also very useful, at an early pre-screening stage, for developers to hold initial discussions with their planning authority and with the statutory nature conservation authorities to learn more about the potential environmental constraints the project might face and how these might be best avoided. This could also help to identify any potential issues to watch out for or any gaps in scientific knowledge that might need further investigation before the plan or project is approved. Experience has shown time and again that good research and consultation right from the start before work begins on the development proposal helps to avoid unnecessary time and expense on unsuitable sites later on.[124]

### *5.3.2 Determining if there is a 'significant effect'*

Every plan or project that could potentially affect a Natura 2000 site(s) should initially be considered as a candidate for Appropriate Assessment. But an Appropriate Assessment will only be required for those that are '….*likely to have a significant effect ..'*.

When doing this initial evaluation it is important to recall that the emphasis is on there being a 'likelihood' of potentially significant effects – not a certitude. This shows the precautionary nature of this initial test. If there is any doubt over whether the effects are likely to be significant or not then an Appropriate Assessment must be undertaken to ensure that these potential effects can be studied in full.

The 'likelihood' of potentially significant effects should be considered in the light of the conservation objectives, the characteristics and the specific environmental conditions of the site. Plans or projects likely to undermine the site's conservation objectives must be considered likely to have a significant effect on that site.

***Likely effects***
*Likely effects on the site should first be identified at this stage. The biodiversity elements liable to be affected (habitats, species, ecological processes) should be determined, taking into account their sensitivity in relation to the planned activities. Risks of effects must be identified using a precautionary approach. Where preliminary scientific evaluation indicates that there are reasonable grounds for concern as to the absence of significant effects, an appropriate assessment has to be carried out.*

***Significant effect***
*The significant nature of the effects on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. In assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project (Case C-127/02 para. 46-48).*

[124] European Best Practice Guidelines for wind energy development, EWEA 2002. Available from http://ec.europa.eu/energy/renewables/studies/wind_energy_en.htm

### *5.3.3 Looking at potential cumulative effects*

The screening process also applies to plans or projects *in combination with other plans or projects*. It may be that one wind farm project alone might not have a significant effect but, if taken in combination with other plans or projects (wind farm or other developments) within the area, the cumulative effects may turn out to be significant.

Other plans or projects to be considered in this case include those that have already been completed, those that are approved by the planning authorities, or those that are currently undergoing planning approval.

The geographical scale over which these cumulative effects need to be considered will depend on the exact circumstances and scale of the plan or project being studied but should cover a sufficiently large area to capture any cumulative effects that may arise with the project under assessment, having the transboundary aspect in mind, when relevant. Again, the relevant nature conservation authorities will be able to help identify the possible plans or projects that need to be considered as part of the in-combination test.[125]

### *5.3.4 Recording the screening decision*

Finally, as screening is a legal requirement, the reasons for the final decision as to whether or not to carry out an Appropriate Assessment should be recorded and sufficient information should be given to justify the conclusion. Given that the nature protection assessments often run in parallel with the EIA/SEA procedures, common information procedures to the public should be envisaged.

**Key questions to be considered at the stage of screening**:

- Identify the geographical scope of the plan or project, and its main characteristics
- Identify all Natura 2000 sites that might be affected by the plan or project.
- Identify the qualifying interests of the Natura 2000 sites concerned (i.e. the habitats and species for which the sites are designated) and the sites' conservation objectives.
- Determine which of those species and habitats could be significantly affected by the planned activities.
- Analyse other plans or projects which could, in-combination with the planned activities, give rise to a likely significant effect on Natura 2000 sites
- Analyse the possible interactions between the plan or project activities, either individually or in combination with other plans or projects, and the qualifying interests, the ecological functions and processes that support them.

[125] A possible (but still preliminary) approach to assessing the cumulative effect of onshore wind farms has been proposed by The Scottish Natural Heritage (SNH 2009b).

# STAGE 2: CARRYING OUT THE APPROPRIATE ASSESSMENT

## 5.4. Purpose of Appropriate Assessment

The purpose of the Appropriate Assessment is to assess the implications of the plan or project in respect of the *site's conservation objectives*, individually or in combination with other plans or projects. The conclusions should enable the competent authorities to ascertain whether or not the plan or project would adversely affect the integrity of the site concerned.

The Appropriate Assessment must be undertaken before the competent authority decides whether or not to undertake or authorise the plan or project. The EU Court of Justice has confirmed that as regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, the provision does not define any particular method for carrying out such an assessment. Nonetheless, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval [126].

In summary, the term 'appropriate' essentially means that the assessment needs to be appropriate to its purpose under the Habitats and Birds Directives – ie that of conserving rare and endangered species and habitat types of European interest. 'Appropriate' also means that the assessment has to be a *reasoned* decision. If the record of the assessment does not disclose the reasoned basis for the subsequent decision, then the assessment does not fulfil its purpose and cannot be considered 'appropriate'.

In this respect, it is important to recall that, in contrast to the EIA or SEA, the outcome of the Appropriate Assessment is legally binding for the competent authority and conditions its final decision[127]. Thus, if it cannot be ascertained that there will be no adverse effects on the integrity of the Natura 2000 site, even after the introduction of mitigation measures, then the plan or project cannot be approved, unless the conditions of Article 6(4) are met.

The lack of information or data cannot be used as a reason for approving a plan or project. The EU Court of Justice confirmed this position in the Waddensea case (C-127/02) where it stated that '*such an (appropriate) assessment of the implications implies that, prior to the approval of the plan or project, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field.*'

## 5.5 Steps for an Appropriate Assessment of wind farm plans and projects

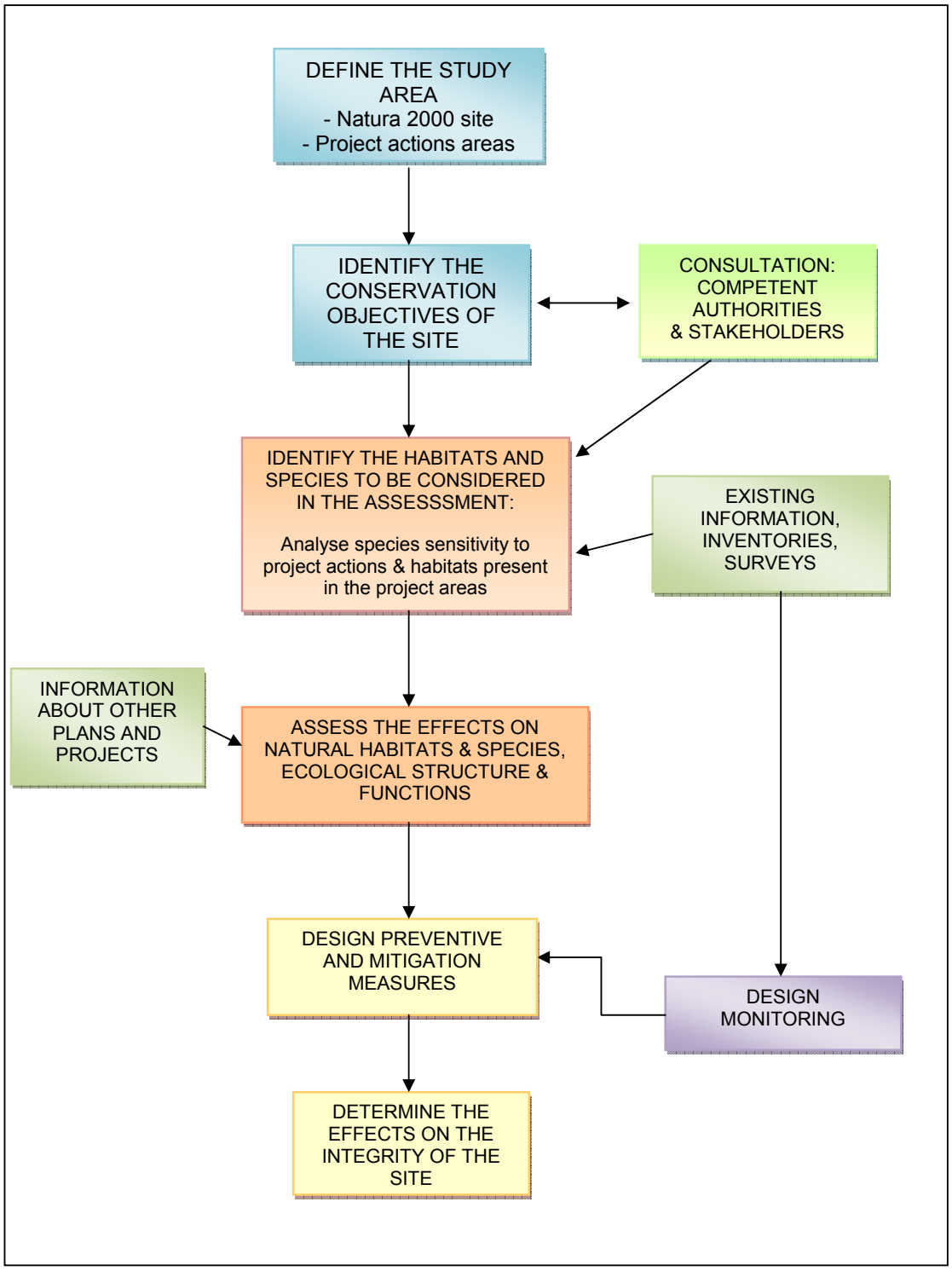
There are several basic steps to follow when carrying out an Appropriate Assessment. These are illustrated in the figure 12.

The focus of the Appropriate Assessment should be specifically on the species and/or habitat types for which the site is designated Natura 2000, and on the possible effects of the plan or project on them. This should also include any indirect effects on these species and/or habitat types, for instance on their supporting ecosystems and natural processes.

[126] C-127/02, paragraphs 52-53.

[127] See chapter 2 for details on the relationship between SEA, EIA and AA

***Figure 12: Steps to be undertaken as part of the appropriate assessment***



*5.5.1. Setting the baseline and gathering further information*

It is important to ensure that the Appropriate Assessment is well focussed and provides clear terms of reference for evaluating the potentially negative effects of the wind energy project on the Natura 2000 site(s). This means identifying more precisely what impacts the Appropriate Assessment should cover and to ensure that all necessary information is gathered to enable these impacts to be assessed correctly.

This builds on the information already gathered under the screening exercise but, this time, any gaps in knowledge should also be filled as far as possible so that the assessment can be made on sound scientific grounds. Sound baseline data is of vital importance as the Appropriate Assessment has to be able to ascertain with certainty that the proposal will not affect the integrity of the site concerned. **If there is some degree of doubt, the competent authorities may require further field work to be carried out or may refuse the project as it stands on the grounds of uncertainty over the impacts**.

At this stage it is also useful to define the study area bearing in mind that the potentially negative effects may be felt over a wider area than the immediate location of the wind turbines. It may for instance be useful to start with a 1km radius and then to adjust this to make the study area larger or smaller in function of the species and habitat types likely to be affected.

**Information gathering during scoping**

The **information about the plan or project** should contain details of all elements that are relevant for the assessment. They should include at least the folllowing:

- Detailed maps of precise location of the wind turbines and the associated infrastructures in relation to the Natura 2000 site(s) in the given area;
- The scale and design of the wind farm, e.g. the number and size of wind turbines, their layout and design, etc..
- Similar details for all associated infrastructures;
- Activities foreseen during construction works and their duration / timing;
- Activities foreseen during operation and management;
- Provisions for repowering and decommissioning;
- Details of any other plans or projects in the area that could, if taken in combination with this plan or project have a significant cumulative effect on the Natura 2000 site

The **information about the Natura 2000 site** should contain at least the following:

- Details on each species and habitat type for which the site is designated and ecological maps of their location within and around the site over time (eg over an annual lifecycle);
- Data on their overall usage of the site for activities such as foraging, breeding, resting, staging or hibernating;
- Data on their representativity and conservation status both within that site and within the area in general (including, inter alia, data on population size, degree of isolation; ecotype, genetic pool; age class structure..);
- Data on ecological structure and functioning of the site and its overall conservation state;
- Details of the conservation objectives of the site (incl any management plans etc);
- The role of the site within the biogeographical region[128] and the Natura 2000 network;
- Any other aspects of the site or its wildlife that is likely to have an influence on its conservation state and objectives (eg current management activities, other developments..)

[128] The lists of Sites of Community Importance (SCI) within the Natura 2000 network, are adopted by biogeographical region. For further information and links to maps go to http://ec.europa.eu/environment/nature/natura2000/db_gis/index_en.htm

Once again, in addition to requesting the developer to provide any relevant assessments, impact studies and surveys etc… that may be reasonably required of them, it is strongly recommended that the competent authorities also consult with, and seek the advice and guidance of, the relevant nature authorities, as early as possible during the scoping stage. They will be able to provide details about the Natura 2000 site and its conservation objectives. They can also provide scientific advice on the likely ecological effects that a wind energy project could have on the site.

Other bodies such as conservation NGOs, research institutions or local stakeholder groups can also be contacted to help provide further local knowledge and ecological information. Consulting these organisations already during the scoping exercise will help ensure that as complete a picture as possible is built up about the site, the species/habitats present and the potential impacts of the plan or project on these. It can also lead to a smoother decision making process if all interest groups are collaborating from the start in finding solutions that are acceptable to all.

Information gathering is necessarily an iterative process. If the first identification and analysis of effects reveals that there are important gaps in knowledge, then further surveys and monitoring work will need to be undertaken in order to complete the picture. This will ensure there is a sufficient basis of scientific knowledge to be able to make a reasoned decision.

**Experience has shown that many of the delays or problems encountered during the Appropriate Assessment are caused by the fact that the information gathered for the Appropriate Assessment is incomplete or deficient**. As a result, the authorities are unable to confirm that there be no adverse effects on the integrity of the site and the whole assessment process has to be put on hold whilst the missing information is being gathered.

***Fictitious example of further information requirements identified during scoping.***

| **Wind farm project with twelve turbines on edge of a woodland** | | | |
|---|---|---|---|
| **1. Possible likely significant effect** | **Collision mortality** | **Disturbance and displacement** | **Habitat loss and degradation** |
| **2. Information about species and habitats at the Natura 2000 site** | Ecological data on the bat and bird species of European interest and at potential risk at the site. | Data on habitat requirements for species of European interest and at potential risk at the site. | Location of key habitats in or around the site. |
| **3. Potential impacts to be assessed** | Collision mortality rates during different parts of the species life cycle, e.g. during breeding or migration periods | Habitat usage across the site | Location of core roosting, breeding or foraging sites, and location of movement routes between these. |
| **4. Data needed for these assessments** | Field data over at least one annual cycle, for risk assessments, using modeling or sensitivity indices. | Field data on local dispersal patterns inside and around the site over at least one annual cycle. | |

*5.5.2. Assessing the impacts on the Natura 2000 site*

The Appropriate Assessment itself involves looking at all the aspects of the plan or project that could cause a significant effect on the Natura 2000 site. In this context, each element of the project (wind turbines, other constructions etc..as well as effects during construction, maintenance and operation etc…) should be examined in turn and the potential effects of that element should be considered in relation to each of the species or habitat types of European interest for which the site has been designated Natura 2000 site. This is because each species has different conservation requirements. Also, the impacts on one species may vary from one site to another depending on its conservation state and the underlying ecological conditions of the site.

For example, a wind farm project proposes to locate 10 wind turbines in a degraded grassland away from any bird or bat interest within the Natura 2000 site but also proposes to construct an access road to the wind turbine site that will run across rare habitat types such as blanket bogs and natural forests. In such a case, the wind turbines themselves may be unlikely to cause any significant impact but the access road probably will, and so the effects of both operations should be examined in detail in light of the site's conservation objectives.

Thereafter, the effects of the different features within the plan or proposal should be looked at together, and in relation to each other, so that the interactions between them can be identified. For instance, it may be that the risk of collision mortality with the wind turbines alone is not likely to be significant but if it is taken in combination with the installation of overhead cables, which could also cause collision mortality, then the effects could become significant.

If there are several Natura 2000 sites that could be affected, as in the case of a development plan for instance, the impacts on each should also be studied seperately at first as they may have been designated for different species or habitat types and may have different conservation objectives.

**Conservation objectives of Natura 2000 sites**

*The conservation objectives for a Natura 2000 site are determined at member state level.*

*The Natura 2000 Standard Data Forms (SDF), which have been compiled for each designated site, contain information about the habitats (e.g. surface area, representativity and conservation status) and the species (populations, status) and the value of the site for the habitats/species for which the site has been designated. The SDF therefore provides information regarding the qualifying interests of a Natura 2000 site and, in the absence of more detailed definition of conservation objectives for a atura 2000 site, they can be considered as such. Some countries have developed more detailed conservation objectives for their Natura 2000 sites either at a strategic level across a suite of sites, or at an individual site level. Some sites may also have management plans or management objectives that provide clear indications about the conservation objectives to be attained.*

*The Habitats Directive (Article 4.4) requires that once a site of Community importance (SCI) has been adopted, the Member State concerned shall designate that site as a Special Area of Conservation (SAC) as soon as possible and within six years at most and apply the necessary conservation measures for the maintenance or restoration of the habitat and species for which the site has been designed to a favourable conservation status. These measures should also be taken into account as part of the Appropriate Assessment as they show how the site's conservation objectives will be translated into practical actions.*

Whilst the focus should be on the species and habitats of Community interest that have justified the site designation (the qualifying interests of the site), it should not be forgotten that these qualifying interests also interact with other species and habitats in complex ways. It is therefore important to consider all the elements that are essential to the functions and the structure of the site, its qualifying interests and its conservation objectives. Furthermore, other species can also be relevant for determining potential effects on protected habitats if they constitute typical species of the habitat in question.

The assessment should be based on the best available scientific knowledge of the following main elements as they relate to the qualifying interests of the site (EC 2007b):

- Structure and function, and the respective role of the site's ecological assets.
- Area, representativity and conservation status of priority and non-priority habitats in the site.
- Population size, degree of isolation, ecotype, genetic pool, age class structure, and conservation status of species under Annex II of the Habitats Directive, Annex I of the Birds Directive, and regularly occurring migratory species not listed in Annex I Birds Directive present in the site.
- Role of the site within the biogeographical region and in the coherence of the Natura 2000 network.Any other ecological assets and functions that are essential for meeting the site's conservation objectives.

The following boxes provide an overview of possible survey methods that have been used to identify and assess the likely effects of wind farms. These are based on a review of existing good practices and may therefore provide useful ideas and suggestions for future development proposals.

When field surveys are required a distinction should be made between those that are carried out before a decision is taken on the plan or project and those that involving longer term monitoring as a condition in the planning application – for instance to confirm the effects predicted in the AA/EIA or to monitor the effectiveness of the mitigation measures (which may be consideration so that adaptive mitigation can be applied). Baseline surverys which are necessary for the EIA/AA should be broader in scope in order to characterise the area for all species and habitats to enable a valid assessment to be made of the impacts and their significance.

**Good practice methodologies for survey work on the likely effects of wind**

*The Appropriate Assessment will need to be based on sound scientific and objectively verifiable information. This can sometimes require additional survey work to be carred out before the plan or project is approved. The following section provides a series of possible methodologies for carrying out further surveys on the likely effects of wind farms on species of European interest. They are derived from a range of sources and are indicative of the kind of information that may need to be gathered for onshore or offshore wind farms.*

*There are no legal stipulations about the length or extent of the pre-construction surveys, this has to be decided case-by-case. However, some indications can be given on the basis of existing experience and knowledge. For onshore locations, a 2 year ornithological baseline survey for wind farm projects may be required[129] and for bats it should cover a full annual cycle (including maternity and hibernating seasons as well as spring and autumn migration[130]).*

[129] In UK, cf DEFRA personal communication

[130] Rodrigues et al. (2008) for the elements to be included in a monitoring programme for bats.

*For offshore wind farms, year around studies over a period of 1-2 years have been recommended for marine mammals[131] and a 2 year period is recommended for birds due to the general paucity of existing data in these environments.*

*Field surveys have also to be designed to provide data that can be used for reliable and robust statistical analyses for comparisons, for instance, between before and after construction, between sites, or between a wind farm site and a reference area with similar environmental characteristics as regards habitats or climate for instance*

*A non-exhaustive overview of the most common techniques used so far is given in the following table. They include a mixture of techniques based on direct visual observation (e.g. birds and bats), sampling methods (e.g. for marine fish and benthic fauna) and remote techniques such as radar and sonar. It has to be kept in mind, however, that as the understanding of the potential impacts improves, the recommended methodologies may change.*

*Visual observations are frequently used for studying bird abundance and distribution in zones around proposed wind farm locations in order to investigate potential displacement effects[132]. Recordings of flight movement, e.g. along frequently used migration corridors for birds or bats, is a common monitoring technique for collecting data needed for assessing collision risks and potential barrier effects. For studies of potential displacement effects by birds around onshore locations, traditional territory mapping and line transect counts are useful tools[133]. Offshore, ship-based surveys are generally better for species identification and behavioural observations, while aerial surveys have the advantage of enabling relatively rapid coverage of large sea areas.*

*Records of flight calls has been found to be a useful complement, both to visual observations and remote techniques, e.g. for species identification*

*Carcass collection is included in many monitoring programmes for onshore locations. Although the method suffers from the obvious difficulty that carcasses can be overlooked or already removed by scavengers, it may still provide useful complementary and qualitative information about species killed by collision. Preferably, the search should be done in a standardised way that makes it possible to relate the number of findings to search effort, and (if needed) with correction factors for e.g. observer efficiency and scavenging rates[134]. For offshore locations, constructions of floating bunds and/or nets to retain corpses at wind farms have been considered but in most cases found to be impractical and not yielding reliable information[135].*

*Sampling of fish and marine fauna: Sampling methods such as trawling for fish and epifauna, and grab sampling for infauna are can be useful in combination with various remote techniques.*

*Remote techniques have been found to be very useful tools for collecting the data needed for impact assessments. Radar has a wide application and can be used to record movements (elevation as well direction) by birds and bats at night and in poor visibility. It is best used in combination with visual observations and/or records of flight calls to help with species identification etc. Thermal Animal Detection Systems (TADS) is a more recent, infra-red based technology with the potential to provide information about avoidance behaviour, flock size and flock altitude by birds and bats in close proximity to the rotor blades[136]. High Definition Video Surveys is an airplane-based technique for surveys of birds in marine environments, still under development[137]. Microphones for automatic registration of flight calls may also be a useful complement to species identification as well as quantitative estimates[138]. Hand-held or automatic bat detectors are necessary tools if the occurrence of bats is a key element in the surveillance programme.*

[131] E.g. Diederichs et al. (2008) and primarily with reference to Harbour Porpoise (*Phocoena phocoena*).
[132] E.g Petersen et al. (2006), see also BSH (2007) and DEFRA (2005) for detailed descriptions.
[133] Useful references in SNH (2005b).
[134] E.g. Morrison et al. (2007).
[135] E.g. Desholm et al. (2006).
[136] E.g. Desholm et al. (2006) and Hüppop et al. (2006), and references in these publications. See also Kunz et al. (2007b) for an overview of various remote techniques for surveillance of nocturnally active birds and bats.
[137] E.g. Mellor & Maher (2008).
[138] E.g. Hüppop et al. (2006).

*For marine environments, a large variety of techniques can be applied. For surveys of marine mammals, click detectors and towed hydrophones have been applied. "Passive Acoustic Monitoring" (PAM) systems, like T-Pods for surveys of whales and dolphins have been on the market for many years, and more advanced technologies, such as C-pods, are under development. Visual methods such as ship-based or aircraft surveys are useful complementary methods. – Remotely Operated Video (ROV) techniques are used for monitoring sediment characteristics and marine epifauna. For sediment processes hydro-acoustical techniques such as side scan sonar can be applied.*

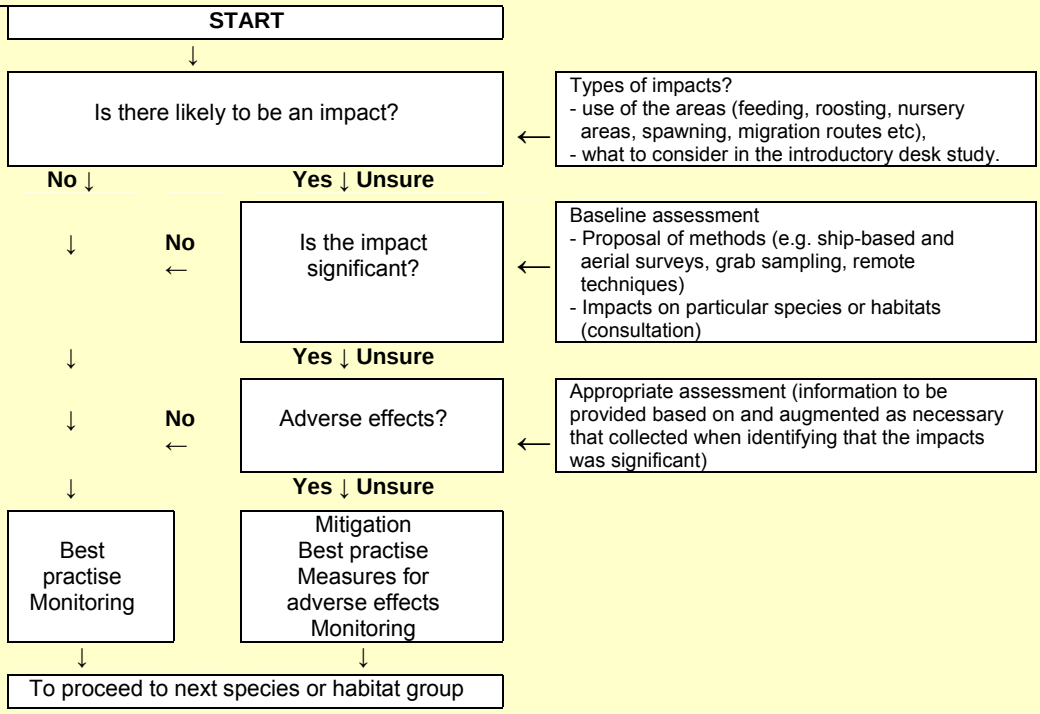
| Study method | Disturbance & displacement - onshore | Disturbance & distancing - offshore | Collision | Barrier effect | Change in habitat structure |
|---|---|---|---|---|---|
| Visual observations (primarily birds)<br>- Ship-based transect counts<br>- Aircraft surveys<br>- Records of flight movements<br>- Territory mapping<br>- Line transect counts | <br><br><br><br>X<br>X | <br>X<br>X<br><br><br> | <br><br><br>X<br><br> | <br><br><br>X<br><br> | |
| Visual obs (marine mammals)<br>- Ship-based transect counts<br>- Aircraft surveys | | <br>X<br>X | | | |
| Carcass collection (birds, bats) | | | X | | |
| Bat detector | X | X | X | | X |
| Trawling (fish, marine epifauna) | | X | | | |
| Grab sampling (marine infauna) | | X | | | X |
| Photo-sampling (marine epifauna) | | X | | | X |
| Recording of flight calls (birds) | X | X | X | X | |
| Radar surveys (birds, bats) | | | X | X | |
| Microphone registration (birds) | | | X | | |
| Thermal Animal Detection System (TADS) post construction. | | | X | X | |
| Beam trawl (marine fish, marine epifauna) | | X | | | |
| Passive acoustic monitoring (PAM; T-pods etc; marine mammals) | | X | | | |
| Towed hydrophones (marine mammals) | | X | | | |
| Ship-based acoustics (marine fish) | | X | | | |
| Hydro-acoustic techniques (Side scan sonar etc.; marine sediments) | | X | | | X |
| Video transects, e.g. remotely operated video (ROV; marine sediments, marine epifauna) | | X | | | X |
| Hydrological surveys | X | | | | X |
| Noise emission from turbines | X | X | | | X |

**UK guidelines for assessing impacts on Natura 2000 sites of offshore wind farm development.**

Guidelines and standards for EIAs and assessments of impacts on Natura 2000 sites, in accordance with Article 6 of the EU Habitats Directive, have been prepared by many Member States[139]. They differ in approach and degree of details, from outlines of the administrative procedures[140] to proposals of more detailed lines of action and appropriate methodology[141]. The approach proposed by the United Kingdom Department for Environment, Food and Rural Affairs[142] for assessments of impacts on marine Natura 2000 sites of offshore wind farm development has a wider application potential, also with reference to onshore locations and for other groups of species and habitats than the ones mentioned below.

The assessments are proposed to be done stepwise for various groups of species and habitats, e.g. as follows (flowchart below):
- Birds
- Marine mammals
- Fish and shellfish
- Subtidal benthos
- Intertidal benthos
- Terrestrial and coastal habitats
- Coastal and sedimentary processes

The guidance document includes proposals about relevant methodology for the various groups of species and habitats, with references to further studies and more detailed information. It is to be considered as a working document and it will be revised as the understanding of issues develops and new information becomes available.




[139] A selection of national guidelines are listed in Annex VI.
[140] E.g. the brief Swedish guidelines, "Vindkraft – tillståndsprocessen och kunskapsläget" (2007), edited by the Swedish Energy Agency.
[141] E.g. BSH (2007) for offshore wind farms in Germany, Scottish Natural Heritage (SNH 2005b) with reference to impacts birds of onshore wind farms and DEFRA (2005) for offshore wind farms in UK.
[142] DEFRA (2005).

Once all the information needed to make a reasoned assessment of impacts has been collated, the next stage of the Appropriate Assessment can begin in earnest: that of identifying the likely effects of the wind farm development proposal on the site's integrity in light of its conservation objectives.

This impact assessment has to be made in light of:
- the best scientific knowledge in the field (ECJ Waddensea ruling – see above)
- the Natura 2000 site's conservation objectives, as defined in the relevant national legislative framework and
  the potential impact on the site's integrity

Chapter 3 gives an overview of the kind of effects that are most frequently associated with wind farm developments and identifies the species or habitat types that have proven to be particularly vulnerable to this form of development. This provides a good starting point on what to look out for as it is based on current experiences and scientific studies.

But the effects of each project will be unique and must be evaluated on a case-by-case basis. According to the same ECJ Waddensea ruling (see above): *in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.*

Predicting the likely impacts can be difficult as one should have a good understanding of ecological processes and conservation requirements of particular species or habitat types types likely to be affected. It is therefore strongly recommended that the competent authorities secure the necessary expert advice and support in carrying out the impact assessment. As with all impact assessments, the Appropriate Assessment should be undertaken within a structured framework to ensure that the predictions can be made as objectively and accurately as possible.

For this purpose, impacts are often categorised into the following types:
- Direct and indirect effects;
- Short and long-term effects;
- Effects during different stages of the project (construction, operation, decommissioning..)
- Isolated and interactive effects
- Cumulative effects

For each effect identified, the *significance* of the impact will depend on:
- The magnitude of the impact
- The type of impact
- The extent
- Duration
- Intensity
- Timing
- Probability

Impacts should be predicted as precisely as possible, and the basis of these predictions should be made clear (this means also including some explanation of the degree of certainty in the prediction of effects). Wherever possible, predictions should be presented in such a way as to make them verifiable, as the outcomes of the tests can then be directly linked to a future monitoring programme (this may be one of the conditions placed in the planning permission – see below).

The impact assessment should also apply the best available techniques and methods to estimate the extent of the effects. Some of the techniques commonly used are listed in the following box.

**Commonly used methods for predicting impacts:**

- *Direct measurements*, for example of areas of habitat lost or affected, proportionate losses from species populations, habitats and communities.
- *Flow charts, networks and systems diagrams* to identify chains of impacts resulting from direct impacts; indirect impacts are termed secondary, tertiary, etc. impacts in line with how they are caused. Systems diagrams are more flexible than networks in illustrating interrelationships and process pathways.
- *Quantitative predictive models* to provide mathematically derived predictions based on data and assumptions about the force and direction of impacts. Models may extrapolate predictions that are consistent with past and present data (trend analysis, scenarios, analogies which transfer information from other relevant locations) and intuitive forecasting. Normative approaches to modelling work backwards from a desired outcome to assess whether the proposed project will achieve these aims.
- Population level studies: are potentially beneficial for determining population level effects of impacts to bird or bat or marine mammal species, for instance.
- *Geographical information systems (GIS)* used to produce models of spatial relationships, such as constraint overlays, or to map sensitive areas and locations of habitat loss. GIS are a combination of computerised cartography, storing map data, and a database-management system storing attributes such as land use or slope. GIS enable the variables stored to be displayed, combined, and analysed speedily.
- *Information from previous similar projects* may be useful, especially if quantitative predictions were made and have been monitored in operation.
- *Expert opinion and judgment* derived from previous experience and consultations on similar wind farms.
- *Description and correlation*: physical factors (water regime, noise) may be directly related to distribution and abundance of species. If future physical conditions can be predicted then it may be possible to predict future abundance on this basis.
- *Carrying capacity analysis* involves identifying the threshold of stress below which populations and ecosystem functions can be sustained. Carrying capacity analysis involves the identification of potentially limiting factors, and mathematical equations are developed to describe the capacity of the resource or system in terms of the threshold imposed by each limiting factor.
- *Ecosystem analysis* This approach aims to provide a broad regional perspective with a holistic framework. Three basic principles of ecosystem analysis are (i) taking the 'landscape level' view of ecosystems, (ii) use a suite of indicators including community level and ecosystem-level indices and (iii) taking into account the many interactions amongst ecological components which are involved in maintaining ecosystem function.

*Adapted from: Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC; http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf.*

*5.5.3. Assessing whether there are no adverse effects on site integrity*

Once the potential effects of the plan or project have been predicted as accurately as possible, the Appropriate Assessment can move onto the next stage which is to determinine whether the impacts will adversely affect the integrity of the Natura 2000 site, either alone or in combination with other plans or projects.

Again, it is important to bear in mind that **the focus of the assessment should be on objectively demonstrating, with supporting evidence, that there will be no adverse effects on the integrity of the Natura 2000 site,** in light of its conservation objectives. Thus, the competent authority has to be sure that there is no reasonable scientific doubt. If the adverse effects cannot be ruled out or if there is too much scientific doubt, the adverse effects have to be assumed.

It is clear from the purpose of the Directive that the 'integrity of the site' relates directly to the site's conservation objectives. Determining whether the integrity of the site is affected means determining whether the plan or project will adversely affect the:

- the coherence of the site's ecological structure and function, across its entire area, or
- the habitats, complex of habitats and/or
- populations of species for which the site is designated.

The focus is also on the specific site. Thus, it is not possible to accept a plan or project with significant adverse effects on the grounds that the conservation status of the habitat types and species it hosts will anyway remain favourable within the Member State or the EU as a whole.

***Integrity of the site***

*Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem, including structural and functional assets. In the framework of the Habitats Directive, the "integrity"' of the site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 Network (EC 2007b). It has been usually defined as "the coherence of the site's ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or populations of species for which the site is classified"* [143] *(EC 2000b, ODPM 2005). As regards the meaning of 'integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation. (EC 2000b).*

*A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity of self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management is required. When looking at the "integrity of the site", it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term (EC 2000b).*

*Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely to adversely affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2) (ECJ ruling on case C-127/02 para. 36).*

[143] PPG 9, UK Department of the Environment, October 1994 quoted on page 39 of the Commission's article 6 guide on "Managing Natura 2000 sites". The concept of 'integrity of the site' is further elaborated on page 79.

To sum up, there are two possible conclusions that can be drawn from this first impact assessment:

- there is no adverse effect and the project or plan can be approved as it stands;
- there will be adverse effects or adverse effects cannot be ruled out.

The latter does not necessarily mean that the plan or project is automatically refused. The competent authority could ask the developer to redesign or relocate the wind farm or introduce mitigation measures that would avoid or eliminate the predicted adverse effects. This would then normally imply a second evaluation round in the Appropriate Assessment to ensure that the mitigation measures/safegaurds are indeed sufficient. This is discussed further in the next section.

### *5.5.4. Considering how to mitigate adverse effects on the Natura 2000 site*

For a wind energy project, the AA is the key tool for ensuring that adverse effects on the integrity of the sites concerned are prevented or mitigated during design of the project. Mitigation involves introducing measures into the plan or project to eliminate the potential negative effects on the conservation objectives of the Natura 2000 site, or to reduce them to a level where they will no longer adversely affect the integrity of the site. As such, they should be directly linked to the likely negative effects which have been identified during the impact assessment described above. The competent authority, upon the advice of its ecological experts or the relevant nature authorities, should determine the level of mitigation required.

It can then ask the developer/planner to propose suitable mitigation measures (e.g. changes to the siting, design, scale of the wind farm and its associated instrastructures) or it can set certain conditions or restrictions in the development permit as a pre-condition for approving the plan or project (eg as regards the timing of the construction works or restrictions on the operation of the wind turbines, for instance during peak dispersal and migraiton periods).

Either way each mitigation measure should be based on sound scientific principles that will ensure they will be effective. As such they should contain:

- details of the measure proposed and an explanation of how it will avoid or reduce the adverse impacts which have been identified;
- evidence of how they will be implemented and by whom;
- a timetable for implementation relative to the plan or project (some may need to be put in place before the development can proceed);
- details of how the measure will be monitored and how the results will be fed back into the day to day operation of the wind farm (adaptive management – see below).

This will enable the competent authority to evaluate the mitigation measures as part of the Appropriate Assessment (second round) and determine whether or not they are sufficient or suitable for eliminating or removing the adverse effects which have been identified (and do not inadvertently cause other adverse effects on the species and habitat types in question). If the mitigation measures are deemed sufficient, they will become an integral part of the specification of the plan or project.

In the case of wind farm plans or projects, the most obvious mitigation measure is to adjust the location of wind farm away from areas where it can cause conflicts with the species and habitat types for which the site has been designated (e.g. foraging paths, flyways, migration routes, vulnerable areas such as breeding sites or foraging area). Evidence to date shows that the inappropropriate siting of wind farms and their associated structures is one of the most frequent and common causes of impact.

But mitigation measures can also involve modifications to the size, design and the configuration of wind farms and to the construction of turbines and associated infrastructures. Or they can introduce temporal adjustments of activities during construction and operation.

The following box provides an overview of some of the mitigations that have been used in the case of wind farm developments in particular and which may provide useful ideas or suggestions for future developments.

**Possible mitigation measures that have been used or proposed for wind farms so far**

The list below provides an overview of possible mitigation measures that have been proposed or applied with reference to wind farms:

***Configuration of wind farms**:*
Wind farms should be carefully planned having regard to the flight paths of birds and bats in particular. It has been proposed that grouping turbines in rows that run parallel – instead of perpendicular - to the main flight direction of certain birds can be an effective mitigation measure.[144] In addition, locating turbines in blocks to create corridors can create safety zones through which birds can pass. Adjustments of the configuration of wind farms may also be considered when old turbines are replaced by new and larger ones.

***Construction of turbines and associated infrastructures**:*
A variety of technical adjustments to wind turbines have been proposed to reduce the collision risk. This concerns in particular the turbine's height and the rotor-sweep[145].

- Resting and perching places: In the past, wind turbines sometimes provided attractive perching sites for birds. Modern turbines should be designed to remove any possible perches. If this is not possible then various kinds of anti-perching devises should be introduced, such as enclosing the nacelles, avoiding lattice constructions and eliminating guy wires to support the turbines[146]. The junction between nacelle and tower should also be well sealed, and the nacelle closed, in order to avoid offering a roost for bats.
- Design of rotor blades: On the basis of theoretical modelling of collision risks among birds, it has been proposed that fewer rotor blades and low tip speed can lower collision risk[147], but there is some conflicting evidence whether turbines with a larger rotor-swept area may have similar or even smaller avian fatality than turbines with smaller rotor-swept areas.
- Increasing rotor visibility: Birds may be unable to see rotors when they get close (motion smear) and this phenomenon may at least partly explain collision even in times of good visibility[148]. Various tests whether increasing the visibility of rotors by painting high-contrast patterns (e.g. black and white bands) may help to reduce the collision risk have so far yielded mixed results, and the same applies for on-going test with UV-painted rotor blades[149].
- Using fewer but larger turbines: There are increasing evidence that fewer but larger and more power-efficent turbines may produce fewer collision risks for large-sized birds, while there is more concern with reference to bats[150].

[144] E.g. Drewitt & Langston (2006, 2008).
[145] But the evidence for this is still anecdotal and lacks adequate data, e.g. Johnson et al. (2007), Drewitt & Langston (2008).
[146] E.g. Johnson et al. (2007).
[147] Tucker (1996a, 1996b).
[148] E.g. Drewitt & Langston (2008) and references therein.
[149] E.g. Drewitt & Langston (2006). In addition, painting rotor-blades or turbines might be questionable due to landscape and visual effects.
[150] E.g. Hötker (2006), Barclay at al. (2007), Smallwood & Karas (2009).

***Associated infrastructure***

- Inter-array cable installations and grid infrastructure: Where possible, inter-array cables (e.g. between turbines and substations) should be buried underground while taking into account relevant considerations e.g. to habitat sensitivity.
- Lighting of wind farms: There is broad consensus that lighting of turbines is to be avoided to reduce the risk of fatalities, for onshore as well as offshore locations. If lighting cannot be avoided, e.g. for safety or navigation purposes, flashing white strobe light has been proposed to be less attractive for birds than e.g. solid or pulsating red light[151]. But these must still be in compliance with national and international regulations on health and aviation/shipping safety.
- Reduction of the electro-magnetic fields around cables from offshore turbines: Impact recommended to be reduced by choice of cable type, burial of at least 1 m and/or conversion to higher voltage[152].
- Appropriate choice of foundations for offshore locations[153]; to the extent possible as the choice of foundation is primarily related to the geological conditions.

***Measures in order to reduce risks during construction period***

- Timing of construction work: Certain risks are concentrated at critical times of the year, such as reproductive or moulting periods of marine mammals and breeding or migration periods for sensitive bird species. The first option for mitigation would be to avoid these sensitive periods altogether, and plan the construction to take place at other times of the year (eg in winter for hibernating bats). Appropriate seasons (time windows) should be identified in order to reduce disturbance at potentially sensitive life stages of species.

  This may not always be possible in particular for offshore projects where time windows for construction can already be quite limited for practical/safety reasons and therefore this needs to be analysed on a case-by-case basis. Many of these issues will be site-specific. The time periods in which construction work is recommended to be avoided depends on the affected species' main periods of foraging, resting and breeding. If this is not feasible then restrictions in construction work like temporary and short-term breaks, in order to reduce the reduced risk of collision fatalities or disturbance may need to be considered.
- Noise and vibration during construction work: In respect to offshore wind farms, and in order to minimise impact from noise and vibration on both fish and mammals, it is recommended to start pile driving gently to allow individuals to move away from the noise source (i.e. soft-start). This may be combined with the use of passive acoustic monitoring and marine mammal observers to minimise the risk of animals being in the area when piling commences. Other proposed methods, including specifically engineered solutions such as bubble curtains and piling cushions, are under development. "Scrammers" and "pingers" may provide additional deterrence to marine mammals entering the construction area.

***Measures in order to avoid risks during operation***

Similar considerations may also be required during the operation phase and on a more long-term basis to avoid risks during critical times of the year. For bats, many of the above proposed technical modifications may be inadequate, and shutting down turbines during critical periods of limited duration is so far a primary mitigation measure to reduce the risk fatalities, e.g. during migration periods in spring and autumn (especially August-October) or during periods of calm weather when insect prey are concentrated around turbines (and energy producing capacity might be low in any case)[154].

Temporary halting of the operation or reducing rotor speed may also be considered in order to avoid fatalities e.g. during peak migration periods or main display periods by birds, or disturbance during or spawning seasons by fish.

[151] E.g. Johnson et al. (2007).

[152] A conversation from 33 kV to 135 kV reduces the induced field by a factor of 4 (but may turn out to be unpractical in many cases; DEFRA 2005).

[153] E.g. Hammar et al. (2008) for comparisons between different types of foundations.

[154] E.g. Rodrigues et al. (2008), Ahlén et al. (2007), Baerwald et al. (2009).

*5.5.5. Recording the results of the Appropriate Assessment*

Once these mitigation measures and possible safeguards/conditions have been identified and assessed, the competent authority will finally be in a position to determine conclusively whether the plan or project can be approved or not, and if any conditions apply. Whatever the results, they should be clearly recorded. In this respect, the Appropriate Assessment report should be sufficiently detailed to demonstrate how the final decision was reached, and on what scientific grounds the decision was made.

This is confirmed by an ECJ ruling: *The appropriate assessment should contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the site concerned*. (Commission/Italy, C-304/05).

The report should:

- describe the project or plan in sufficient detail for members of the public to understand its size, scale and objectives;
- describe the baseline conditions and conservation objectives of the Natura 2000 site;
- identify the adverse effects of the project or plan on the Natura 2000 site;
- explain how those effects will be avoided through mitigation;
- set out a timescale and identify the mechanisms through which the mitigation measures will be secured, implemented and monitored.

Following the Appropriate Assessment, and despite the application of mitigation measures, if the competent authority considers that adverse effects remain, then the project or plan may not proceed until the derogation test under Article 6.4 has been successfully completed and it has been objectively concluded that there is an absence of alternative solutions.

## STAGE 3: DEROGATION PROCEDURE: ARTICLE 6.4

### 5.6 The derogation procedure of Article 6.4 of the Habitats Directive

*5.6.1 The scheme of Article 6.4*

If, on the basis of the Appropriate Assessment, it cannot be ascertained that a plan or project will not adversely affect the integrity of the site concerned, the plan/project should either be refused as it stands or the provisions of Art. 6(4) of the Habitats Directive should be applied. Article 6(4) is only applicable under the strict conditions and will only be passed in exceptional circumstances.

The requirements of Article 6(4) of the Habitats Directive establish a set of conditions, which must be met for the competent authority to authorise the plan or project where the AA shows that the integrity of a Natura 2000 site will be adversely affected by it. Being an exception to Article 6(3), the fulfilment of the conditions under which it may be applied is subject to strict interpretation.

It falls on whoever wants to make use of Article 6(4) to prove, as a prerequisite, that the following conditions do indeed exist:

- The alternative put forward for approval is the least damaging for the integrity of the Natura 2000 site in terms of its qualifying interests, and no other feasible alternative exists that would not adversely affect the integrity of any Natura 2000 site;

- There are imperative reasons of overriding public interest (IROPI);
- All necessary compensatory measures have been adopted .

The European Commission has published a Guidance Document on Article 6(4) of the Habitats Directive which provides clarification of the concepts of alternative solutions, imperative reasons of overriding pubic interest, compensatory measures, overall coherence and the opinion of the Commission required in some cases[155].

### *5.6.2 The absence of alternative solutions*

The search for alternatives can be quite broad and should be linked to the public interest objectives of the plan or project. It could involve alternative locations, different scales or designs of development, or alternative processes. If the intention is to increase the renewable energy capacity by a certain amount, the question is then: can this be achieved in a less damaging way, for instance, by selecting a more appropriate site for wind farm development elsewhere or by resizing or scaling down the plan or project.

In practice, alternative solutions should normally already have been identified within the framework of the initial assesment under Article 6(3). They are part of the iterative process seeking to improve the siting and design of a plan or project at the earliest stages.

To fulfil the requirements of Article 6(4), the competent authority must be the ones to assess alternative solutions, once the appropriate assessment stage has concluded that it cannot be ascertained that the plan or project will not have adverse effects on the integrity of the site concerned, even after mitigation measures have been introduced. The competent authorities have also to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should also be considered at this stage[156].

They should also make comparisons between various possible alternatives but It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. This means that the conservation objectives and status of the Natura 2000 should be weighted against any consideration of costs, delays or aspects of an alternative solution, following the procedures prescribed in Article 6(4).

The alternative solutions chosen should also in principle undergo the same screening exercise as the original plan or project and could be subject to a new Appropriate Assessment for, although the alternative is less damaging, it could still have an adverse effect on the integrity of the same or another Natura 2000 site. Usually, if the alternative is

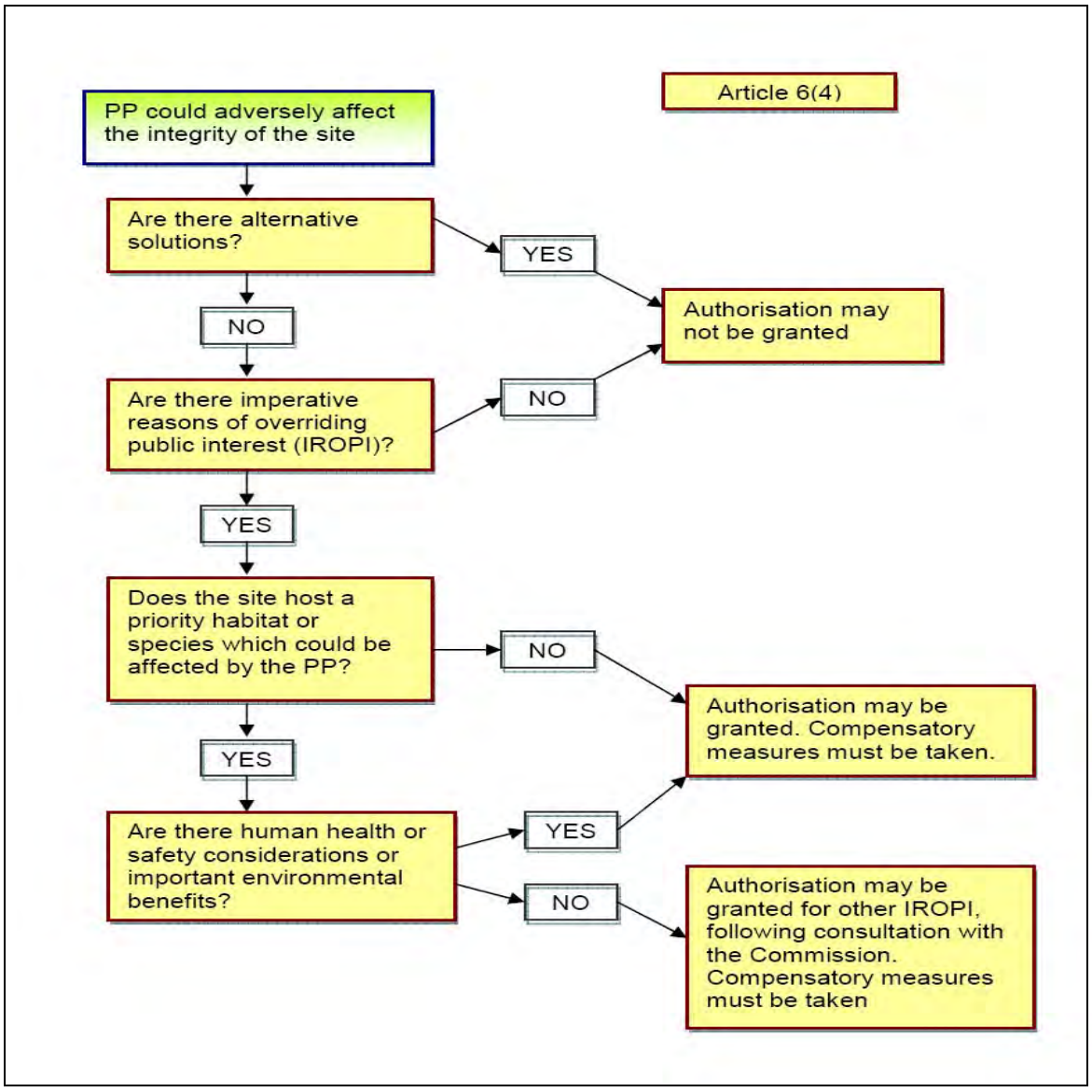
---

[155] 'Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission';
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

[156] Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf
and
'Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission';
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

similar to the original proposal, the Appropriate Assessment may be able to draw a lot of the information needed from the first Appropriate Assessment.

***Figure 13 . Flow chart of the Article 6(4) conditions***




*5.6.3. Imperative reasons of overriding public interest (IROPI)*

It is clear from the wording of Article 6(4) that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be

considered to meet this condition of Article 6(4) where such public interests are served and demonstrated[157].

Such public interests may include human health, public safety, beneficial consequences of primary importance for the environment, and other interests of a social (e.g. employment) or economic nature.

To fulfil the requirements of Article 6(4) of the Habitats Directive, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the Natura site(s) affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

a) The public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see e.g. its 4th recital stating *"Community's natural heritage"*).

b) In this context, it seems also reasonable to assume that the public interest can only be overriding if it is a long-term interest; short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive. Overriding interests, as long-term, fundamental social interests, may be properly identified beforehand by published policies, and land-use and other plans.

It is reasonable to consider that the "*imperative reasons of overriding public interest, including those of social and economic nature*" refer to situations where plans or projects envisaged prove to be indispensable:
- within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, environment);
- within the framework of fundamental policies for the State and the Society;
- within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service.

It should be noted that the conditions of overriding public interest are even stricter when it comes to the realisation of a plan or project likely to adversely affect the integrity of a Natura 2000 site that hosts qualifying *priority* habitats and/or species, where those habitats and/or species are affected.

These can only be justified if the imperative reasons of overriding public interest concern
- human health and public safety or
- overriding beneficial consequences for the environment, or,
- for other imperative reasons if, before granting approval to the plan or project, the opinion of the Commission has been given (EC 2007b).

[157] Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

*5.6.4. The adoption of all necessary compensatory measures*

Compensatory measures, as described in Article 6(4) of the Habitats Directive, constitute the "last resort" and are used only when the decision has been taken to proceed with a plan or project having an adverse effect on the integrity of the Natura 2000 site because no alternative solutions exist and the project has been judged to be of overriding public interest under the conditions described above.

The compensatory measures constitute measures specific to the unavoidable adverse effects of a project or plan. They aim to ensure that the overall coherence of Natura 2000 is protected, and should provide compensation corresponding precisely to the negative effects on the species or habitat concerned. There is little experience with the implementation of compensation measures under Article 6(4) of the Habitats Directive in the context of wind energy projects.

To ensure that the overall coherence of Natura 2000 is protected, the compensatory measures proposed for a plan or project should:

a) contribute to the conservation of natural habitats and species of Community Interest "within the biogeographical region concerned", in order to ensure the maintenance of the overall coherence of the Natura 2000 Network (for sites designated under the Habitats Directive), or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned.

b) address, in comparable proportions, the habitats and species of Community Interest negatively affected;

c) provide functions comparable to those which had justified the selection of the original site, particularly regarding the adequate geographical distribution

It is considered good practice to take compensatory measures as close as possible to the affected area in order to maximise chances of protecting the overall coherence of the Natura 2000 network. Therefore, locating compensation within or nearby the Natura 2000 site concerned in a location showing suitable conditions for the measures to be successful is the most preferred option. However, this is not always possible and it is necessary to set a range of priorities to be applied when searching locations that meet the requirements of the Habitats Directive.

As a general principle, the compensatory measures should be in place and working before the work on the plan or project has begun. This is to help buffer the damaging effects of the project on the species and habitats by offering them suitable alternative locations in the compensation area.

If this is not fully achievable, the competent authorities should require extra compensation for the interim losses that would occur in the meantime. Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats or in natural habitats that need a long period of time to provide the same ecological functionality (EC 2007b). Under these circumstances, the likelihood of long-term success is best evaluated by peer-reviewed scientific studies of trends.

The information on the compensatory measures should be submitted to the Commission before they are implemented and indeed before the realisation of the plan or project concerned. It is therefore advised that compensatory measures should be submitted to the

Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied (EC 2007b).

The Commission will deliver an opinion when priority habitats and/or species might be adversely affected. In delivering its opinion, the Commission will check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in case of non-conformity with Community law, legal action may be taken.

According to existing EC guidance[158], compensatory measures under Article 6(4) can consist of one or more of the following:

- **Restoration or enhancement** within existing Natura 2000 sites: restoring the habitat to ensure the maintenance of its conservation value and compliance with the conservation objectives of the site or improving the remaining habitat in proportion to the loss due to the plan or project on a Natura 2000 site;

- **Habitat Recreation**: recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;

- **Designation of new sites** under the Birds and Habitats Directive, in association with other works, as described above. As regards compensatory measures for designated sites under the Birds Directive (SPA), any new habitat created as compensation for damage to an SPA should be designated as an SPA once it meets its objectives in order to maintain the overall coherence of the network.

**Key issues to address in designing compensatory measures include:**

- Targeted objectives to address the unavoidable adverse effects and to ensure that the overall coherence of Natura 2000 is protected
- Ensuring the compensation is feasible and effective i.e. level of risk of failure;
- Assessment of technical feasibility;
- Extent of compensatory measures;
- Location in relation to damage;
- Timing in relation to damage;
- Long-term implementation.

[158] Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

## ANNEX I:

## Recommendations and resolutions adopted by international conventions on the potential impact of wind farms on wildlife and habitats

Different international biodiversity Conventions and Agreements have adopted measures that relate to wind farm developments.

*Bern Convention on the Conservation of European Wildlife and Natural Habitats.*
On behalf of the Bern Convention, BirdLife International presented in 2003 an analysis of effects on birds and guidance on environmental assessment criteria and site selection issues, based on a literature overview[159]. This initiative was followed up with a resolution "on minimising adverse effects of wind power generation on wildlife", adopted by the Convention Standing Committee in December 2004[160] . The Contracting Parties are recommended to take appropriate measures to minimise the potential adverse effects of wind turbines on wildlife, to involve the industry sector and to ensure adequate monitoring and surveillance to improve the understanding of the impact of wind farms.

*Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS)*
The Conference of the Parties of the Bonn Convention adopted a resolution on wind turbines and migratory species in 2002[161]. The resolution calls upon the Parties, *inter alia* to identify areas where migratory species are vulnerable to wind turbines and where wind turbines should be evaluated to protect migratory species. They should also apply and strengthen comprehensive strategic environmental impact assessments where major developments of wind turbines are planned, and take full account of the precautionary principle.

*The Agreement of the Conservation of Populations of European Bats (EUROBATS)*
As a follow up to the above mentioned resolution the Bonn Convention adopted a resolution on the potential impact of wind farms on bats in 2003[162]. This includes a request to the Advisory Committee to assess the evidence of the impacts, and if appropriate, to develop guidelines for assessing potential impacts. These guidelines were published in 2008[163].

*The Agreement of the Conservation of Small Cetaceans of the Baltic and North Sea (ASCOBANS)*
Also as part of the agreement under the Bonn Convention (CMS), a resolution was adopted on "adverse effects of sound, vessels and other forms of disturbance on small cetaceans" in 2006[164]. Parties and Range States are invited to conduct further research into the effects on small cetaceans of e.g. "extractive and other industrial industries, including windfarms", and to include physical and behavioural effects both at the individual and population levels. Parties and Range States are also invited to develop appropriate management measures, guidelines and technological adaptations to minimise adverse effects on small cetaceans; and to implement procedures to assess the effectiveness of any guidelines and management measures. A workshop on impacts and methodologies for assessing impacts of offshore wind farms on marine mammals took place in 2007

[159] Langston & Pullan (2003), Council of Europe T-PVS/Inf (2003) 12,
[160] Recommendation No. 109 (2004) of the Standing Committee
[161] Resolution No. 7.5,
[162] Resolution No. 4.7, available via http://www.eurobats.org/documents/pdf/MoP4/Record_MoP4_complete.pdf.
[163] Rodrigues et al. (2008), available via http://www.eurobats.org/publications/publication_series.htm.
[164] Resolution No. 4, available via http://www.service-board.de/ascobans_neu/files/mop5-final-4.pdf.

## ANNEX II:

## Bird species considered to be particularly vulnerable to wind farms [165]

XXX = Evidence on substantial risk of impact, XX = Evidence or indications of risk or impact, X = Potential risk or impact, x = small or non-significant risk or impact, but still to be considered in assessments. This is an indicative list for guidance, and any potential impacts will be site-specific.

| Species / Species group | Conserva-tion status in Europe[166] | Listed in Annex I of the EU Birds Directive | Habitat displacement | Bird strike / collision | Barrier effect | Change in habitat structure | Potential positive impact |
|---|---|---|---|---|---|---|---|
| *Gavia stellata* (breeding) | (Depleted) | YES | X | X | X | | |
| *Gavia stellata* (wintering) | (Depleted) | YES | XXX | X | | | |
| *Gavia arctica* | (Vulnerable) | YES | X | X | | | |
| *Podiceps auritus* | (Declining) | YES | X | X | | | |
| *Morus bassanus* | Secure | NO | X | X | | | |
| *Phalacrocorax carbo* | Secure | NO | X | x | x | | |
| *Phalacrocorax aristotelis* | (Secure) | NO[167] | | | | X | |
| *Ciconia nigra* | Rare | YES | | | x | | |
| *Ciconia ciconia* | Depleted | YES | | XX | X | | |
| *Cygnus cygnus* | Secure | YES | X | X | | | |
| *Anser fabalis* (wintering) | Secure | NO | X | | | | |
| *Anser brachyrhynchus* | Secure | NO | See foot-note[168] | X | | | |
| *Anser albifrons* (wintering) | Secure | NO[169] | XX | X | | | |
| *Branta leucopsis* | Secure | YES | X | X | | | |
| *Branta bernicla* | Vulnerable | NO | X | X | | | |
| *Anas penelope* (non-breeding season) | Secure | NO | XX | | x | | |
| *Aythya ferina* (flights between feeding and roosting sites in winter) | (Declining) | NO | | x | X | | |

[165] Primarily based on information from Barrios & Rodrígues (2007), Bevanger et al. (2008), Bright et al. (2006), Carrete et al. (2009), de Lucas et al. (2007b), Devereux et al. (2008), Dirksen et al. (2007), Everaert & Stienen (2007), García de la Morena et al. (2009), Gonzáles & Margalida (2008), Hötker et al. (2005, 2006), Kruckenberg & Jaene (1999), Langston & Pullan (2003), Larsen & Madsen (2000), Lawrence et al. (2007), Lekuona & Ursúa (2007), Madsen & Boertmann (2008), Madders & Whitfield (2006), Pearce-Higgins et al. (2008, 2009), Petersen et al. (2006), Petersen & Fox (2007) and Thelander & Smallwood (2007).

[166] Ref. BirdLife International (2004).

[167] Except for *P.a. desmarestii.*

[168] Initial displacement effects, but indication of long-term habituation (e.g. Madsen & Boertmann 2008).

[169] Except for *A.a. flavirostris.*

| Species / Species group | Conserva-tion status in Europe[170] | Listed in Annex I of the EU Birds Directive | Habitat displacement | Bird strike / collision | Barrier effect | Change in habitat structure | Potential positive impact |
|---|---|---|---|---|---|---|---|
| *Aythya fuligula* (flights between feeding and roosting sites in winter) | (Declining) | NO | | x | X | | |
| *Aythya marila* (flights between feeding and roosting sites in winter) | (Declining) | NO | | x | X | | |
| *Somateria mollissima* | Secure | NO | X | X | X | X | |
| *Somateria mollissima* (staging, wintering) | Secure | NO | X | x | | | |
| *Clangula hyemalis* (wintering) | (Secure) | NO | XX | X | X | X | |
| *Melanitta nigra* (breeding) | (Secure) | NO | X | | | | |
| *Melanitta nigra* (wintering) | (Secure) | NO | XX[171] | X | X | X | |
| *Bucephala clangula* (flights between feeding and roosting sites in winter) | (Secure) | NO | | x | x | | |
| *Mergus serrator* | (Secure) | NO | | | | | x[172] |
| *Pernis apivorus* | (Secure) | YES | | | x | | |
| *Milvus migrans* | (Vulnerable) | YES | X | X | X | | |
| *Milvus milvus* | Declining | YES | X | XXX | x | | |
| *Haliaeetus albicilla* | Rare | YES | XXX | XXX | | | |
| *Gypaetus barbatus* | (Vulnerable) | YES | X | X | | | |
| *Gyps fulvus* | Secure | YES | X | XXX[173] | X | | |
| *Neophron percnopterus* | Endangered | YES | XXX | XX | XXX | | |
| *Circaetus gallicus* | (Rare) | YES | X | XXX | X | | |
| *Circus aeroginosus* | Secure | YES | X | x | x | | |
| *Circus cyaneus* | Depleted | YES | XX | X | x | | |
| *Circus pygargus* | Secure | YES | X | XX | | | |
| *Accipiter gentilis* | Secure | NO[174] | | | x | | |
| *Accipiter nisus* | Secure | NO[175] | | x | x | | |
| *Buteo buteo* | Secure | NO | x | XX | x | | |
| *Buteo lagopus* | (Secure) | NO | X | | | | |
| *Aquila pomarina* | (Declining) | YES | | XX | | | |
| *Aquila heliaca* | Rare | YES | X | X | | | |
| *Aquila adalberti* | (Endangered) | YES | XXX | x | x | XX | |
| *Aquila chrysaetos* | Rare | YES | X | XXX | | | |
| *Hieraaetus fasciatus* | Endangered | YES | X | X | | | |

[170] Ref. BirdLife International (2004).
[171] Initial avoidance, recovery within 3-5 years (Petersen & Fox 2007).
[172] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[173] 63.1% of all bird and bat fatalities in a study in Navarra, Spain, 2000-2002 (13 wind power plants, 741 turbines, 360 fatalities in total, Lekuona & Ursúa 2007).
[174] Except for *A.g. arrigonii.*
[175] Except for *A.n. granti.*

| Species / Species group | Conserva-tion status in Europe[176] | Listed in Annex I of the EU Birds Directive | Habitat displacement | Bird strike / collision | Barrier effect | Change in habitat structure | Potential positive impact |
|---|---|---|---|---|---|---|---|
| *Falco naumanni* | Depleted | YES | | x | | | |
| *Falco tinnunculus* | Declining | NO | X | XX | X | | |
| *Falco columbarius* | (Secure) | YES | | | x | | |
| *Falco subbuteo* | (Secure) | NO | | | x | | |
| *Falco peregrinus* | Secure | YES | X | X | x | | |
| *Lagopus lagopus* | Secure | NO[177] | X | XX | | | |
| *Tetrao tetrix* | Depleted | NO[178] | X | X | X | X | |
| *Tetrao urogallus* | (Secure) | YES | X | | X | X | |
| *Alectoris rufa* | (Declining) | NO | X | x | | | |
| *Phasianus colchicus* | (Secure) | NO | X | x | | | |
| *Crex crex* | Depleted | YES | X | X | | | |
| *Grus grus* | (Depleted) | YES | X | X | x | | |
| *Tetrax tetrax* | Vulnerable | YES | XX | X | x | x | |
| *Pluvialis apricaria* | (Secure) | YES | XX | X | X | | |
| *Vanellus vanellus* | Vulnerable | NO | XX | X | x | | |
| *Calidris maritima* (wintering site) | (Secure) | NO | X | x | x | | |
| *Calidris alpina* | (Depleted) | NO[179] | X | X | | | |
| *Calidris* spp. | | | | | x | | |
| *Gallinago gallinago* | Declining | NO | XX | X | | | |
| *Limosa limosa* | Vulnerable | NO | X | x | X | | |
| *Numenius arquata* | Declining | NO | XX | | X | | |
| *Stercorarius parasiticus* | (Secure) | NO | X | X | | | |
| *Larus minutus* | (Depleted) | YES | | | | | x[180] |
| *Larus argentatus* | Secure | NO | | x | x | | x[181] |
| *Sterna sandvicensis* | Depleted | YES | | XX | x | | |
| *Sterna hirundo* | Secure | YES | | XX | x | | |
| *Sterna hirundo / S. paradisea* | | YES | X | | | | |
| *Sterna albifrons* | (Secure) | YES | | XX | x | | |
| *Uria aalge / Alca torda* | (Secure) | NO[182] | XX | X | | X | |
| Doves and pigeons (Columbidae) | | | | x | | | |
| *Cuculus canorus* | Secure | NO | | x | | | |

[176] Ref. BirdLife International (2004).
[177] Except for *L.l. pyrenaicus* and *L.l helveticus*.
[178] Except for *T.t. tetrix.*
[179] Except for *C.a. schinzii.*
[180] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[181] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[182] Except for *U.a. ibericus.*

| Species / Species group | Conserva-tion status in Europe[183] | Listed in Annex I of the EU Birds Directive | Habitat displacement | Bird strike / collision | Barrier effect | Change in habitat structure | Potential positive impact |
|---|---|---|---|---|---|---|---|
| *Bubo bubo* | (Depleted) | YES | | X | | | |
| *Asio otus* | (Secure) | NO | | x | | | |
| *Caprimulgus europaeus* | (Depleted) | YES | X | X | | | |
| *Tachyparptis melba* | Secure | NO | | X | | | |
| *Apus apus* | (Secure) | NO | | x | | | |
| *Upupa epops* | (Declining) | NO | | x | | | |
| Passerines (several species ) | | | | X[184] | X[185] | | |
| *Chersophilus duponti* | (Depleted) | YES | XX | X | XX | XX | |
| *Alauda arvensis* (winter) | (Depleted) | NO | X | | | | |
| *Anthus pratensis* | (Secure) | NO | X | | | | |
| *Oenanthe oenanthe* | (Decling) | NO | XX | | | | |
| *Acrocephalus schoenobaenus* | Secure | NO | | | | | x[186] |
| *Pyrrhocorax pyrrhocorax* | Declining | YES | X | x | | | |
| *Sturnus vulgaris* (non-breeding) | Declining | NO | XX | | x | | |
| Granivorous farmland birds (winter)[187] | See footnote[188] | NO | x | | | | |
| *Emberiza schoeniclus* | Secure | NO | | | | | x[189] |

[183] Ref. BirdLife International (2004).
[184] Especially nocturnal migrants (e.g. Langston & Pullan 2003).
[185] Excl. starling and crows (Hötker et al. 2005, 2006).
[186] Indications of increased attraction to areas around wind turbines, presumably due positive response to habitat change around the studied wind turbines (Hötker et al. 2005, 2006).
[187] *Emberiza citriniella, E. schoeniclus, Passer montanus, Miliara calandra.*
[188] *Emberiza citriniella* and*, E. schoeniclus* are "secure", *Passer montanus* and *Miliara calandra* are "declining".
[189] Indications of increased attraction to areas around wind turbines, presumably due positive response to habitat change around the studied wind turbines (Hötker et al. 2005, 2006).

## ANNEX III:

## Bat behaviour in relation to wind farms [190].

| Species | Listed in Annex II of the EU Habitats Directive[191] | Hunting close to habitat structures | Migration or long-distance moving | High flight (<40 m) | Low flight | Possibly disturbed by turbine ultrasounds | Attracted by light | Roosting inside nacelles | Known loss of hunting habitat | Risk of loss of hunting habitat | Known collision | Risk of collision |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Rhinolophus ferrumequinum* | X | X | | | X | | | | | | | |
| *Rhinolophus hipposideros* | X | X | | | X | | | | | | | |
| *Rhinolophus euryale* | X | X | | | X | | | | | | | |
| *Rhinolophus mehelyi* | X | | | | | | | | | | | |
| *Rhinolophus blasii* | X | | | | | | | | | | | |
| *Myotis myotis* | X | | X | X | X | | | | | | X | X |
| *Myotis blythii* | X | | X | X | X | | | | | | | X |
| *Myotis punicus* | | | | | | | | | | | | |
| *Myotis daubentonii* | | X | | X | X | | | | | | X | X |
| *Myotis emarginatus* | X | X | ? | X | X | | | | | | | |
| *Myotis nattereri* | | X | | | X | | | | | | | |
| *Myotis mystacinus* | | X | | | X | | | | | | | X |
| *Myotis brandtii* | | X | | X | X | | | | | | X | X |
| *Myotis alcathoe* | | X | | | X | | | | | | | |
| *Myotis bechsteinii* | X | X | | | X | | | | | | | |
| *Myotis dasycneme* | X | | X | X | X | | | | | | X | X |
| *Myotis capaccini* | X | | | | X | | | | | | | |
| *Nyctalus noctula* | | | X | X | | X | X | ? | | X | X | X |
| *Nyctalus leisleri* | | | X | X | | X | X | ? | | X | X | X |
| *Nyactalus lasiopterus* | | | ? | X | | ? | | | | X | X | X |
| *Eptesicus nilssonii* | | | | X | | | X | | | | X | X |
| *Eptesicus serotinus* | | | ? | X | | X | X | | (X) | | X | X |
| *Vespertilio murinus* | | | X | X | | | X | | | X | X | X |
| *Pipistrellus pipistrellus* | | X | | X | X | ? | X | | | | X | X |
| *Pipistrellus pygmaeus* | | X | X | X | X | ? | X | | | | X | X |
| *Pipistrellus kuhlii* | | X | | X | X | ? | X | | | | X | X |
| *Pipistrellus nathusii* | | X | X | X | X | ? | X | | | | X | X |
| *Hypsugo savii* | | X | | X | X | ? | X | | | | X | X |

[190] From Rodrigues et al. (2008).

[191] In addition, 'Microchiroptera, all species' are listed in Annex IV(a) of the 'Habitats Directive', i.e. in practise that obligations following from Article 12 of the directive apply for all European bat species.

| Species | Listed in Annex II of the EU Habitats Directive[192] | Hunting close to habitat structures | Migration or long-distance moving | High flight (<40 m) | Low flight | Possible disturbed by turbine ultrasounds | Attracted by light | Roosting inside nacelles | Known loss of hunting habitat | Risk of loss of hunting habitat | Known collision | Risk of collision |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Plecotus auritus* | | X | | X | X | | | | | | X | X |
| *Plecotus austriacus* | | X | | X | X | | | | | | X | X |
| *Plecotus macrobullaris* | | ? | | | X | | | | | | | |
| *Plecotus kolombatovici* | | | | | | | | | | | | |
| *Barbastella barbastellus* | X | X | | | X | | | | | | | |
| *Miniopterus schreibersii* | X | ? | X | X | X | | X | | | | X | X |
| *Tadarida tenotis* | | | | X | | X | X | | | | X | X |
| *Rousettus aegipticus*[193] | X | | | | | | | | | | | |

[192] In addition, 'Microchiroptera, all species' are listed in Annex IV(a) of the 'Habitats Directive', i.e. in practise that obligations following from Article 12 of the directive apply for all European bat species.

[193] No information on *Rousettus aegiptiacus* is given by Rodrigues et al. (2008).

## ANNEX IV:

## Aquatic species listed in Annexes II and/or IV(a) of the 'Habitats Directive' and recommended to be especially considered with reference to adverse impact from wind farms (list is non-exhaustive[194]).

| Species, species group | Annex | Reason for consideration |
|---|---|---|
| Seals (Phocidae) | | |
| *Halichoerus grypus* | II | • Disturbance (noise etc) from offshore wind farms, primarily during construction. |
| *Monachus monachus* | II (priority), IV(a) | • Although no information about impacts has been found, risk for disturbance (noise etc) from offshore wind farms during construction phase should nevertheless by considered, in analogy with findings for other marine mammals and concern for the overall unfavourable conservation status of this species. |
| *Phoca hispida bottnica* | II | • Although not studies with reference to potential impact from wind farms, risk for disturbance (noise etc) from offshore wind farms during construction phase should nevertheless by considered, in analogy with findings for other marine mammals and concern for the conservation status of this subspecies, endemic to the Baltic Sea. |
| *Phoca vitulina* | II | • Disturbance (noise etc) from offshore wind farms, primarily during construction. |
| Whales, dolphins and porpoises (Cetacea) | | |
| All species | IV(a) | • Disturbance (noise etc) from offshore wind farms, primarily during construction, and possibly also during operation, in analogy with findings for *Phocoena phocoena.* |
| *Phocoena phocoena* | II | • Disturbance (noise etc) from offshore wind farms, primarily during construction, but also conflicting evidence on impact during operation. |
| *Tursiops truncatus* | II | • Disturbance (noise etc) from offshore wind farms, primarily during construction, and possibly also during operation, in analogy with findings for *Phocoena phocoena.* |
| Terrestrial mammals[195]: | | |
| *Lutra lutra* | II, IV(a) | • Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands). |
| Fish: | | |
| *Salmo salar* | II | • Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands). |
| Molluscs: | | |
| *Margaritifera margaritifera* | II | • Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands). |

[194] Primarily based on information from Hötker et al. (2005, 2006), Lucke at al. (2006), Rodrigues et al. (2008) and Thomsen et al. (2006) with reference to bats and marine mammals.

[195] Ref. comments from Scottish and Irish *ad hoc* group members (August 2008).

## ANNEX V

### Some examples of proposed or confirmed impacts of wind farm development on species and species groups

| Kind of impact | Onshore | Offshore |
|---|---|---|
| Disturbance and displacement, birds | • For staging and wintering waterfowl there is evidence of disturbance, with ranges from zero up to around 800 m and with 600 m from the development as an often accepted 'rule of thumb'[196], but also that staging waterfowl may habituate over time[197].<br>• Studies in wintering farmland birds in UK indicate only minimal effects[198].<br>• Breeding birds may been proposed to be more tolerant than staging and wintering birds[199], but this assumption needs to be further verified on the basis of long-term studies. For single bird species, however, there is evidence of displacement effects during the breeding periods[200].<br>• This was further confirmed in a study in upland habitats in northern UK, where breeding densities were reduced by 15-53% within a zone 500m around the wind turbines for 7 of 12 species[201]. | • Danish studies at offshore developments, 1999-2007, indicated displacement as well as recovery of single bird species using waters around wind farms for staging or wintering[202]. Initial indications of avoidance of areas up to at least 2 km were reported for e.g. Red-throated Diver (*Gavia stellata*), Common Scoter (*Melanitta nigra*) and auks (*Uria aalge* and *Alca torda*). A clear recovery was reported 3-5 years after construction for Common Scoter, while still to clarify if this was related to change in food supply or habituation. For Red-throated Diver, no indications of recovery were recorded still 5-6 years after construction works. |
| Disturbance and displacement, marine mammals and fish | N.A. | • For marine mammals (seals, dolphins, whales) and fish impact of noise has been a main issue for study.<br>• Construction work, especially pile-driving, may result in short-term but long-ranged impacts[203], with audibility extending 80 km for |

[196] E.g. Drewitt and Langston (2006) and references therein.
[197] E.g. Madsen & Boertmannn (2008), with reference to Pink-footed Goose (*Anser brachyrhynchos*).
[198] Devereux et al. (2008).
[199] E.g. Hötker et al (2005, 2006) on the basis of a literature overview covering 127 studies.
[200] E.g. White-tailed Eagle (*Haliaeetus albicilla*, Follestad et al. 2007) and Eurasian Golden Plover (*Pluvialis apricaria*, Pearce-Higgins et al. 2008).
[201] Pearce-Higgins et al. (2009).
[202] E.g. Petersen et al. (2006), Petersen & Fox (2007) and references therein.
[203] E.g. Nedwall et al. (2007), Diederichs et al. (2008).

| | | |
|---|---|---|
| | | Harbour Porpoise (*Phocoena phocoena*) and Harbour Seal (*Phoca vitulina*), and potential behavioural responses up to 15-20 km. In immediate vicinity, severe injuries of ramming activities cannot be excluded[204].<br>• Impact during construction has been shown to more evident for porpoises than on seals. Detailed studies of the Harbour Seal populations at the Nysted and Horns Rev offshore wind farms indicated a drecrease in numbers during pile driving but no overall change in abundance during the construction phase[205]. For Harbour Porpoise, a substantial but short-lived effect of pile-driving was observed. At Horns Rev, a slight decrease in abundance occurred during the construction, but no effect under operation. At Nysted, there was a clear decrease during construction, and this effect persisted also after two years of operation, although with indications of a slow, gradual recovery [206].<br>• Noise during operation is generally low and mostly not exceeding variations which may be encountered during the animals' normal course of activity. Impact (if any) is local but long-lasting[207], but may differ between sites[208].<br>• Electro-magnetic fields induced in the vicinity of under-water cables have been an issue of concern with reference to interference with electric fields used by some fish species for prey detection, spatial orientation etc, and magnetic fields used for navigation; especially |

[204] Thomsen et al. (2006).
[205] Teilmann et al. (2006).
[206] Teilmann et al. (2008).
[207] E.g. Nedwall et al. (2007), Diederichs et al. (2008).
[208] E.g. with reference to Harbour Porpoise (*Phocoena phocoena*) and comparisons between the Nysted and Horns Rev offshore wind farms in Denmark (Teilmann et al. 2008).
[209] E.g. OSPAR (2006a).
[210] E.g. Meissner & Sordyl (2006).
[211] Bochert & Zettler (2006).
[212] E.g. Keller et al. (2006), Thomsen et al. (2006).
[213] E.g. Wilhelmsson et al. (2006).
[214] E.g. Fiskeriverket (2007).

| | | |
|---|---|---|
| | | with reference to sharks, rays and lampreys[209], although information available is not conclusive with reference to any major effects[210].<br>• For marine benthic animals, the static magnetic fields of sub-marine cables did not seem to have any clear influence on orientation, movement and physiology, when tested during artificial conditions, although further studies are needed to focus on a long-term perspective[211].<br>• For some fish species, including cod and herring, operational noise may be detectable up to 4 km distance, and up to around 1 km for some other species; with a risk of masking intraspecific communication. Behavioural and physiological stress is expected to be restricted to very close surroundings[212].<br>• Offshore wind farms may function as combined artificial reefs and fish aggregations devices[213], and restrictions in fishery in the immediate surroundings may have an additional positive impact on the fish stocks[214]. |
| Collision fatalities, birds | • Collision rates are overall very low, but with the noteworthy exception of high frequency of fatalities involving raptors. Special concern has to be raised for e.g. Eurasian Griffon Vulture (*Gyps fulvus*), Egyptian Vulture (*Neophron percnopterus*), White-tailed Eagle (*Haliaeetus albicilla*), Golden Eagle (*Aquila chrysaetos*), Red Kite (*Milvus milvus*) and Common Kestrel (*Falco tinnunculus*)[215].<br>• Single cases with high number of fatalities at various locations in e.g. California, Spain and Norway have attracted wide-spread publicity, but risks are highly site-specific[216].<br>• Birds making regular foraging flights between nesting and feeding areas may face enhanced risks[217]. | • For offshore locations information about collision fatalities are still limited, but direct observations and radar studies as well as modelling indicate very low risks, as has been shown e.g. for Eider (*Somateria mollissima*)[218]. |

[215] E.g. Barrios & Rodrígues (2004, 2007), Hötker at al. (2005, 2006), Lekuona & Ursúa (2007), Follestad et al. (2007), Thelander & Smallwood (2007) and Carrete et al. (2009).
[216] Drewitt and Langston (2008), and references therein.
[217] E.g. Everaert & Stienen (2007), with reference to a study of three species of breeding terns at coastal breeding site.
[218] E.g. Pettersson (2005), Petersen et al. (2006).

| | | |
|---|---|---|
| Collision fatalities, bats | • Higher mortality risks than for birds, primarily for migrating species (short and long distance) at both onshore and offshore locations[219].<br>• In a one-year study of operational impacts on bats in the Freiburg region in southern Germany, including standardsied seach of carcasses at 16 turbines, 50 dead bats were found, with a dominance of *Pipistrellus pipistrellus* and *Nyctalus leisleri,* while only 9 birds (of 5 species) were recorded. Most bats were found in late summer, and most fatalities were recorded in forests and none in open areas. At 2 turbines where acitvity was studied, using a thermal imaging camera, and around 25% of the bats showed evasive behaviour when approaching a rotor[220]. | • Higher mortality risks than for birds, primarily for migrating species at both onshore and offshore locations[221]. |
| Barrier effects | • From literature overviews it can be concluded that avoidance behaviour is a relatively common but still poorly understood phenomenon. E.g. most information refers to day-time observations while there is lack of data with reference to night-time, when much migration takes place[222]. | • At an offshore wind farm (7 turbines) located at a frequently used flyway at Kalmarsund, SE Sweden, avoidance behaviour at a distance of 1-2 km was recorded among migrating waterbirds (primarily Eider, *Somateria mollissima*). In spring migration (but not autumn), the flight corridor was adjusted to a more easterly location. The total length of migration, and thus the energy expenditure was assessed to increase by 0.2-0.5%[223].<br>• Good evidence on avoidance behaviour among various species of waterbirds (incl. Eider) exists also from Danish offshore wind farms, with most bird flocks heading for the wind farm at 1.5-2 km distance, although responses were highly species-specific[224].<br>• No evidence of barrier effect among fish and marine mammals has been found[225] |

[219] E.g. Rodrigues et al. (2008).
[220] Brinkmann et al. (2006).
[221] E.g. Rodrigues et al. (2008).
[222] Hötker (2005, 2006).
[223] Pettersson (2005).
[224] E.g. Petersen et al. (2006), Masden et al. (2009).
[225] OSPAR (2006a), with references to studies at the Horns Rev and Nysted wind farms in Denmark.

## ANNEX VI:

## European and national guidance documents of relevance for impact assessments with reference to wind farms

This list of already existing EC and national guidance that might be of relevance with reference to impact assessments of wind farms plans and projects is non-exhaustive. For the national documents, it is primarily based on information provided by the *ad hoc* group members. The list also includes a few guidance documents prepared by NGOs.

### Europe

The documents listed below have been developed by the EC. They provide detailed guidance on how to apply the EU nature legislation.

European Commission (2000) Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities; http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

European Commission (2002) Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of articles 6(3) and (4) of the Habitats Directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities; http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

European Commission (2003) Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment; http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf

European Commission (2007) Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission; http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

European Commission (2007) Guidance document on the strict protection of animal species of Community interest under the 'Habitats Directive'92/43/EEC. Final version, February 2007. http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

*Other guidance documents relevant on the supra-national level (selection)*

Diederichs, A., Nehlds, G., Dähne, M., Adler, S, Koschinski, S. & Verfuss, U. (2008) Methodologies for measuring and assessing potential changes in marine mammal behaviour, abundance or distribution arising from the construction, operation and decommissioning of offshore windfarms. – Commissioned by COWRIE Ltd.; http://www.offshorewindfarms.co.uk/Assets/Latest%20COWRIE_CHANGE_report_final.pdf

Kettunen, M., Terry, A., Tucker, G. & Jones, A. (2007) Guidance on the maintenance of landscape features of major importance for wild flora and fauna – guidance on the implementation of Article 3 of the Birds Directive (79/43/EEC) and Article 10 of the Habitats Directive (92/43/EEC). – Institute for European Environmental Policy (IEEP), Brussels; http://ec.europa.eu/environment/nature/ecosystems/docs/adaptation_fragmentation_guidelines.pdf.

OSPAR (2008) OSPAR guidance on environmental considerations for offshore wind farm development. – OSPAR Commission Reference Number 2008-3. http://www.ospar.org/v_measures/get_page.asp?v0=08-03e_Consolidated%20Guidance%20for%20Offshore%20Windfarms.doc&v1

Rodrigues, L., Bach, L., Duborg-Savage, M-J., Goodwin, J. & Harbusch, C. (2008) Guidelines for consideration of bats in wind farm projects. – EUROBATS Conservation Series No. 3 (English version), UNEP/EUROBATS Secretariat, Bonn;
http://www.eurobats.org/publications/publication_series.htm.

Seeley, B., Parr, J., Evans, J. & Lear, D. (2008) Establishing best practice for the documentation and dissemination of marine biological data. - Commissioned by COWRIE Ltd.
http://www.offshorewindfarms.co.uk/Assets/DATA_14_11_08_FINALREPORT.pdf

**National**

*Belgium*

Gouvernement Wallon (2002) Cadre de référence pour l'implantation d'éoliennes en région Wallonne.
http://mrw.wallonie.be/DGATLP/DGATLP/Pages/DAU/Dwnld/NoteEolienne.pdf

Everaert, J. (2008) Effecten van windturbines op de fauna in Vlaanderen: onderzoeksresultaten, discussie en aanbevelingen [Effects of wind turbines on fauna in Flanders. Study results, discussion and recommendations]. Rapporten van het Instituut voor Natuur- en Bosonderzoek, 2008(44).
http://www.inbo.be/content/page.asp?pid=en_fau_bir_windturbines

Vlaamse regering (2006). Omzendbrief EME/2006/01-RO/2006/02. Afwegingskader en randvoorwaarden voor de inplanting van windturbines. Belgisch Staatsblad 24.10.2006, p. 56705-56713.
http://www.energiesparen.be/node/912

*Finland*

Ministry of Environment (2005) Tuulivoimarakentaminen (Development of wind power). – The Ministry of Environment, Helsinki (available in Finnish and Swedish);
http://www.ymparisto.fi/download.asp?contentid=42234&lan=fi

*France*

DIREN Bourgogne (2007) Définition et cartographie des enjeux avifaunistiques vis à vis du développement de l'énergie éolienne en Bourgogne. – Direction Régionale de l'Environnement, Bourgogne, Dijon.
http://www.bourgogne.ecologie.gouv.fr/plugins/fckeditor/UserFiles/EPOB%20rapport%20carto%20final(1).pdf

Ministère de l'Ecologie, du Développement et de l'Aménagement Durables (2006) Guide de l'étude d'impact sur l'environnement des parcs éoliens;
http://www.developpement-durable.gouv.fr/IMG/pdf/guide_etude_impact_eolien_2006.pdf

Ministère de l'Ecologie, du Développement et de l'Aménagement Durables (2007) Les questions-réponses sur les zones développement de l'éolien (ZDE);
http://www.industrie.gouv.fr/energie/renou/questions-zde.htm.

*Germany*

BSH (2007) Standard. Untersuchung der Auswirkungen von Offshore-Windenergieanlagen auf die Meeresumwelt (StUK 3). Stand: Februar 2007. – Bundesamt für Seeschiffahrt und Hydrographie (Federal Maritime and Hydropgraphic Agency), Hamburg and Rostock;
http://www.bsh.de/de/Produkte/Buecher/Standards_Windenergie/7003.pdf

*Ireland*

Wind Energy Development Guidelines (2006) Guidelines for planning authorities.- Department of Environmental Heritage and Local Government, Dublin.
http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,1633,en.pdf

*Italy*

Di Bene, A. & Scazzoni, L. (2006, eds.) Gli impianti eolici: suggerimenti per la progettazione e la valutazione paesaggistica. – Minestori per i beni e le attività culturali and Gangemi Editore, Rome; http://www.parc.beniculturali.it/ita/paesaggio/linee_guida/inserimentopaes/min_beni_imp_eolici.pdf

*Sweden*

Energimyndigheten (Swedish Energy Agency) (2007) Vindkraft – tillståndsprocessen och kunskapsläget. - Energimyndigheten, Eskilstuna; http://www.energimyndigheten.se/Global/Om%20oss/Vindkraft/vind.pdf

Boverket (Swedish National Board of Building, Housing and Planning) (2009) Vindkraftshandboken - planering och prövning av vindkraftverk på land och i kustnära vattenområden. - Boverket. Karlskrona. http://www.boverket.se/Global/Webbokhandel/Dokument/2009/Vindkraftshandboken.pdf

*UK*

BERR (2007) Onshore wind energy planning conditions guidance note. A report for the Renewables Advisory Board and BERR. – Department for Business, Enterprise & Regulatory Reform; http://www.berr.gov.uk/files/file35240.pdf.

BERR (2007) Atlas of the UK Marine Renewable Energy Resources. – Department for Business, Enterprise & Regulatory Reform; http://www.renewables-atlas.info.

BWEA, WWF, English Nature & RSPB (2001) Wind farm development and nature conservation- A guidance document for nature conservation organisations and developers when consulting over wind farm proposals in England. – British Wind Energy Association, London; http://www.bwea.com/pdf/wfd.pdf.

DEFRA (2004) Offshore Wind Farms. Guidance note for Environmental Impact Assessment in respect of FEPA and CPA requirements. http://www.cefas.co.uk/publications/files/windfarm-guidance.pdf

DEFRA (2005) Nature conservation guidance on offshore windfarm development. A guidance note on the applications of the EC Wild Birds and Habitats Directives for developers undertaking offshore windfarm developments. Version R1.9, March 2005. http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/ewd/windfarms/windfarmguidance.pdf.

DTI (2004) Guidance notes. Offshore wind farm consent process. – Department for Trade & Industry, London; http://www.berr.gov.uk/files/file22990.pdf.

JNCC, Natural England & Countryside Council for Wales (draft) The protection of marine European Protected Species from injury and disturbance. To be published during 2010. http://www.jncc.gov.uk/page-4226.

*UK, England*

Bright, J.A., Langston, R.H. & Anthony, S. (2009) Mapped and written guidance in relation to birds and onshore wind energy development in England. – RSPB Reserach Report No. 35. https://www.rspb.org.uk/Images/EnglishSensitivityMap_tcm9-237359.pdf

*UK, Scotland*

SNH (2005) Survey methods for use in assessing the impacts of onshore windfarms on bird communities – Scottish Natural Heritage; http://www.snh.org.uk/pdfs/strategy/renewable/bird_survey.pdf.

SNH (2009) Strategic locational guidance for onshore wind farms in respect to the natural heritage. – Policy Statement No. 02/02, update March 2009, Scottish Natural Heritage; http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind/

SNH (2009) Assessing the cumulative effect of onshore wind energy developments. Version 3- DRAFT - for consultation, November 2009. - Scottish Natural Heritage; http://www.snh.org.uk/pdfs/strategy/renewables/A307913.pdf

**NGOs**

*Belgium*

Natagora (2008). L'implantation d'éoliennes en région Wallonne. Natagora vzw, Association de protection de la nature en Wallonie et à Bruxelles. http://www.natagora.org/images/stories/docu/position_eoliennes_natagora.pdf

Vanholme, S. & Vanderbeuren, R. (2009) Windmolens in Vlaanderen te land en ter zee. Beleidskader en regelgeving. Natuurpunt vzw. http://www.natuurpunt.be/uploads/natuurbehoud/natuurbeleid/documenten/pag_363_windenergie_nota.pdf

*Greece*

Dimalexis A., Saravia Mullin, V., Xirouchakis S., & K. Grivas. 2009. Assessment of the impacts of wind farms on birds: Guidelines for the implementation of the appropriate ornithological assessment of proposed projects. Hellenic Ornithological Society – Birdlife in Greece. Athens. 77pp (in Greek); http://ornithologiki.gr/gr/politiki/show_article.php?artID=391&locale=gr

Dimalexis A., Kastritis, T., Manolopoulos, A., Korbeti, M., Fric, J., Saravia Mullin, V., Xirouchakis, S., and D. Bousbouras. 2010. Identification and mapping of bird sensitive areas to wind farm development in Greece. Hellenic Ornithological Society – Birdlife in Greece, Athens. 126 pp. (in Greek with English summary); http://ornithologiki.gr/gr/politiki/show_article.php?artID=391&locale=gr

*Luxembourg*

Biver, G. & J. Pir (2008): Abstandsempfehlungen zu besonderen Tiervorkommen bei der Planung von Windkraftanlagen. Die Seiten der Centrale ornithologique. Regulus 2008 / 12: 12-13. LNVL.

*Poland*

PWEA (2008) Guidelines for assessment of wind farms' impact on birds. – Polish Wind Energy association (PWEA), Polish Bird Protection Society (OTPO) & West Pomeranian Society of Practical Ecology (ZTEP), Szczecin. http://www.elektrownie-wiatrowe.org.pl/en/files/guidelines_for_assessment__of_wind_farms_impacts_on_birds.pdf

*Spain*

Atienza, J.C., Martín Fierro, I., Infante, O. & Vallis, J. (2008) Directrices para la evaluación del impacto de los parques eólicos en aves y murciélagos (versión 1.0). – SEO/BirdLife, Madrid: http://www.seo.org/media/docs/MANUAL%20PARQUES%20E%C3%93LICOS%20para%20web.pdf.

*UK*

Dodd, A.M., Cleary, B.E., Dawkins, J.S., Byron, H.J., Palframan, L.J. & Williams, G.M. (2007) The Appropriate Assessment of spatial plans in England: a guide to why, when and how to do it. The Royal Society for the Protection of Birds (RSPB), Sandy.
http://www.seit.ee/failid/470.pdf

Bowyer, C., Baldock, D., Tucker, G., Valsecchi, C., Lewis, M, Hjerp, P. & Gantioler, S. (2009) Positive planning for onshore wind – expanding onshore wind energy capacity while conserving nature. – Institute for European Environmental Policy (IEEP) and the Royal Society for the Protection of Birds (RSPB);
http://www.ieep.eu or http://www.rspb.org.uk

## REFERENCES


Ahlén, I. (2008) Vindkraft - ett hot för fladdermöss och fåglar. – Biodiverse 13(1): 10-11.

Ahlén, I., Baagøe, H.J. & Bach, L. (2009) Behavior of Scandinavian bats during migration and foraging at sea. - Journal of Mammology 90:1318-1323.

Ahlén, I., Baagøe, H.J. Bach, L. & Pettersson, J. (2007) Bats and offshore wind turbines studied in southern Scandinavia. – Naturvårdsverket Rapport 5571, 35 pages.

Azkorra, Z., Aizpurua, A., Riga, P., Heras, P., Ibargoitia, M., Gallejones, P., Gartzia, N., González, A. & Camps Arbestian, M. (2008) Characterisation of organic carbon in mire and heath soils at the Elgea-Urkilla Wind Farm, northern Spain. – Mires and Peat 4 (2008/9), Article 05[226].

Baerwald, E.F., D'Amours, G.H., Klug, B.J. & Barclay, R.M.R. (2008) Barotrauna is a significant cause of bat fatalities at wind turbines. – Current Biology 18: 695-696.

Baerwald, E.F., Edworthy, J., Holder, M. & Barclay, R.M.R. (2009) A large-scale mitigation experiment to reduce bat fatalities at wind energy facilities. – Journal of Wildlife Management 73: 1077-1081; doi: 10-2193/2008-233.

Band, W., Madders, M. & Whitfield, D.P. (2007) Developing field and analytical methods to assess avian collision risk at wind farms. – Chapter 15 (pages 259-275) in de Lucas et al. (2007a).

Barclay, R.M.R., Baerwald, E.F., & Gruver, J.C. (2007) Variation in bird and bat fatalities at wind energy facilities: assessing the effects of rotor size and tower height. – Can. J. Zool. 85: 381-387; doi 10.1139/Z07-011.

Barrios, L. & Rodrígues, A. (2004) Behavioural and environmental correlates of soaring-bird mortality at on-shore wind turbines. – Journal of Animal Ecology 41: 72-81.

Barrios, L. & Rodrígues, A. (2007) Spatiotemporal patterns of bird mortality at two wind farms of Southern Spain. – Chapter 13 (pages 231-239) in de Lucas et al. (2007a).

Bevanger, K., Clausen, S., Dahl, E.L., Flagstad, Ø,Follestad, A., Gjershaug, O.G., Halley, D., Hanssen, F., Hoel, P.L., Jacobsen, K-O., Johnsen, L., May, R., Nygård, T., Pedersen, H.C., Reitan, O., Stenheim, Y. & Vang, R. (2008) Pre- and postconstruction studies of conflicts between birds and wind turbines in coastal Norway. Progress Report 2008 – NINA Report 409, 55 pp.

BirdLife International (2004) Birds in Europe: population estimates, trends and conservation status. – BirdLife Conservation Series No. 12, Cambridge.

Bochert, R. & Zettler, M. (2006) Effect of electromagnetic fields on marine organisms. – Pages 223-234 in Köller at al. (2006).

Bowyer, C., Baldock, D., Tucker, G., Valsecchi, C., Lewis, M, Hjerp, P. & Gantioler, S. (2009) Positive planning for onshore wind – expanding onshore wind energy capacity while conserving nature. – Institute for European Environmental Policy (IEEP) and the Royal Society for the Protection of Birds (RSPB).[227]

Bragg, O. (2007) Derrybrien: where the question began. – International Mire Conservation Group (IMCG) Newsletter Issue 2007/4: 3-8.[228]


[226] Available via http://www.mires-and-peat.net/mpj3.html.
[227] http://www.ieep.eu or http://www.rspb.org.uk
[228] http://www.imcg.net/imcgnl/pdf/nl0704.pdf.

Bright, J.A., Langston, R.W., Bullman, R., Evans, R.J., Gardner, S., Pearce-Higgins, J. & Wilson, E. (2006) Bird sensitivity map to provide locatitional guidance for onshore wind farms in Scotland. – RSPB Research Report No 20.

Bright, J.A., Langston, R.W., Bullman, R., Evans, R.J., Gardner, S. & Pearce-Higgins, J. (2008) Map of bird sensitivities to wind farms in Scotland: A tool to aid planning and conservation. – Biological Conservation 141: 2342-2356.

Bright, J.A., Langston, R.W. & Anthony, S (2009) Mapped and written guidance in relation to birds and onshore wind energy development in England. – RSPB Research Report No 35.

Brinkmann, R., Schauer-Weisshahn, H. & Bontadina, F. (2006) Survey of possible operational impacts on bats by wind facilities in Southern Germany. – Final report submitted by the Administrative District of Freiburg, Department of Conservation and Landscape Management and supported by Naturschutzfonds Baden-Württemberg. Brinkmann Ecological Consultancy, Gundelfingen/Freiburg[229].

BSH (2007) Standard Untersuchung der Auswirkungen von Offshore-Windenergieanlagen auf die Meeresumwelt (StUK 3). Stand: Februar 2007. – Bundesamt für Seeschiffahrt und Hydrographie (Federal Maritime and Hydropgraphic Agency), Hamburg and Rostock[230].

Carrete, M., Sánchez-Zapata, J., Bernítez, J.R., Lobón, M. & Donázar, J.A. (2009) Large scale risk-assessment of wind-farms on population viability of a globally endangered long-lived raptor. - Biological Conservation 142: 2954-1961; doi: 10.1016/j.biocon.2009.07.027.

Chamberlain, D.E., Rehfisch, M.R., Fox, A.D., Desholm, M. & Anthony, S.J. (2006) The effect of avoidance rates on bird mortality predications made by wind turbine collision risk models. – Ibis 148 (supplement): 198-202.

Cryan, P.M. & Barcley, R.M. (2009) Causes of bat mortality at wind turbines: hypothesis and predictions. - Journal of Mammology 90: 1330-1340.

DEFRA (2005) Nature conservation guidance on offshore windfarm development. A guidance note on the applications of the EC Wild Birds and Habitats Directives for developers undertaking offshore windfarm developments. Version R1.9, March 2005.

De Lucas, M., Janss, G.F.E. & Ferrer, N. (2007a, eds.) Birds and wind farms – risk assessment and mitigation. – Quercus, Madrid.

De Lucas, M., Janss, G.F.E. & Ferrer, N. (2007b) Wind farm effects on birds in the Strait of Gibraltar. – Chapter 12 (pages 219-227) in de Lucas et al. (2007a)

De Lucas, M., Janss, G.F.E., Whitfield, D.P. & Ferrer, M. (2008) Collision fatality of raptors in wind farms does not depend on raptor abundance. - Journal of Applied Ecology 45: 1695-1703; doi: 10.1111/j.1365-2664.2008.01549.x

Desholm, M. (2009) Avian sensitivity to mortality: Prioritising migratory bird species for assessment at proposed wind farms. – Journal of Environmemtal Management 90: 2672-2679.

Desholm, M., Fox, A.D., Beasley, P.D.L. & Kahlert, J. (2006) Remote techniques for counting and estimating the number of bird-wind turbine collisions at sea – a review. – Ibis 148 (Supplement): 76-89.

[229] http://www.buero-brinkmann.de/downloads/Brinkmann_Schauer-Weisshahn_2006.pdf
[230] http://www.bsh.de/de/Produkte/Buecher/Standards_Windenergie/7003.pdf

Devereux, C.L., Denny, M.J.H. & Whittingham, M.J. (2008) Minimal effects of wind turbines on the distribution of wintering farmland birds. – Journal of Applied Ecology 45: 1968-1694: doi: 10.1111/j.1365-2664.2008.01560.x.

Diederichs, A., Nehlds, G., Dähne, M., Adler, S, Koschinski, S. & Verfuss, U. (2008) Methodologies for measuring and assessing potential changes in marine mammal behaviour, abundance or distribution arising from the construction, operation and decommissioning of offshore windfarms. – Commissioned by COWRIE Ltd.[231]

Dirksen, S., Spaans, A.L. & van der Winden, J. (2007) Collision risks for diving ducks at semi-offshore wind farms in freshwater lakes: a case study. – Chapter 11 (pages 201-218) in de Lucas et al. (2007a).

Drewitt, A.L. & Langston, R.H.W. (2006) Assessing impacts of wind farms on birds. - Ibis 148 (supplement): 29-42.

Drewitt, A.L. & Langston, R.H.W. (2008) Collision effects of wind-power generators and other obstacles on birds. – Annals of the New York Academy of Sciences 1134: 233-266; doi: 10.1196/annals.1439.015.

EEA (2009) Europe's onshore and offshore wind energy potential. An assessment of environmental and economic constraints. – EEA Technical report No 6/2009.[232]

Evans, P.G.H. (2008, ed.) Proceedings of the ASCOBANS workshop offshore wind farms and marine mammals: impact & methodologies for assessing impacts. – ECS Special Publications Series No. 49[233].

Everaert, J. & Stienen, E.W.M. (2007) Impact of wind turbines on birds in Zeebrugge (Belgium). – Biodiversity and Conservation 16: 3345-3359.

Fagúndez, J. (2008) Effects of wind farm construction and operation on mire and wet heath vegetation in the Monte Maior SCI, north-west Spain. – Mire and Peat 4 (2008/9), Article 02[234].

Fiskeriverket (2007) Revidering av kunskapsläget för vindkraftens effekter på fisket och fiskbestånden. – Fiskeriverket (The Swedish Board of Fisheries), Göteborg.

Follestad, A., Flagstad, Ø., Nygård, T., Reitan, O. & Schulze, J. (2007) Wind power and birds at Smøla 2003-2006. – NINA Rapport 248, 78 pages (In Norwegian, summary in English).

Fox, A.D., Desholm, M., Kahlert, J., Christensen, T.K. & Petersen, I.K. (2006) Information needs to support environmental impact assessment of the effects of European marine offshore wind farms on birds. - Ibis 148 (supplement): 129-144.

Fraga, M.I., Romero-Pedreira, D., Souto, M., Castro, D. & Sahuquillo, E. (2008) Assessing the impact of wind farms on the plant diversity of blanket bogs in the Xistral Mountains (NW Spain). - Mire and Peat 4 (2008/9), Article 06[235].

Garcia de la Morena, E.L., Bota, G., Silva, J.P., Pojoan, A., De Juana, E., Suárez, F, Mañosa, S. & Morales, M.B. (2009) Patrones de movimiento estacional del sisón común (*Tetrx tetrax*) en la península ibérica. - VI Congreso de Ornitologia y IV Congreso Ibérico de Ornitologia. Elvas, 5-8 de diciembre de 2008.

Garthe, S. & Hüppop, O. (2004) Scaling possible adverse effects of marine wind farms on seabird: developing a vilnerability index. – Journal of Applied Ecology 41: 724-734.

[231] http://www.offshorewindfarms.co.uk/Assets/Latest%20COWRIE_CHANGE_report_final.pdf.
[232] http://www.energy.eu/publications/a07.pdf
[233] http://www.service-board.de/ascobans_neu/files/Wind%20Farm_Workshop2007_final.pdf
[234] Available via http://www.mires-and-peat.net/mpj3.html.
[235] Available via http://www.mires-and-peat.net/mpj3.html.

González, L.M. & Margalida, A. (2008, ed) Biología del águila imperial ibérica (*Aquila adalberti*). Conservation biology of the Spanish Imperial Eagle (*Aquila adalberti*). - Organismo Autónomo Parques Nacionales. Ministerio de Medio Ambiente y Medio marino y Rural. Madrid.

Grieve, I. & Gilvear, D. (2008) Effects of wind farm construction on concentrations and fluxes of dissolved organic carbon and suspended sediment from peat catchments at Braes of Doune, central Scotland. – Mires and Peat 4 (2008/9), Article 03[236].

Hammar, L., Andersson, S. & Rosenberg, R. (2008) Miljömässig optimering av fundament för havsbaserad vindkraft. – Naturvårdsverket (The Swedish Environmental Protection Agency), Stockholm; in Swedish, summary in English[237].

Hötker, H. (2006) The impact of repowering if wind farms on birds and bats. – Michael-Otto-Institut im NABU, Bergenhausen (Research commissioned by Landesamt für Natur und Umwelt des Landes Schleswig-Holstein.

Hötker, H. (2009) Birds of prey and wind farms: Analysis of problems and possible solutions. Documentation of an international workshop in Berlin, 21st and 22nd October 2008. - Micheal-Otto-Institut im NABU, Bergenhausen.

Hötker H., Thomsen K.-M. & Köster H. (2005) Auswirkungen regenerativer Energiegewinnung auf die biologische Vielfalt am Beispiel der Vögel und der Fledermäuse – Fakten, Wissenslücken, Anforderungen an die Forschung, ornithologische Kriterien zum Ausbau von regenerativen Energiegewinnungsformen. - BfN-Schriften 142, Bonn and Michael Otto-Institut im NABU, Bergenhausen.

Hötker H., Thomsen K.-M. & Jeromin, H. (2006) Impacts on biodiversity of exploitation of renewable energy sources: the example of birds and bats – facts, gaps in knowledge, demands for further research, and ornithological guidelines for the development of renewable energy exploitation. - Michael Otto-Institut im NABU, Bergenhausen.

Hunt, G. & Hunt, T. (2006) The trend of Golden Eagle territory occupancy in the vicinity of the Altamont Pass Wind Resource Area: 2005 survey. – California Energy Commission, PIER Energy_Related Environmental Research, CEC-500-2006-056.

Hüppop, O., Dierschke, J., Exo, K-M., Fredrich, E. & Hill, R. (2006) Bird migration studies and potential risk with offshore wind turbines. – Ibis 148 (supplement): 90-109.

Inger, R., Attrill, M.J., Bearhop, S., Broderick, A.C., Grecian, W.J., Hodgson, D.J., Mills, C., Sheehan, E., Votier, S.C., Witt, M.J. & Godley, B.J. (2009) Marine renewable energy: potential benefits to biodiversity? An urgent call for research. - Journal of Applied Ecology 46: 1145-1153; doi: 10.1111/j.1365-2664.2009.01697.x.

Johnson, G.D., Strickland, M.D., Erickson, W.P. & Young, D.P.Jr (2007) Use of data to develop mitigation measures for wind power development impact to birds. – Chapter 14 (pages 241-257) in de Lucas et al. (2007a).

Keeley, B., Uogretz, S. & Strickland, D. (2001) Bat ecology and wind turbine considerations. – Pages 135-141 in Schwartz (2001).

Keller, O., Lüdemann, K. & Kafemann, R. (2006) Literature review of offshore wind farms with regard to fish fauna. – Pages 47-130 in Zucco et al. (2006).

Kettunen, M., Terry, A., Tucker, G. & Jones, A. (2007) Guidance on the maintenance of landscape features of major importance for wild flora and fauna – guidance on the implementation of Article 3 of the Birds

[236] Available via http://www.mires-and-peat.net/mpj3.html.
[237] http://www.naturvardsverket.se/Documents/publikationer/620-5828-9.pdf

Directive (79/43/EEC) and Article 10 of the Habitats Directive (92/43/EEC). – Institute for European Environmental Policy (IEEP), Brussels.[238]

Köller, J., Köppel, J. & Peters, E. (2006, eds.) Offshore wind energy Research on environmental impacts. – Springer, Berlin.

Kruckenberg, H. & Jaene, J. (1999) Zum Einfluss eines Windparks auf die Verteilung weidender Blässgänse im Rheiderland (Landkreis Leer, Niedersachsen). – Natur und Landschaft 74: 420-427.

Kunz, T.K., Arnett, E.B., Erickson, W.P., Alexander, A.R.H., Johnson, G.D., Larkin, R.P., Strickland, M.D., Thresher, R.W. & Tuttle, M.D. (2007a) Ecological impacts of wind energy development on bats: questions, research, needs and hypotheses. – Front. Ecol. Environ. 5: 315-324.

Kunz, T.K., Arnett, E.B., Cooper, B.M., Erickson, W.P., Larkin, R.P., Mabee, T., Morrison, M.L., Strickland, M.D. & Szewczak, J.M. (2007b) Assessing impacts of wind-energy developments on nocturnally active birds and bats: a guidance document. – Journal of Wildlife Management 71: 2449-2486; doi: 10.2193/2007-270.

LAG-VSW (Länder-Arbeitsgemainschaft der Vogelschutzwarten, 2007) Abstandsregelungen für Windenergieanlagen zu bedeutsamen Vogellebensräumen sowie Brutplätzen ausgewählter Vogelarten. – Berichte Zum Vogelschutz 44: 151-153 (in German, Engish summary).

Langston, R.H.W. & Pullan, J.D. (2003) Windfarms and birds: an analysis of the effect of windfarms on birds, and guidance on environmental assessment criteria and site selection issues. – Council of Europe T-PVS/Inf (2003) 12, 58 pages.[239]

Larsen, J.K. & Madsen, J. (2000) Effects of wind turbines and other physical elements on field utilisation by pink-footed geese (*Anser brachyrhynchos*): A landscape perspective. – Landscape Ecology 15: 755-764.

Lawrence, E.S., Painter, S. & Little, B. (2007) responses of birds to the wind farm at Blyth Harbour, Northumberland, UK. – Chapter 2 (pages 47-69) in de Lucas et al. (2007a).

Lekuona, J.M. & Ursúa, C. (2007) Avian mortality in wind power plants of Navarra (Northern Spain) – Chapter 9 (pages 177-192) in de Lucas et al. (2007a).

Lindsay, R. (2007) Windfarms and peat: conflicts from a confluence of conditions. – International Mire Conservation Group (IMCG) Newsletter Issue 2007/4: 17-22.[240]

Lindsay, R. and Bragg, O. (2004). Wind farms and blanket mires: The bog slide of 16th October 2003 at Derrybrien, Co. Galway, Ireland. School of Health and Biosciences, University of East London.

Lucke, K., Storch, S., Cooke, J. & Siebert, U. (2006) Literature review of offshore wind farms with regard to marine mammals. – Pages 199-284 in Zucco et al. (2006).

Maar, M., Bolding, K., Petersen, J.K., Hansen, J.L.S. & Timmermann, K. (2009) Local effects of blue mussel turbine foundation in an ecosystem model of Nysted off-shore wind farm, Denmark. - Journal of Sea Research 62: 159-174; doi: 10-1016/j.seares.2009.01.008.

Madders, M. & Whitfield, D.P. (2006) Upland raptors and the assessments of wind farm impacts. – Ibis 148 (Supplement): 43-56.

[238] Available via http://ec.europa.eu/environment/nature/ecosystems/docs/adaptation_fragmentation_guidelines.pdf.
[239] http://www.birdlife.org/eu/pdfs/BirdLife_Bern_windfarms.pdf
[240] http://www.imcg.net/imcgnl/pdf/nl0704.pdf.

Madsen, P. T., Wahlberg, M., Tougaard, J., Lucke, K. and Tyack P. (2006). Wind turbine underwater noise and marine mammals: implications of current knowledge and data needs. - Marine Ecology Progress Series, 309: 279–295.

Madsen, J. & Boertmann, D. (2008) Animal behavioral adaptation to changing landscapes: spring-staging geese habituate to wind farms. – Landscape Ecology 23: 1007-1011; doi: 10.1007/s10980-008-9269-9.

Masden, E.A., Haydon, D.T., Fox, A.D., Furness, R.W., Bullman, R. & Desholm. M. (2009) Barriers to movement: impacts of wind farms on migrating birds. - ICES Journal of Marine Science 66: 746-753.

Meissner, K. & Sordyl, H. (2006) Literature review of offshore wind farms with regard to benthic communities and habitats. – Pages 1-46 in Zucco et al. (2006).

Mellor, M. & Maher, M. (2008) Full scale trial of High Definition Video survey for offshore windfarm sites. – Commissioned by COWRIE Ltd (COWRIE HIDEF.03-08).

Mitchell-Jones, T. & Carlin, C. (2009) Bats and onshore wind turbines. Interim guidance. - Natural England Technical Information Note TIN051[241].

Morrison, M.L., Sinclair, K.C. & Thelander, C.G. (2007) A sampling framework for conducting studies of the influence of wind energy developments on birds and other animals. – Chapter 5 (pages 101-115) in de Lucas et al. (2007a).

Nayak, D.R., Miller, D., Nolan, A., Smith, P. & Smith, J. (2008) Calculating carbon savings from wind farms on Scottish peat lands – a new approach. Final Report. – Project funded by Rural and Environment Research and Analysis Directorate of the Scottish Government, Science Policy and Co-ordination Division.

Nedwall, J.R., Parvin, S.J., Edwards, B., Workman, R., Brooker, A.G. & Kynoch, J.E. (2007) Measurement and interpretation of underwater noise during construction and operation of offshore windfarms in UK waters. – Subacoustic Report No. 544R0738 to COWRIE Ltd[242].

OSPAR (2006a) Review of the current state of knowledge on the environmental impacts of the location, operation and removal/disposal of offshore wind-farms. – OSPAR Convention BDC 06/4/5-E.

OSPAR (2006b) Review of the current gaps in knowledge on the environmental impacts of offshore wind-farms. – OSPAR Convention BDC 06/4/7-E.

OSPAR (2008) Draft assessment of the environmental impact of offshore wind farms. – OSPAR Convention BDC 08/5/9-E.

Pearce-Higgins, J.W., Stephen, L., Langston, R.H.W. & Bright, J.A. (2008) Assessing the cumulative impacts of wind farms on peatland birds: a case study of golden plover *Pluvialis apricaria* in Scotland. – Mires and Peat 4: 1-13[243].

Pearce-Higgins, J.W., Stephen, L., Langston, R.H.W, Baibridge, I.P. & Bullman, R. (2009) The distribution of breeding birds around upland wind farms. – Journal of Applied Ecology 46: 1323-1331; doi: 10.1111/j.1365-2664,2009,01715.x.

Petersen, I.K., Christensen, T.K., Kahlert, J., Desholm, M. & Fox A.D. (2006) Final results of bird studies at the offshore wind farms at Nysted and Horns rev, Denmark. – National Environmental Research Institute (NERI), Copenhagen (report request commissioned by DONG energy and Vattenfall A/S).

[241] http://naturalengland.etraderstores.com/NaturalEnglandShop/TIN051
[242] http://www.offshorewindfarms.co.uk/Assets/Final%20noise%20report%2022.02.08.pdf
[243] Available via http://www.mires-and-peat.net/mpj3.html.

Petersen, I.K. & Fox, A.D. (2007) Changes in bird habitat utilization around Horns rev 1 offshore wind farm, with particular emphasis on Common Scoter. – National Environmental Research Institute (NERI), Aarhus (report request commissioned by Vattenfall A/S).

Petersen, J.K. & Malm, T. (2006) Offshore windmill farms: threats to or possiblities for the marine environment. – Ambio 35: 75-80.

Pettersson, J. (2005) Havsbaserade vindkraftsverks inverkan på fågellivet i södra Kalmarsund. En slutrapport baserad på studier 1999-2003. University of Lund and Swedish Energy Agency (In Swedish).

Rasran, L., Mammen, U. & Hötker, H. (2009) Effect of wind farms on population trend and breeding success of Red Kites and other birds of prey. - Pages 25-28 in Hötker (2009).

Rodrigues, L., Bach, L., Duborg-Savage, M-J., Goodwin, J. & Harbusch, C. (2008) Guidelines for consideration of bats in wind farm projects. – EUROBATS Conservation Series No. 3 (English version), UNEP/EUROBATS Secretariat, Bonn[244].

Sæther, B.E. & Bakke, Ø. (2000) Avian life history variation and contribution of demographic traits to the population growth rate. - Ecology 81: 642-653.

Schwartz, S.S. (2001, ed) Proceeding of the National Avian-Wind Power Planning Meeting IV, Carmel, CA, May 16-17, 2000. 179 pp.

Smallwood, K. S. & Karas, B. (2009) Avian and bat fatality rates at old-generation and repowered wind turbines in California. – Journal of Wildlife Management 73: 1062-1071; doi: 10.2193/2008-464.

SNH (2005) Survey methods for use in assessing the impacts of onshore windfarms on bird communities – Scottish Natural Heritage[245].

SNH (2009a) Strategic locational guidance for onshore wind farms in respect to the natural heritage. – Policy Statement No. 02/02, update March 2009. - Scottish Natural Heritage[246].

SNH (2009b) Assessing the cumulative effect of onshore wind energy developments. Version 3- DRAFT - for consultation, November 2009. - Scottish Natural Heritage[247].

Sterner, D., Orloff, S. & Spiegel, L. (2007) Wind turbine collision research in the United States. – Chapter 4 (pages 81-100) in de Lucas et al. (2007a).

Stewart, G.B., Pullin, A.S. & Coles, C.F. (2004) Effects of wind turbines in bird abundance. Summary Report. – Systematic Review No. 4, Centre for Evidence-based Conservation, Birmingham.

Stewart, G.B., Pullin, A.S. & Coles, C.F. (2007) Poor evidence-base for assessment of windfarm impacts on birds. – Environmental Conservation 34 (1): 1-11; doi: 10.1017/S037682907003554.

Teilmann, J., Tougaard, J., Carstensen, J., Dietz, R. & Tougaard, S. (2006) Summary on seal monitoring 1999-2005 around Nysted and Horns Rev Offshore Wind Farms. – Technical Report to Energi E2 A/S and Vattenfall A/S. Ministry of Environment, Denmark.

Teilmann, J., Tougaard, J. & Carstensen, J. (2008) Effects from offshore wind farms on Harbour Porpoises in Denmark. – Pages 50-59 in Evans (2008).

[244] Available via http://www.eurobats.org/publications/publication_series.htm.
[245] http://www.snh.org.uk/pdfs/strategy/renewable/bird_survey.pdf.
[246] http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind
[247] http://www.snh.org.uk/pdfs/strategy/renewables/A307913.pdf.

Thelander, K. & Smallwood, K.S. (2007) The Altamont Pass Wind resource Area's effects on birds: a case study. – Chapter 1 (pages 25-46) in de Lucas et al. (2007a).

Thomsen, F., Lüdemann, K., Kafemann, R. & Piper, W. (2006) Effects of offshore wind farm noise on marine mammals and fish. – biola, Hamburg on behalf of COWRIE, Ltd[248].

Tucker, V.A. (1996a) A mathematical model of bird collisions with wind turbine rotors. - Journal of Solar Energy Engineering 118:253-262.

Tucker, V.A. (1996b) Using a collision model to design safer wind turbine rotors for birds. - Journal of Solar Energy Engineering 118: 263–269.

Wilhelmsson, D., Malm, T. & Öhman, M. (2006) The influence of windpower on demersal fish. – ICES Journal of Marine Science 63: 775-784; doi: 10.1016/j.icesjms.2006.02.001.

Wilhelmsson, D., Malm, T., Thompson, R., Tchou, J., Sarantakos, G., McCormick, N., Luitjens, S., Gullström, M, Petterson Ewards, J.K., Amor, O. & Dubi, A. (2010) Greening Blue Energy: Identifying and managing the biodiversity risks annd opportunities of offshore renewable energy. - IUCN, Glnad[249]

Zervos, A. & Kjaer, C. (2009) Pure power – wind energy targets for 2020 and 2030. – European Wind Energy Association.[250]

Zucco. C., Wende, W., Merck, T., Köchling, I. & Köppel, J. (2006, eds.) Ecological research on offshore wind farms: international exchange and experience. Part B: Literature overview of ecological impacts. – BfN-Skripten 186, Bundesamt für Naturschütz, Bonn[251].

[248] http://www.energieeffizienz-im-service.de/page/fileadmin/offshore/documents/Naturschutz/Geraeuschauswirkungen_der_Offshore-Windparks_auf_Voegel__maritime_Saeuger_und_Fische.pdf

[249] http://data.iucn.org/dbtw-wpd/edocs/2010-014.pdf

[250] http://www.ewea.org/fileadmin/ewea_documents/documents/publications/reports/Pure_Power_Full_Report.pdf

[251] Available via www.dnl-online.de.

II

*(Non-legislative acts)*

# RULES OF PROCEDURE

## RULES OF PROCEDURE OF THE COURT OF JUSTICE

### Table of Contents


*Page*

**INTRODUCTORY PROVISIONS** . . . 9

Article 1 Definitions . . . 9

Article 2 Purport of these Rules . . . 10

**TITLE I - ORGANISATION OF THE COURT** . . . 10

CHAPTER 1 - JUDGES AND ADVOCATES GENERAL . . . 10

Article 3 Commencement of the term of office of Judges and Advocates General . . . 10

Article 4 Taking of the oath . . . 10

Article 5 Solemn undertaking . . . 10

Article 6 Depriving a Judge or Advocate General of his office . . . 10

Article 7 Order of seniority . . . 10

CHAPTER 2 - PRESIDENCY OF THE COURT, CONSTITUTION OF THE CHAMBERS AND DESIGNATION OF THE FIRST ADVOCATE GENERAL . . . 10

Article 8 Election of the President and of the Vice-President of the Court . . . 10

Article 9 Responsibilities of the President of the Court . . . 11

Article 10 Responsibilities of the Vice-President of the Court . . . 11

Article 11 Constitution of Chambers . . . 11

Article 12 Election of Presidents of Chambers . . . 11

Article 13 Where the President and Vice-President of the Court are prevented from acting . . . 11

Article 14 Designation of the First Advocate General . . . 11

CHAPTER 3 - ASSIGNMENT OF CASES TO JUDGE-RAPPORTEURS AND ADVOCATES GENERAL . . . 11

Article 15 Designation of the Judge-Rapporteur . . . 11

Article 16 Designation of the Advocate General . . . 12

CHAPTER 4 - ASSISTANT RAPPORTEURS . . . 12

Article 17 Assistant Rapporteurs . . . 12

CHAPTER 5 - REGISTRY . . . 12

Article 18 Appointment of the Registrar . . . 12

*Page*

Article 19 Deputy Registrar . . . 12

Article 20 Responsibilities of the Registrar . . . 12

Article 21 Keeping of the register . . . 12

Article 22 Consultation of the register and of judgments and orders . . . 13

CHAPTER 6 - THE WORKING OF THE COURT . . . 13

Article 23 Location of the sittings of the Court . . . 13

Article 24 Calendar of the Court's judicial business . . . 13

Article 25 General meeting . . . 13

Article 26 Drawing-up of minutes . . . 13

CHAPTER 7 - FORMATIONS OF THE COURT . . . 13

Section 1. Composition of the formations of the Court . . . 13

Article 27 Composition of the Grand Chamber . . . 13

Article 28 Composition of the Chambers of five and of three Judges . . . 14

Article 29 Composition of Chambers where cases are related or referred back . . . 14

Article 30 Where a President of a Chamber is prevented from acting . . . 14

Article 31 Where a member of the formation of the Court is prevented from acting . . . 14

Section 2. Deliberations . . . 14

Article 32 Procedures concerning deliberations . . . 14

Article 33 Number of Judges taking part in the deliberations . . . 15

Article 34 Quorum of the Grand Chamber . . . 15

Article 35 Quorum of the Chambers of five and of three Judges . . . 15

CHAPTER 8 - LANGUAGES . . . 15

Article 36 Language of a case . . . 15

Article 37 Determination of the language of a case . . . 15

Article 38 Use of the language of the case . . . 16

Article 39 Responsibility of the Registrar concerning language arrangements . . . 16

Article 40 Languages of the publications of the Court . . . 16

Article 41 Authentic texts . . . 16

Article 42 Language service of the Court . . . 16

**TITLE II - COMMON PROCEDURAL PROVISIONS** . . . 16

CHAPTER 1 - RIGHTS AND OBLIGATIONS OF AGENTS, ADVISERS AND LAWYERS . . . 16

Article 43 Privileges, immunities and facilities . . . 16

Article 44 Status of the parties' representatives . . . 17

Article 45 Waiver of immunity . . . 17

Article 46 Exclusion from the proceedings . . . 17

*Page*

Article 47 University teachers and parties to the main proceedings . . . 17

CHAPTER 2 - SERVICE . . . 17

Article 48 Methods of service . . . 17

CHAPTER 3 - TIME-LIMITS . . . 18

Article 49 Calculation of time-limits . . . 18

Article 50 Proceedings against a measure adopted by an institution . . . 18

Article 51 Extension on account of distance . . . 18

Article 52 Setting and extension of time-limits . . . 18

CHAPTER 4 - DIFFERENT PROCEDURES FOR DEALING WITH CASES . . . 18

Article 53 Procedures for dealing with cases . . . 18

Article 54 Joinder . . . 18

Article 55 Stay of proceedings . . . 18

Article 56 Deferment of the determination of a case . . . 19

CHAPTER 5 - WRITTEN PART OF THE PROCEDURE . . . 19

Article 57 Lodging of procedural documents . . . 19

Article 58 Length of procedural documents . . . 19

CHAPTER 6 - THE PRELIMINARY REPORT AND ASSIGNMENT OF CASES TO FORMATIONS OF THE COURT 19

Article 59 Preliminary report . . . 19

Article 60 Assignment of cases to formations of the Court . . . 20

CHAPTER 7 - MEASURES OF ORGANISATION OF PROCEDURE AND MEASURES OF INQUIRY . . . 20

Section 1. Measures of organisation of procedure . . . 20

Article 61 Measures of organisation prescribed by the Court . . . 20

Article 62 Measures of organisation prescribed by the Judge-Rapporteur or the Advocate General . . . 20

Section 2. Measures of inquiry . . . 20

Article 63 Decision on measures of inquiry . . . 20

Article 64 Determination of measures of inquiry . . . 20

Article 65 Participation in measures of inquiry . . . 20

Article 66 Oral testimony . . . 21

Article 67 Examination of witnesses . . . 21

Article 68 Witnesses' oath . . . 21

Article 69 Pecuniary penalties . . . 21

Article 70 Expert's report . . . 21

Article 71 Expert's oath . . . 21

Article 72 Objection to a witness or expert . . . 21

Article 73 Witnesses' and experts' costs . . . 21

Page

Article 74 Minutes of inquiry hearings . . . 22

Article 75 Opening of the oral part of the procedure after the inquiry . . . 22

CHAPTER 8 - ORAL PART OF THE PROCEDURE . . . 22

Article 76 Hearing . . . 22

Article 77 Joint hearing . . . 22

Article 78 Conduct of oral proceedings . . . 22

Article 79 Cases heard in camera . . . 22

Article 80 Questions . . . 22

Article 81 Close of the hearing . . . 22

Article 82 Delivery of the Opinion of the Advocate General . . . 22

Article 83 Opening or reopening of the oral part of the procedure . . . 22

Article 84 Minutes of hearings . . . 23

Article 85 Recording of the hearing . . . 23

CHAPTER 9 - JUDGMENTS AND ORDERS . . . 23

Article 86 Date of delivery of a judgment . . . 23

Article 87 Content of a judgment . . . 23

Article 88 Delivery and service of the judgment . . . 23

Article 89 Content of an order . . . 23

Article 90 Signature and service of the order . . . 24

Article 91 Binding nature of judgments and orders . . . 24

Article 92 Publication in the Official Journal of the European Union . . . 24

**TITLE III - REFERENCES FOR A PRELIMINARY RULING** . . . 24

CHAPTER 1 - GENERAL PROVISIONS . . . 24

Article 93 Scope . . . 24

Article 94 Content of the request for a preliminary ruling . . . 24

Article 95 Anonymity . . . 24

Article 96 Participation in preliminary ruling proceedings . . . 24

Article 97 Parties to the main proceedings . . . 24

Article 98 Translation and service of the request for a preliminary ruling . . . 25

Article 99 Reply by reasoned order . . . 25

Article 100 Circumstances in which the Court remains seised . . . 25

Article 101 Request for clarification . . . 25

Article 102 Costs of the preliminary ruling proceedings . . . 25

Article 103 Rectification of judgments and orders . . . 25

Article 104 Interpretation of preliminary rulings . . . 25

*Page*

CHAPTER 2 - EXPEDITED PRELIMINARY RULING PROCEDURE . . . 26

Article 105 Expedited procedure . . . 26

Article 106 Transmission of procedural documents . . . 26

CHAPTER 3 - URGENT PRELIMINARY RULING PROCEDURE . . . 26

Article 107 Scope of the urgent preliminary ruling procedure . . . 26

Article 108 Decision as to urgency . . . 26

Article 109 Written part of the urgent procedure . . . 26

Article 110 Service and information following the close of the written part of the procedure . . . 27

Article 111 Omission of the written part of the procedure . . . 27

Article 112 Decision on the substance . . . 27

Article 113 Formation of the Court . . . 27

Article 114 Transmission of procedural documents . . . 27

CHAPTER 4 - LEGAL AID . . . 27

Article 115 Application for legal aid . . . 27

Article 116 Decision on the application for legal aid . . . 27

Article 117 Sums to be advanced as legal aid . . . 28

Article 118 Withdrawal of legal aid . . . 28

**TITLE IV - DIRECT ACTIONS** . . . 28

CHAPTER 1 - REPRESENTATION OF THE PARTIES . . . 28

Article 119 Obligation to be represented . . . 28

CHAPTER 2 - WRITTEN PART OF THE PROCEDURE . . . 28

Article 120 Content of the application . . . 28

Article 121 Information relating to service . . . 28

Article 122 Annexes to the application . . . 28

Article 123 Service of the application . . . 29

Article 124 Content of the defence . . . 29

Article 125 Transmission of documents . . . 29

Article 126 Reply and rejoinder . . . 29

CHAPTER 3 - PLEAS IN LAW AND EVIDENCE . . . 29

Article 127 New pleas in law . . . 29

Article 128 Evidence produced or offered . . . 29

CHAPTER 4 - INTERVENTION . . . 29

Article 129 Object and effects of the intervention . . . 29

Article 130 Application to intervene . . . 30

Article 131 Decision on applications to intervene . . . 30

Page

Article 132 Submission of statements . . . 30

CHAPTER 5 - EXPEDITED PROCEDURE . . . 30

Article 133 Decision relating to the expedited procedure . . . 30

Article 134 Written part of the procedure . . . 30

Article 135 Oral part of the procedure . . . 30

Article 136 Decision on the substance . . . 31

CHAPTER 6 - COSTS . . . 31

Article 137 Decision as to costs . . . 31

Article 138 General rules as to allocation of costs . . . 31

Article 139 Unreasonable or vexatious costs . . . 31

Article 140 Costs of interveners . . . 31

Article 141 Costs in the event of discontinuance or withdrawal . . . 31

Article 142 Costs where a case does not proceed to judgment . . . 31

Article 143 Costs of proceedings . . . 31

Article 144 Recoverable costs . . . 31

Article 145 Dispute concerning the costs to be recovered . . . 31

Article 146 Procedure for payment . . . 32

CHAPTER 7 - AMICABLE SETTLEMENT, DISCONTINUANCE, CASES THAT DO NOT PROCEED TO JUDGMENT AND PRELIMINARY ISSUES . . . 32

Article 147 Amicable settlement . . . 32

Article 148 Discontinuance . . . 32

Article 149 Cases that do not proceed to judgment . . . 32

Article 150 Absolute bar to proceeding with a case . . . 32

Article 151 Preliminary objections and issues . . . 32

CHAPTER 8 - JUDGMENTS BY DEFAULT . . . 32

Article 152 Judgments by default . . . 32

CHAPTER 9 - REQUESTS AND APPLICATIONS RELATING TO JUDGMENTS AND ORDERS . . . 33

Article 153 Competent formation of the Court . . . 33

Article 154 Rectification . . . 33

Article 155 Failure to adjudicate . . . 33

Article 156 Application to set aside . . . 33

Article 157 Third-party proceedings . . . 33

Article 158 Interpretation . . . 34

Article 159 Revision . . . 34

CHAPTER 10 - SUSPENSION OF OPERATION OR ENFORCEMENT AND OTHER INTERIM MEASURES . . . 34

Article 160 Application for suspension or for interim measures . . . 34

Article 161 Decision on the application . . . 35

*Page*

Article 162 Order for suspension of operation or for interim measures . . . 35

Article 163 Change in circumstances . . . 35

Article 164 New application . . . 35

Article 165 Applications pursuant to Articles 280 TFEU and 299 TFEU and Article 164 TEAEC . . . 35

Article 166 Application pursuant to Article 81 TEAEC . . . 35

**TITLE V - APPEALS AGAINST DECISIONS OF THE GENERAL COURT** . . . 35

CHAPTER 1 - FORM AND CONTENT OF THE APPEAL, AND FORM OF ORDER SOUGHT . . . 35

Article 167 Lodging of the appeal . . . 35

Article 168 Content of the appeal . . . 35

Article 169 Form of order sought, pleas in law and arguments of the appeal . . . 36

Article 170 Form of order sought in the event that the appeal is allowed . . . 36

CHAPTER 2 - RESPONSES, REPLIES AND REJOINDERS . . . 36

Article 171 Service of the appeal . . . 36

Article 172 Parties authorised to lodge a response . . . 36

Article 173 Content of the response . . . 36

Article 174 Form of order sought in the response . . . 36

Article 175 Reply and rejoinder . . . 36

CHAPTER 3 - FORM AND CONTENT OF THE CROSS-APPEAL, AND FORM OF ORDER SOUGHT . . . 36

Article 176 Cross-appeal . . . 36

Article 177 Content of the cross-appeal . . . 36

Article 178 Form of order sought, pleas in law and arguments of the cross-appeal . . . 37

CHAPTER 4 - PLEADINGS CONSEQUENT ON THE CROSS-APPEAL . . . 37

Article 179 Response to the cross-appeal . . . 37

Article 180 Reply and rejoinder on a cross-appeal . . . 37

CHAPTER 5 - APPEALS DETERMINED BY ORDER . . . 37

Article 181 Manifestly inadmissible or manifestly unfounded appeal or cross-appeal . . . 37

Article 182 Manifestly well-founded appeal or cross-appeal . . . 37

CHAPTER 6 - EFFECT ON A CROSS-APPEAL OF THE REMOVAL OF THE APPEAL FROM THE REGISTER 37

Article 183 Effect on a cross-appeal of the discontinuance or manifest inadmissibility of the appeal . . . 37

CHAPTER 7 - COSTS AND LEGAL AID IN APPEALS . . . 37

Article 184 Costs in appeals . . . 37

Article 185 Legal aid . . . 38

Article 186 Prior application for legal aid . . . 38

Article 187 Decision on the application for legal aid . . . 38

Article 188 Sums to be advanced as legal aid . . . 38

*Page*

Article 189 Withdrawal of legal aid . . . 38

CHAPTER 8 - OTHER PROVISIONS APPLICABLE TO APPEALS . . . 38

Article 190 Other provisions applicable to appeals . . . 38

**TITLE VI - REVIEW OF DECISIONS OF THE GENERAL COURT** . . . 39

Article 191 Reviewing Chamber . . . 39

Article 192 Information and communication of decisions which may be reviewed . . . 39

Article 193 Review of decisions given on appeal . . . 39

Article 194 Review of preliminary rulings . . . 39

Article 195 Judgment on the substance of the case after a decision to review . . . 40

**TITLE VII - OPINIONS** . . . 40

Article 196 Written part of the procedure . . . 40

Article 197 Designation of the Judge-Rapporteur and of the Advocate General . . . 40

Article 198 Hearing . . . 40

Article 199 Time-limit for delivering the Opinion . . . 40

Article 200 Delivery of the Opinion . . . 40

**TITLE VIII - PARTICULAR FORMS OF PROCEDURE** . . . 40

Article 201 Appeals against decisions of the arbitration committee . . . 40

Article 202 Procedure under Article 103 TEAEC . . . 41

Article 203 Procedures under Articles 104 TEAEC and 105 TEAEC . . . 41

Article 204 Procedure provided for by Article 111(3) of the EEA Agreement . . . 41

Article 205 Settlement of the disputes referred to in Article 35 TEU in the version in force before the entry into force of the Treaty of Lisbon . . . 41

Article 206 Requests under Article 269 TFEU . . . 42

**FINAL PROVISIONS** . . . 42

Article 207 Supplementary rules . . . 42

Article 208 Implementing rules . . . 42

Article 209 Repeal . . . 42

Article 210 Publication and entry into force of these Rules . . . 42

# RULES OF PROCEDURE OF THE COURT OF JUSTICE

THE COURT OF JUSTICE

Having regard to the Treaty on European Union, and in particular Article 19 thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular the sixth paragraph of Article 253 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a(1) thereof,

Having regard to the Protocol on the Statute of the Court of Justice of the European Union, and in particular Article 63 and the second paragraph of Article 64 thereof,

Whereas:

(1) Despite having been amended on several occasions over the years, the Rules of Procedure of the Court of Justice have remained fundamentally unchanged in structure since their original adoption on 4 March 1953. The Rules of Procedure of 19 June 1991, which are currently in force, still reflect the initial preponderance of direct actions, whereas in fact the majority of such actions now fall within the jurisdiction of the General Court, and references for a preliminary ruling from the courts and tribunals of the Member States represent, quantitatively, the primary category of cases brought before the Court. That fact should be taken into account and the structure and content of the Rules of Procedure of the Court adapted, in consequence, to changes in its caseload.

(2) While references for a preliminary ruling should be given their proper place in the Rules of Procedure, it is also appropriate to draw a clearer distinction between the rules that apply to all types of action and those that are specific to each type, to be contained in separate titles. In the interests of clarification, procedural provisions common to all cases brought before the Court should, therefore, all be contained in an initial title.

(3) In the light of experience gained in the course of implementing the various procedures, it is also necessary to supplement or to clarify, for the benefit of litigants as well as of national courts and tribunals, the rules that apply to each procedure. The rules in question concern, in particular, the concepts of party to the main proceedings, intervener and party to the proceedings before the General Court, or, in preliminary rulings, the rules governing the bringing of matters before the Court and the content of the order for reference. With regard to appeals against decisions of the General Court, a clearer distinction must also be drawn between appeals and cross-appeals in consequence of the service of an appeal on the cross-appellant.

(4) Conversely, the excessive complexity of certain procedures, such as the review procedure, has come to light on their implementation. Accordingly, they should be simplified by providing, inter alia, for a Chamber of five Judges to be designated for a period of one year to be responsible for ruling both on the First Advocate General's proposal to review and on the questions to be reviewed.

(5) Similarly, the procedural arrangements for dealing with requests for Opinions should be eased by aligning them with those that apply to other cases and by providing, in consequence, for a single Advocate General to be involved in dealing with the request for an Opinion. In the interests of making the Rules easier to understand, all the particular procedures currently to be found in a number of separate titles and chapters of the Rules of Procedure should also be brought together in a single title.

(6) In order to maintain the Court's capacity, in the face of an ever-increasing caseload, to dispose within a reasonable period of time of the cases brought before it, it is also necessary to continue the efforts made to reduce the duration of proceedings before the Court, in particular by extending the opportunities for the Court to rule by reasoned order, simplifying the rules relating to the intervention of the States and institutions referred to in the first and third paragraphs of Article 40 of the Statute and providing for the Court to be able to rule without a hearing if it considers that it has sufficient information on the basis of all the written observations lodged in a case.

(7) In the interests of making the Rules applied by the Court easier to understand, lastly, certain rules which are outdated or not applied should be deleted, every paragraph of the present Rules numbered, each article given a specific heading summarising its content and the terminology harmonised.

With the Council's approval given on 24 September 2012.

HAS ADOPTED THESE RULES OF PROCEDURE:

## INTRODUCTORY PROVISIONS

*Article 1*

### Definitions

1. In these Rules:

(a) provisions of the Treaty on European Union are referred to by the number of the article concerned followed by 'TEU',

(b) provisions of the Treaty on the Functioning of the European Union are referred to by the number of the article concerned followed by 'TFEU',

(c) provisions of the Treaty establishing the European Atomic Energy Community are referred to by the number of the article concerned followed by 'TEAEC',

(d) 'Statute' means the Protocol on the Statute of the Court of Justice of the European Union,

(e) 'EEA Agreement' means the Agreement on the European Economic Area, [1]

(f) 'Council Regulation No 1' means Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community. [2]

2. For the purposes of these Rules:

(a) 'institutions' means the institutions of the European Union referred to in Article 13(1) TEU and bodies, offices and agencies established by the Treaties, or by an act adopted in implementation thereof, which may be parties before the Court,

(b) 'EFTA Surveillance Authority' means the surveillance authority referred to in the EEA Agreement,

(c) 'interested persons referred to in Article 23 of the Statute' means all the parties, States, institutions, bodies, offices and agencies authorised, pursuant to that Article, to submit statements of case or observations in the context of a reference for a preliminary ruling.

*Article 2*

**Purport of these Rules**

These Rules implement and supplement, so far as necessary, the relevant provisions of the EU, FEU and EAEC Treaties, and the Statute.

## TITLE I

## ORGANISATION OF THE COURT

### Chapter 1

### JUDGES AND ADVOCATES GENERAL

*Article 3*

**Commencement of the term of office of Judges and Advocates General**

The term of office of a Judge or Advocate General shall begin on the date fixed for that purpose in the instrument of appointment. In the absence of any provisions in that instrument regarding the date of commencement of the term of office, that term shall begin on the date of publication of the instrument in the *Official Journal of the European Union*.

*Article 4*

**Taking of the oath**

Before taking up his duties, a Judge or Advocate General shall, at the first public sitting of the Court which he attends after his appointment, take the following oath provided for in Article 2 of the Statute:

'I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court.'

*Article 5*

**Solemn undertaking**

Immediately after taking the oath, a Judge or Advocate General shall sign a declaration by which he gives the solemn undertaking provided for in the third paragraph of Article 4 of the Statute.

*Article 6*

**Depriving a Judge or Advocate General of his office**

1. Where the Court is called upon, pursuant to Article 6 of the Statute, to decide whether a Judge or Advocate General no longer fulfils the requisite conditions or no longer meets the obligations arising from his office, the President shall invite the Judge or Advocate General concerned to make representations.

2. The Court shall give a decision in the absence of the Registrar.

*Article 7*

**Order of seniority**

1. The seniority of Judges and Advocates General shall be calculated without distinction according to the date on which they took up their duties.

2. Where there is equal seniority on that basis, the order of seniority shall be determined by age.

3. Judges and Advocates General whose terms of office are renewed shall retain their former seniority.

### Chapter 2

### PRESIDENCY OF THE COURT, CONSTITUTION OF THE CHAMBERS AND DESIGNATION OF THE FIRST ADVOCATE GENERAL

*Article 8*

**Election of the President and of the Vice-President of the Court**

1. The Judges shall, immediately after the partial replacement provided for in the second paragraph of Article 253 TFEU, elect one of their number as President of the Court for a term of three years.

2. If the office of the President falls vacant before the normal date of expiry of the term thereof, the Court shall elect a successor for the remainder of the term.

3. The elections provided for in this Article shall be by secret ballot. The Judge obtaining the votes of more than half the Judges of the Court shall be elected. If no Judge obtains that majority, further ballots shall be held until that majority is attained.

[1] OJ L 1, 3.1.1994, p. 27.
[2] OJ, English Special Edition 1952-1958 (I), p. 59.

4. The Judges shall then elect one of their number as Vice-President of the Court for a term of three years, in accordance with the procedures laid down in the preceding paragraph. Paragraph 2 shall apply if the office of the Vice-President of the Court falls vacant before the normal date of expiry of the term thereof.

5. The names of the President and Vice-President elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

*Article 9*

**Responsibilities of the President of the Court**

1. The President shall represent the Court.

2. The President shall direct the judicial business of the Court. He shall preside at general meetings of the Members of the Court and at hearings before and deliberations of the full Court and the Grand Chamber.

3. The President shall ensure the proper functioning of the services of the Court.

*Article 10*

**Responsibilities of the Vice-President of the Court**

1. The Vice-President shall assist the President of the Court in the performance of his duties and shall take the President's place when the latter is prevented from acting.

2. He shall take the President's place, at his request, in performing the duties referred to in Article 9(1) and (3) of these Rules.

3. The Court shall, by decision, specify the conditions under which the Vice-President shall take the place of the President of the Court in the performance of his judicial duties. That decision shall be published in the *Official Journal of the European Union*.

*Article 11*

**Constitution of Chambers**

1. The Court shall set up Chambers of five and three Judges in accordance with Article 16 of the Statute and shall decide which Judges shall be attached to them.

2. The Court shall designate the Chambers of five Judges which, for a period of one year, shall be responsible for cases of the kind referred to in Article 107 and Articles 193 and 194.

3. In respect of cases assigned to a formation of the Court in accordance with Article 60, the word 'Court' in these Rules shall mean that formation.

4. In respect of cases assigned to a Chamber of five or three Judges, the powers of the President of the Court shall be exercised by the President of the Chamber.

5. The composition of the Chambers and the designation of the Chambers responsible for cases of the kind referred to in Article 107 and Articles 193 and 194 shall be published in the *Official Journal of the European Union*.

*Article 12*

**Election of Presidents of Chambers**

1. The Judges shall, immediately after the election of the President and Vice-President of the Court, elect the Presidents of the Chambers of five Judges for a term of three years.

2. The Judges shall then elect the Presidents of the Chambers of three Judges for a term of one year.

3. The provisions of Article 8(2) and (3) shall apply.

4. The names of the Presidents of Chambers elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

*Article 13*

**Where the President and Vice-President of the Court are prevented from acting**

When the President and the Vice-President of the Court are prevented from acting, the functions of President shall be exercised by one of the Presidents of the Chambers of five Judges or, failing that, by one of the Presidents of the Chambers of three Judges or, failing that, by one of the other Judges, according to the order of seniority laid down in Article 7.

*Article 14*

**Designation of the First Advocate General**

1. The Court shall, after hearing the Advocates General, designate a First Advocate General for a period of one year.

2. If the office of the First Advocate General falls vacant before the normal date of expiry of the term thereof, the Court shall designate a successor for the remainder of the term.

3. The name of the First Advocate General designated in accordance with this Article shall be published in the *Official Journal of the European Union*.

Chapter 3

ASSIGNMENT OF CASES TO JUDGE-RAPPORTEURS AND ADVOCATES GENERAL

*Article 15*

**Designation of the Judge-Rapporteur**

1. As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case.

2. For cases of the kind referred to in Article 107 and Articles 193 and 194, the Judge-Rapporteur shall be selected from among the Judges of the Chamber designated in accordance with Article 11(2), on a proposal from the President of that Chamber. If, pursuant to Article 109, the Chamber decides that the reference is not to be dealt with under the urgent procedure, the President of the Court may reassign the case to a Judge-Rapporteur attached to another Chamber.

3. The President of the Court shall take the necessary steps if a Judge-Rapporteur is prevented from acting.

*Article 16*

**Designation of the Advocate General**

1. The First Advocate General shall assign each case to an Advocate General.

2. The First Advocate General shall take the necessary steps if an Advocate General is prevented from acting.

Chapter 4

ASSISTANT RAPPORTEURS

*Article 17*

**Assistant Rapporteurs**

1. Where the Court is of the opinion that the consideration of and preparatory inquiries in cases before it so require, it shall, pursuant to Article 13 of the Statute, propose the appointment of Assistant Rapporteurs.

2. Assistant Rapporteurs shall in particular:

(a) assist the President of the Court in interim proceedings and

(b) assist the Judge-Rapporteurs in their work.

3. In the performance of their duties the Assistant Rapporteurs shall be responsible to the President of the Court, the President of a Chamber or a Judge-Rapporteur, as the case may be.

4. Before taking up his duties, an Assistant Rapporteur shall take before the Court the oath set out in Article 4 of these Rules.

Chapter 5

REGISTRY

*Article 18*

**Appointment of the Registrar**

1. The Court shall appoint the Registrar.

2. When the post of Registrar is vacant, an advertisement shall be published in the *Official Journal of the European Union*. Interested persons shall be invited to submit their applications within a time-limit of not less than three weeks, accompanied by full details of their nationality, university degrees, knowledge of languages, present and past occupations, and experience, if any, in judicial and international fields.

3. The vote, in which the Judges and the Advocates General shall take part, shall take place in accordance with the procedure laid down in Article 8(3) of these Rules.

4. The Registrar shall be appointed for a term of six years. He may be reappointed. The Court may decide to renew the term of office of the incumbent Registrar without availing itself of the procedure laid down in paragraph 2 of this Article.

5. The Registrar shall take the oath set out in Article 4 and sign the declaration provided for in Article 5.

6. The Registrar may be deprived of his office only if he no longer fulfils the requisite conditions or no longer meets the obligations arising from his office. The Court shall take its decision after giving the Registrar an opportunity to make representations.

7. If the office of Registrar falls vacant before the normal date of expiry of the term thereof, the Court shall appoint a new Registrar for a term of six years.

8. The name of the Registrar elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

*Article 19*

**Deputy Registrar**

The Court may, in accordance with the procedure laid down in respect of the Registrar, appoint a Deputy Registrar to assist the Registrar and to take his place if he is prevented from acting.

*Article 20*

**Responsibilities of the Registrar**

1. The Registrar shall be responsible, under the authority of the President of the Court, for the acceptance, transmission and custody of all documents and for effecting service as provided for by these Rules.

2. The Registrar shall assist the Members of the Court in all their official functions.

3. The Registrar shall have custody of the seals and shall be responsible for the records. He shall be in charge of the publications of the Court and, in particular, the European Court Reports.

4. The Registrar shall direct the services of the Court under the authority of the President of the Court. He shall be responsible for the management of the staff and the administration, and for the preparation and implementation of the budget.

*Article 21*

**Keeping of the register**

1. There shall be kept in the Registry, under the responsibility of the Registrar, a register in which all procedural documents and supporting items and documents lodged shall be entered in the order in which they are submitted.

2. When a document has been registered, the Registrar shall make a note to that effect on the original and, if a party so requests, on any copy submitted for the purpose.

3. Entries in the register and the notes provided for in the preceding paragraph shall be authentic.

4. A notice shall be published in the *Official Journal of the European Union* indicating the date of registration of an application initiating proceedings, the names of the parties, the form of order sought by the applicant and a summary of the pleas in law and of the main supporting arguments or, as the case may be, the date of lodging of a request for a preliminary ruling, the identity of the referring court or tribunal and the parties to the main proceedings, and the questions referred to the Court.

*Article 22*

**Consultation of the register and of judgments and orders**

1. Anyone may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court on a proposal from the Registrar.

2. The parties to a case may, on payment of the appropriate charge, obtain certified copies of procedural documents.

3. Anyone may, on payment of the appropriate charge, also obtain certified copies of judgments and orders.

Chapter 6

THE WORKING OF THE COURT

*Article 23*

**Location of the sittings of the Court**

The Court may choose to hold one or more specific sittings in a place other than that in which it has its seat.

*Article 24*

**Calendar of the Court's judicial business**

1. The judicial year shall begin on 7 October of each calendar year and end on 6 October of the following year.

2. The judicial vacations shall be determined by the Court.

3. In a case of urgency, the President may convene the Judges and the Advocates General during the judicial vacations.

4. The Court shall observe the official holidays of the place in which it has its seat.

5. The Court may, in proper circumstances, grant leave of absence to any Judge or Advocate General.

6. The dates of the judicial vacations and the list of official holidays shall be published annually in the *Official Journal of the European Union*.

*Article 25*

**General meeting**

Decisions concerning administrative issues or the action to be taken upon the proposals contained in the preliminary report referred to in Article 59 of these Rules shall be taken by the Court at the general meeting in which all the Judges and Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary.

*Article 26*

**Drawing-up of minutes**

Where the Court sits without the Registrar being present it shall, if necessary, instruct the most junior Judge for the purposes of Article 7 of these Rules to draw up minutes, which shall be signed by that Judge and by the President.

Chapter 7

FORMATIONS OF THE COURT

Section 1. Composition of the formations of the Court

*Article 27*

**Composition of the Grand Chamber**

1. The Grand Chamber shall, for each case, be composed of the President and the Vice-President of the Court, three Presidents of Chambers of five Judges, the Judge-Rapporteur and the number of Judges necessary to reach 15. The last-mentioned Judges and the three Presidents of Chambers of five Judges shall be designated from the lists referred to in paragraphs 3 and 4 of this Article, following the order laid down therein. The starting-point on each of those lists, in every case assigned to the Grand Chamber, shall be the name of the Judge immediately following the last Judge designated from the list concerned for the preceding case assigned to that formation of the Court.

2. After the election of the President and the Vice-President of the Court, and then of the Presidents of the Chambers of five Judges, a list of the Presidents of Chambers of five Judges and a list of the other Judges shall be drawn up for the purposes of determining the composition of the Grand Chamber.

3. The list of the Presidents of Chambers of five Judges shall be drawn up according to the order laid down in Article 7 of these Rules.

4. The list of the other Judges shall be drawn up according to the order laid down in Article 7 of these Rules, alternating with the reverse order: the first Judge on that list shall be the first according to the order laid down in that Article, the second Judge shall be the last according to that order, the third Judge shall be the second according to that order, the fourth Judge the penultimate according to that order, and so on.

5. The lists referred to in paragraphs 3 and 4 shall be published in the *Official Journal of the European Union*.

6. In cases which are assigned to the Grand Chamber between the beginning of a calendar year in which there is a partial replacement of Judges and the moment when that replacement has taken place, two substitute Judges may be designated to complete the formation of the Court for so long as the attainment of the quorum referred to in the third paragraph of Article 17 of the Statute is in doubt. Those substitute Judges shall be the two Judges appearing on the list referred to in paragraph 4 immediately after the last Judge designated for the composition of the Grand Chamber in the case.

7. The substitute Judges shall replace, in the order of the list referred to in paragraph 4, such Judges as are unable to take part in the determination of the case.

*Article 28*

**Composition of the Chambers of five and of three Judges**

1. The Chambers of five Judges and of three Judges shall, for each case, be composed of the President of the Chamber, the Judge-Rapporteur and the number of Judges required to attain the number of five and three Judges respectively. Those last-mentioned Judges shall be designated from the lists referred to in paragraphs 2 and 3, following the order laid down therein. The starting-point on those lists, in every case assigned to a Chamber, shall be the name of the Judge immediately following the last Judge designated from the list for the preceding case assigned to the Chamber concerned.

2. For the composition of the Chambers of five Judges, after the election of the Presidents of those Chambers lists shall be drawn up including all the Judges attached to the Chamber concerned, with the exception of its President. The lists shall be drawn up in the same way as the list referred to in Article 27(4).

3. For the composition of the Chambers of three Judges, after the election of the Presidents of those Chambers lists shall be drawn up including all the Judges attached to the Chamber concerned, with the exception of its President. The lists shall be drawn up according to the order laid down in Article 7.

4. The lists referred to in paragraphs 2 and 3 shall be published in the *Official Journal of the European Union*.

*Article 29*

**Composition of Chambers where cases are related or referred back**

1. Where the Court considers that a number of cases must be heard and determined together by one and the same formation of the Court, the composition of that formation shall be that fixed for the case in respect of which the preliminary report was examined first.

2. Where a Chamber to which a case has been assigned requests the Court, pursuant to Article 60(3) of these Rules, to assign the case to a formation composed of a greater number of Judges, that formation shall include the members of the Chamber which has referred the case back.

*Article 30*

**Where a President of a Chamber is prevented from acting**

1. When the President of a Chamber of five Judges is prevented from acting, the functions of President of the Chamber shall be exercised by a President of a Chamber of three Judges, where necessary according to the order laid down in Article 7 of these Rules, or, if that formation of the Court does not include a President of a Chamber of three Judges, by one of the other Judges according to the order laid down in Article 7.

2. When the President of a Chamber of three Judges is prevented from acting, the functions of President of the Chamber shall be exercised by a Judge of that formation of the Court according to the order laid down in Article 7.

*Article 31*

**Where a member of the formation of the Court is prevented from acting**

1. When a member of the Grand Chamber is prevented from acting, he shall be replaced by another Judge according to the order of the list referred to in Article 27(4).

2. When a member of a Chamber of five Judges is prevented from acting, he shall be replaced by another Judge of that Chamber, according to the order of the list referred to in Article 28(2). If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court who may designate another Judge to complete the Chamber.

3. When a member of a Chamber of three Judges is prevented from acting, he shall be replaced by another Judge of that Chamber, according to the order of the list referred to in Article 28(3). If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court who may designate another Judge to complete the Chamber.

Section 2. Deliberations

*Article 32*

**Procedures concerning deliberations**

1. The deliberations of the Court shall be and shall remain secret.

2. When a hearing has taken place, only those Judges who participated in that hearing and, where relevant, the Assistant Rapporteur responsible for the consideration of the case shall take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

4. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court.

*Article 33*

**Number of Judges taking part in the deliberations**

Where, by reason of a Judge being prevented from acting, there is an even number of Judges, the most junior Judge for the purposes of Article 7 of these Rules shall abstain from taking part in the deliberations unless he is the Judge-Rapporteur. In that case the Judge immediately senior to him shall abstain from taking part in the deliberations.

*Article 34*

**Quorum of the Grand Chamber**

1. If, for a case assigned to the Grand Chamber, it is not possible to attain the quorum referred to in the third paragraph of Article 17 of the Statute, the President of the Court shall designate one or more other Judges according to the order of the list referred to in Article 27(4) of these Rules.

2. If a hearing has taken place before that designation, the Court shall re-hear oral argument from the parties and the Opinion of the Advocate General.

*Article 35*

**Quorum of the Chambers of five and of three Judges**

1. If, for a case assigned to a Chamber of five or of three Judges, it is not possible to attain the quorum referred to in the second paragraph of Article 17 of the Statute, the President of the Court shall designate one or more other Judges according to the order of the list referred to in Article 28(2) or (3), respectively, of these Rules. If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court forthwith who shall designate another Judge to complete the Chamber.

2. Article 34(2) shall apply, *mutatis mutandis*, to the Chambers of five and of three Judges.

Chapter 8

LANGUAGES

*Article 36*

**Language of a case**

The language of a case shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish.

*Article 37*

**Determination of the language of a case**

1. In direct actions, the language of a case shall be chosen by the applicant, except that:

(a) where the defendant is a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them;

(b) at the joint request of the parties, the use of another of the languages mentioned in Article 36 for all or part of the proceedings may be authorised;

(c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised as the language of the case for all or part of the proceedings by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by one of the institutions of the European Union.

2. Without prejudice to the provisions of paragraph 1(b) and (c), and of Article 38(4) and (5) of these Rules,

(a) in appeals against decisions of the General Court as referred to in Articles 56 and 57 of the Statute, the language of the case shall be the language of the decision of the General Court against which the appeal is brought;

(b) where, in accordance with the second paragraph of Article 62 of the Statute, the Court decides to review a decision of the General Court, the language of the case shall be the language of the decision of the General Court which is the subject of review;

(c) in the case of challenges concerning the costs to be recovered, applications to set aside judgments by default, third-party proceedings and applications for interpretation or revision of a judgment or for the Court to remedy a failure to adjudicate, the language of the case shall be the language of the decision to which those applications or challenges relate.

3. In preliminary ruling proceedings, the language of the case shall be the language of the referring court or tribunal. At the duly substantiated request of one of the parties to the main proceedings, and after the other party to the main proceedings and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised for the oral part of the procedure. Where granted, such authorisation shall apply in respect of all the interested persons referred to in Article 23 of the Statute.

4. Requests as above may be decided on by the President; the latter may, and where he wishes to accede to a request without the agreement of all the parties must, refer the request to the Court.

*Article 38*

**Use of the language of the case**

1. The language of the case shall in particular be used in the written and oral pleadings of the parties, including the items and documents produced or annexed to them, and also in the minutes and decisions of the Court.

2. Any item or document produced or annexed that is expressed in another language must be accompanied by a translation into the language of the case.

3. However, in the case of substantial items or lengthy documents, translations may be confined to extracts. At any time the Court may, of its own motion or at the request of one of the parties, call for a complete or fuller translation.

4. Notwithstanding the foregoing provisions, a Member State shall be entitled to use its official language when taking part in preliminary ruling proceedings, when intervening in a case before the Court or when bringing a matter before the Court pursuant to Article 259 TFEU. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

5. The States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, may be authorised to use one of the languages mentioned in Article 36, other than the language of the case, when they take part in preliminary ruling proceedings or intervene in a case before the Court. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

6. Non-Member States taking part in preliminary ruling proceedings pursuant to the fourth paragraph of Article 23 of the Statute may be authorised to use one of the languages mentioned in Article 36 other than the language of the case. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

7. Where a witness or expert states that he is unable adequately to express himself in one of the languages referred to in Article 36, the Court may authorise him to give his evidence in another language. The Registrar shall arrange for translation into the language of the case.

8. The President and the Vice-President of the Court and also the Presidents of Chambers in conducting oral proceedings, Judges and Advocates General in putting questions and Advocates General in delivering their Opinions may use one of the languages referred to in Article 36 other than the language of the case. The Registrar shall arrange for translation into the language of the case.

*Article 39*

**Responsibility of the Registrar concerning language arrangements**

The Registrar shall, at the request of any Judge, of the Advocate General or of a party, arrange for anything said or written in the course of the proceedings before the Court to be translated into the languages chosen from those referred to in Article 36.

*Article 40*

**Languages of the publications of the Court**

Publications of the Court shall be issued in the languages referred to in Article 1 of Council Regulation No 1.

*Article 41*

**Authentic texts**

The texts of documents drawn up in the language of the case or, where applicable, in another language authorised pursuant to Articles 37 or 38 of these Rules shall be authentic.

*Article 42*

**Language service of the Court**

The Court shall set up a language service staffed by experts with adequate legal training and a thorough knowledge of several official languages of the European Union.

## TITLE II

## COMMON PROCEDURAL PROVISIONS

### Chapter 1

### RIGHTS AND OBLIGATIONS OF AGENTS, ADVISERS AND LAWYERS

*Article 43*

**Privileges, immunities and facilities**

1. Agents, advisers and lawyers who appear before the Court or before any judicial authority to which the Court has addressed letters rogatory shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. Agents, advisers and lawyers shall also enjoy the following privileges and facilities:

(a) any papers and documents relating to the proceedings shall be exempt from both search and seizure. In the event of a dispute, the customs officials or police may seal those papers and documents; they shall then be immediately forwarded to the Court for inspection in the presence of the Registrar and of the person concerned;

(b) agents, advisers and lawyers shall be entitled to travel in the course of duty without hindrance.

*Article 44*

**Status of the parties' representatives**

1. In order to qualify for the privileges, immunities and facilities specified in Article 43, persons entitled to them shall furnish proof of their status as follows:

(a) agents shall produce an official document issued by the party for whom they act, who shall immediately serve a copy thereof on the Registrar;

(b) lawyers shall produce a certificate that they are authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement, and, where the party which they represent is a legal person governed by private law, an authority to act issued by that person;

(c) advisers shall produce an authority to act issued by the party whom they are assisting.

2. The Registrar of the Court shall issue them with a certificate, as required. The validity of this certificate shall be limited to a specified period, which may be extended or curtailed according to the duration of the proceedings.

*Article 45*

**Waiver of immunity**

1. The privileges, immunities and facilities specified in Article 43 of these Rules are granted exclusively in the interests of the proper conduct of proceedings.

2. The Court may waive immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

*Article 46*

**Exclusion from the proceedings**

1. If the Court considers that the conduct of an agent, adviser or lawyer before the Court is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such agent, adviser or lawyer is using his rights for purposes other than those for which they were granted, it shall inform the person concerned. If the Court informs the competent authorities to whom the person concerned is answerable, a copy of the letter sent to those authorities shall be forwarded to the person concerned.

2. On the same grounds, the Court may at any time, having heard the person concerned and the Advocate General, decide to exclude an agent, adviser or lawyer from the proceedings by reasoned order. That order shall have immediate effect.

3. Where an agent, adviser or lawyer is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another agent, adviser or lawyer.

4. Decisions taken under this Article may be rescinded.

*Article 47*

**University teachers and parties to the main proceedings**

1. The provisions of this Chapter shall apply to university teachers who have a right of audience before the Court in accordance with Article 19 of the Statute.

2. They shall also apply, in the context of references for a preliminary ruling, to the parties to the main proceedings where, in accordance with the national rules of procedure applicable, those parties are permitted to bring or defend court proceedings without being represented by a lawyer, and to persons authorised under those rules to represent them.

Chapter 2

SERVICE

*Article 48*

**Methods of service**

1. Where these Rules require that a document be served on a person, the Registrar shall ensure that service is effected at that person's address for service either by the dispatch of a copy of the document by registered post with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt. The Registrar shall prepare and certify the copies of documents to be served, save where the parties themselves supply the copies in accordance with Article 57(2) of these Rules.

2. Where the addressee has agreed that service is to be effected on him by telefax or any other technical means of communication, any procedural document, including a judgment or order of the Court, may be served by the transmission of a copy of the document by such means.

3. Where, for technical reasons or on account of the nature or length of the document, such transmission is impossible or impracticable, the document shall be served, if the addressee has not specified an address for service, at his address in accordance with the procedures laid down in paragraph 1 of this Article. The addressee shall be so informed by telefax or any other technical means of communication. Service shall then be deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the registered letter at the post office of the place in which the Court has its seat, unless it is shown by the acknowledgement of receipt that the letter was received on a different date or the addressee informs the Registrar, within three weeks of being informed by telefax or any other technical means of communication, that the document to be served has not reached him.

4. The Court may, by decision, determine the criteria for a procedural document to be served by electronic means. That decision shall be published in the *Official Journal of the European Union*.

Chapter 3

TIME-LIMITS

*Article 49*

**Calculation of time-limits**

1. Any procedural time-limit prescribed by the Treaties, the Statute or these Rules shall be calculated as follows:

(a) where a time-limit expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the time-limit in question;

(b) a time-limit expressed in weeks, months or years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the time-limit is to be calculated occurred or took place. If, in a time-limit expressed in months or years, the day on which it should expire does not occur in the last month, the time-limit shall end with the expiry of the last day of that month;

(c) where a time-limit is expressed in months and days, it shall first be calculated in whole months, then in days;

(d) time-limits shall include Saturdays, Sundays and the official holidays referred to in Article 24(6) of these Rules;

(e) time-limits shall not be suspended during the judicial vacations.

2. If the time-limit would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first subsequent working day.

*Article 50*

**Proceedings against a measure adopted by an institution**

Where the time-limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure, that time-limit shall be calculated, for the purposes of Article 49(1)(a), from the end of the 14th day after publication of the measure in the *Official Journal of the European Union*.

*Article 51*

**Extension on account of distance**

The procedural time-limits shall be extended on account of distance by a single period of 10 days.

*Article 52*

**Setting and extension of time-limits**

1. Any time-limit prescribed by the Court pursuant to these Rules may be extended.

2. The President and the Presidents of Chambers may delegate to the Registrar power of signature for the purposes of setting certain time-limits which, pursuant to these Rules, it falls to them to prescribe, or of extending such time-limits.

Chapter 4

DIFFERENT PROCEDURES FOR DEALING WITH CASES

*Article 53*

**Procedures for dealing with cases**

1. Without prejudice to the special provisions laid down in the Statute or in these Rules, the procedure before the Court shall consist of a written part and an oral part.

2. Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

3. The President may in special circumstances decide that a case be given priority over others.

4. A case may be dealt with under an expedited procedure in accordance with the conditions provided by these Rules.

5. A reference for a preliminary ruling may be dealt with under an urgent procedure in accordance with the conditions provided by these Rules.

*Article 54*

**Joinder**

1. Two or more cases of the same type concerning the same subject-matter may at any time be joined, on account of the connection between them, for the purposes of the written or oral part of the procedure or of the judgment which closes the proceedings.

2. A decision on whether cases should be joined shall be taken by the President after hearing the Judge-Rapporteur and the Advocate General, if the cases concerned have already been assigned, and, save in the case of references for a preliminary ruling, after also hearing the parties. The President may refer the decision on this matter to the Court.

3. Joined cases may be disjoined, in accordance with the provisions of paragraph 2.

*Article 55*

**Stay of proceedings**

1. The proceedings may be stayed:

(a) in the circumstances specified in the third paragraph of Article 54 of the Statute, by order of the Court, made after hearing the Advocate General;

(b) in all other cases, by decision of the President adopted after hearing the Judge-Rapporteur and the Advocate General and, save in the case of references for a preliminary ruling, the parties.

2. The proceedings may be resumed by order or decision, following the same procedure.

3. The orders or decisions referred to in paragraphs 1 and 2 shall be served on the parties or interested persons referred to in Article 23 of the Statute.

4. The stay of proceedings shall take effect on the date indicated in the order or decision of stay or, in the absence of such indication, on the date of that order or decision.

5. While proceedings are stayed time shall cease to run for the parties or interested persons referred to in Article 23 of the Statute for the purposes of procedural time-limits.

6. Where the order or decision of stay does not fix the length of stay, it shall end on the date indicated in the order or decision of resumption or, in the absence of such indication, on the date of the order or decision of resumption.

7. From the date of resumption of proceedings following a stay, the suspended procedural time-limits shall be replaced by new time-limits and time shall begin to run from the date of that resumption.

*Article 56*

**Deferment of the determination of a case**

After hearing the Judge-Rapporteur, the Advocate General and the parties, the President may in special circumstances, either of his own motion or at the request of one of the parties, defer a case to be dealt with at a later date.

Chapter 5

WRITTEN PART OF THE PROCEDURE

*Article 57*

**Lodging of procedural documents**

1. The original of every procedural document must bear the handwritten signature of the party's agent or lawyer or, in the case of observations submitted in the context of preliminary ruling proceedings, that of the party to the main proceedings or his representative, if the national rules of procedure applicable to those main proceedings so permit.

2. The original, accompanied by all annexes referred to therein, shall be submitted together with five copies for the Court and, in the case of proceedings other than preliminary ruling proceedings, a copy for every other party to the proceedings. Copies shall be certified by the party lodging them.

3. The institutions shall in addition produce, within time-limits laid down by the Court, translations of any procedural document into the other languages provided for by Article 1 of Council Regulation No 1. The preceding paragraph of this Article shall apply.

4. To every procedural document there shall be annexed a file containing the items and documents relied on in support of it, together with a schedule listing them.

5. Where in view of the length of an item or document only extracts from it are annexed to the procedural document, the whole item or document or a full copy of it shall be lodged at the Registry.

6. All procedural documents shall bear a date. In the calculation of procedural time-limits, only the date and time of lodgment of the original at the Registry shall be taken into account.

7. Without prejudice to the provisions of paragraphs 1 to 6, the date on and time at which a copy of the signed original of a procedural document, including the schedule of items and documents referred to in paragraph 4, is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be the date and time of lodgment for the purposes of compliance with the procedural time-limits, provided that the signed original of the procedural document, accompanied by the annexes and copies referred to in paragraph 2, is lodged at the Registry no later than 10 days thereafter.

8. Without prejudice to paragraphs 3 to 6, the Court may, by decision, determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document. That decision shall be published in the *Official Journal of the European Union*.

*Article 58*

**Length of procedural documents**

Without prejudice to any special provisions laid down in these Rules, the Court may, by decision, set the maximum length of written pleadings or observations lodged before it. That decision shall be published in the *Official Journal of the European Union*.

Chapter 6

THE PRELIMINARY REPORT AND ASSIGNMENT OF CASES TO FORMATIONS OF THE COURT

*Article 59*

**Preliminary report**

1. When the written part of the procedure is closed, the President shall fix a date on which the Judge-Rapporteur is to present a preliminary report to the general meeting of the Court.

2. The preliminary report shall contain proposals as to whether particular measures of organisation of procedure, measures of inquiry or, if appropriate, requests to the referring court or tribunal for clarification should be undertaken, and as to the formation to which the case should be

assigned. It shall also contain the Judge-Rapporteur's proposals, if any, as to whether to dispense with a hearing and as to whether to dispense with an Opinion of the Advocate General pursuant to the fifth paragraph of Article 20 of the Statute.

3. The Court shall decide, after hearing the Advocate General, what action to take on the proposals of the Judge-Rapporteur.

*Article 60*

**Assignment of cases to formations of the Court**

1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.

2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance.

3. The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges.

4. Where the oral part of the procedure is opened without an inquiry, the President of the formation determining the case shall fix the opening date.

Chapter 7

MEASURES OF ORGANISATION OF PROCEDURE AND MEASURES OF INQUIRY

Section 1. Measures of organisation of procedure

*Article 61*

**Measures of organisation prescribed by the Court**

1. In addition to the measures which may be prescribed in accordance with Article 24 of the Statute, the Court may invite the parties or the interested persons referred to in Article 23 of the Statute to answer certain questions in writing, within the time-limit laid down by the Court, or at the hearing. The written replies shall be communicated to the other parties or the interested persons referred to in Article 23 of the Statute.

2. Where a hearing is organised, the Court shall, in so far as possible, invite the participants in that hearing to concentrate in their oral pleadings on one or more specified issues.

*Article 62*

**Measures of organisation prescribed by the Judge-Rapporteur or the Advocate General**

1. The Judge-Rapporteur or the Advocate General may request the parties or the interested persons referred to in Article 23 of the Statute to submit within a specified time-limit all such information relating to the facts, and all such documents or other particulars, as they may consider relevant. The replies and documents provided shall be communicated to the other parties or the interested persons referred to in Article 23 of the Statute.

2. The Judge-Rapporteur or the Advocate General may also send to the parties or the interested persons referred to in Article 23 of the Statute questions to be answered at the hearing.

Section 2. Measures of inquiry

*Article 63*

**Decision on measures of inquiry**

1. The Court shall decide in its general meeting whether a measure of inquiry is necessary.

2. Where the case has already been assigned to a formation of the Court, the decision shall be taken by that formation.

*Article 64*

**Determination of measures of inquiry**

1. The Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.

2. Without prejudice to Articles 24 and 25 of the Statute, the following measures of inquiry may be adopted:

(a) the personal appearance of the parties;

(b) a request for information and production of documents;

(c) oral testimony;

(d) the commissioning of an expert's report;

(e) an inspection of the place or thing in question.

3. Evidence may be submitted in rebuttal and previous evidence may be amplified.

*Article 65*

**Participation in measures of inquiry**

1. Where the formation of the Court does not undertake the inquiry itself, it shall entrust the task of so doing to the Judge-Rapporteur.

2. The Advocate General shall take part in the measures of inquiry.

3. The parties shall be entitled to attend the measures of inquiry.

*Article 66*

**Oral testimony**

1. The Court may, either of its own motion or at the request of one of the parties, and after hearing the Advocate General, order that certain facts be proved by witnesses.

2. A request by a party for the examination of a witness shall state precisely about what facts and for what reasons the witness should be examined.

3. The Court shall rule by reasoned order on the request referred to in the preceding paragraph. If the request is granted, the order shall set out the facts to be established and state which witnesses are to be heard in respect of each of those facts.

4. Witnesses shall be summoned by the Court, where appropriate after lodgment of the security provided for in Article 73(1) of these Rules.

*Article 67*

**Examination of witnesses**

1. After the identity of the witness has been established, the President shall inform him that he will be required to vouch the truth of his evidence in the manner laid down in these Rules.

2. The witness shall give his evidence to the Court, the parties having been given notice to attend. After the witness has given his evidence the President may, at the request of one of the parties or of his own motion, put questions to him.

3. The other Judges and the Advocate General may do likewise.

4. Subject to the control of the President, questions may be put to witnesses by the representatives of the parties.

*Article 68*

**Witnesses' oath**

1. After giving his evidence, the witness shall take the following oath:

'I swear that I have spoken the truth, the whole truth and nothing but the truth.'

2. The Court may, after hearing the parties, exempt a witness from taking the oath.

*Article 69*

**Pecuniary penalties**

1. Witnesses who have been duly summoned shall obey the summons and attend for examination.

2. If, without good reason, a witness who has been duly summoned fails to appear before the Court, the Court may impose upon him a pecuniary penalty not exceeding EUR 5 000 and may order that a further summons be served on the witness at his own expense.

3. The same penalty may be imposed upon a witness who, without good reason, refuses to give evidence or to take the oath.

*Article 70*

**Expert's report**

1. The Court may order that an expert's report be obtained. The order appointing the expert shall define his task and set a time-limit within which he is to submit his report.

2. After the expert has submitted his report and that report has been served on the parties, the Court may order that the expert be examined, the parties having been given notice to attend. At the request of one of the parties or of his own motion, the President may put questions to the expert.

3. The other Judges and the Advocate General may do likewise.

4. Subject to the control of the President, questions may be put to the expert by the representatives of the parties.

*Article 71*

**Expert's oath**

1. After making his report, the expert shall take the following oath:

'I swear that I have conscientiously and impartially carried out my task.'

2. The Court may, after hearing the parties, exempt the expert from taking the oath.

*Article 72*

**Objection to a witness or expert**

1. If one of the parties objects to a witness or an expert on the ground that he is not a competent or proper person to act as a witness or expert or for any other reason, or if a witness or expert refuses to give evidence or to take the oath, the matter shall be resolved by the Court.

2. An objection to a witness or an expert shall be raised within two weeks after service of the order summoning the witness or appointing the expert; the statement of objection must set out the grounds of objection and indicate the nature of any evidence offered.

*Article 73*

**Witnesses' and experts' costs**

1. Where the Court orders the examination of witnesses or an expert's report, it may request the parties or one of them to lodge security for the witnesses' costs or the costs of the expert's report.

2. Witnesses and experts shall be entitled to reimbursement of their travel and subsistence expenses. The cashier of the Court may make an advance payment towards these expenses.

3. Witnesses shall be entitled to compensation for loss of earnings, and experts to fees for their services. The cashier of the Court shall pay witnesses and experts these sums after they have carried out their respective duties or tasks.

*Article 74*

**Minutes of inquiry hearings**

1. The Registrar shall draw up minutes of every inquiry hearing. The minutes shall be signed by the President and by the Registrar. They shall constitute an official record.

2. In the case of the examination of witnesses or experts, the minutes shall be signed by the President or by the Judge-Rapporteur responsible for conducting the examination of the witness or expert, and by the Registrar. Before the minutes are thus signed, the witness or expert must be given an opportunity to check the content of the minutes and to sign them.

3. The minutes shall be served on the parties.

*Article 75*

**Opening of the oral part of the procedure after the inquiry**

1. Unless the Court decides to prescribe a time-limit within which the parties may submit written observations, the President shall fix the date for the opening of the oral part of the procedure after the measures of inquiry have been completed.

2. Where a time-limit has been prescribed for the submission of written observations, the President shall fix the date for the opening of the oral part of the procedure after that time-limit has expired.

Chapter 8

ORAL PART OF THE PROCEDURE

*Article 76*

**Hearing**

1. Any reasoned requests for a hearing shall be submitted within three weeks after service on the parties or the interested persons referred to in Article 23 of the Statute of notification of the close of the written part of the procedure. That time-limit may be extended by the President.

2. On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling.

3. The preceding paragraph shall not apply where a request for a hearing, stating reasons, has been submitted by an interested person referred to in Article 23 of the Statute who did not participate in the written part of the procedure.

*Article 77*

**Joint hearing**

If the similarities between two or more cases of the same type so permit, the Court may decide to organise a joint hearing of those cases.

*Article 78*

**Conduct of oral proceedings**

Oral proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing.

*Article 79*

**Cases heard in camera**

1. For serious reasons related, in particular, to the security of the Member States or to the protection of minors, the Court may decide to hear a case *in camera*.

2. The oral proceedings in cases heard *in camera* shall not be published.

*Article 80*

**Questions**

The members of the formation of the Court and the Advocate General may in the course of the hearing put questions to the agents, advisers or lawyers of the parties and, in the circumstances referred to in Article 47(2) of these Rules, to the parties to the main proceedings or to their representatives.

*Article 81*

**Close of the hearing**

After the parties or the interested persons referred to in Article 23 of the Statute have presented oral argument, the President shall declare the hearing closed.

*Article 82*

**Delivery of the Opinion of the Advocate General**

1. Where a hearing takes place, the Opinion of the Advocate General shall be delivered after the close of that hearing.

2. The President shall declare the oral part of the procedure closed after the Advocate General has delivered his Opinion.

*Article 83*

**Opening or reopening of the oral part of the procedure**

The Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

*Article 84*

**Minutes of hearings**

1. The Registrar shall draw up minutes of every hearing. The minutes shall be signed by the President and by the Registrar. They shall constitute an official record.

2. The parties and interested persons referred to in Article 23 of the Statute may inspect the minutes at the Registry and obtain copies.

*Article 85*

**Recording of the hearing**

The President may, on a duly substantiated request, authorise a party or an interested person referred to in Article 23 of the Statute who has participated in the written or oral part of the proceedings to listen, on the Court's premises, to the soundtrack of the hearing in the language used by the speaker during that hearing.

Chapter 9

JUDGMENTS AND ORDERS

*Article 86*

**Date of delivery of a judgment**

The parties or interested persons referred to in Article 23 of the Statute shall be informed of the date of delivery of a judgment.

*Article 87*

**Content of a judgment**

A judgment shall contain:

(a) a statement that it is the judgment of the Court,

(b) an indication as to the formation of the Court,

(c) the date of delivery,

(d) the names of the President and of the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur,

(e) the name of the Advocate General,

(f) the name of the Registrar,

(g) a description of the parties or of the interested persons referred to in Article 23 of the Statute who participated in the proceedings,

(h) the names of their representatives,

(i) in the case of direct actions and appeals, a statement of the forms of order sought by the parties,

(j) where applicable, the date of the hearing,

(k) a statement that the Advocate General has been heard and, where applicable, the date of his Opinion,

(l) a summary of the facts,

(m) the grounds for the decision,

(n) the operative part of the judgment, including, where appropriate, the decision as to costs.

*Article 88*

**Delivery and service of the judgment**

1. The judgment shall be delivered in open court.

2. The original of the judgment, signed by the President, by the Judges who took part in the deliberations and by the Registrar, shall be sealed and deposited at the Registry; certified copies of the judgment shall be served on the parties and, where applicable, the referring court or tribunal, the interested persons referred to in Article 23 of the Statute and the General Court.

*Article 89*

**Content of an order**

1. An order shall contain:

(a) a statement that it is the order of the Court,

(b) an indication as to the formation of the Court,

(c) the date of its adoption,

(d) an indication as to the legal basis of the order,

(e) the names of the President and, where applicable, the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur,

(f) the name of the Advocate General,

(g) the name of the Registrar,

(h) a description of the parties or of the parties to the main proceedings,

(i) the names of their representatives,

(j) a statement that the Advocate General has been heard,

(k) the operative part of the order, including, where appropriate, the decision as to costs.

2. Where, in accordance with these Rules, an order must be reasoned, it shall in addition contain:

(a) in the case of direct actions and appeals, a statement of the forms of order sought by the parties,

(b) a summary of the facts,

(c) the grounds for the decision.

*Article 90*

**Signature and service of the order**

The original of the order, signed by the President and by the Registrar, shall be sealed and deposited at the Registry; certified copies of the order shall be served on the parties and, where applicable, the referring court or tribunal, the interested persons referred to in Article 23 of the Statute and the General Court.

*Article 91*

**Binding nature of judgments and orders**

1. A judgment shall be binding from the date of its delivery.

2. An order shall be binding from the date of its service.

*Article 92*

**Publication in the Official Journal of the European Union**

A notice containing the date and the operative part of the judgment or order of the Court which closes the proceedings shall be published in the *Official Journal of the European Union*.

**TITLE III**

**REFERENCES FOR A PRELIMINARY RULING**

Chapter 1

GENERAL PROVISIONS

*Article 93*

**Scope**

The procedure shall be governed by the provisions of this Title:

(a) in the cases covered by Article 23 of the Statute,

(b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

*Article 94*

**Content of the request for a preliminary ruling**

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

*Article 95*

**Anonymity**

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.

2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

*Article 96*

**Participation in preliminary ruling proceedings**

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

*Article 97*

**Parties to the main proceedings**

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

*Article 98*

**Translation and service of the request for a preliminary ruling**

1. The requests for a preliminary ruling referred to in this Title shall be served on the Member States in the original version, accompanied by a translation into the official language of the State to which they are being addressed. Where appropriate, on account of the length of the request, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of that request, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the request for a preliminary ruling, the subject-matter of the main proceedings, the essential arguments of the parties to those proceedings, a succinct presentation of the reasons for the reference for a preliminary ruling and the case-law and the provisions of national law and European Union law relied on.

2. In the cases covered by the third paragraph of Article 23 of the Statute, the requests for a preliminary ruling shall be served on the States, other than the Member States, which are parties to the EEA Agreement and also on the EFTA Surveillance Authority in the original version, accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the addressee.

3. Where a non-Member State has the right to take part in preliminary ruling proceedings pursuant to the fourth paragraph of Article 23 of the Statute, the original version of the request for a preliminary ruling shall be served on it accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the non-Member State concerned.

*Article 99*

**Reply by reasoned order**

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

*Article 100*

**Circumstances in which the Court remains seised**

1. The Court shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons referred to in Article 23 of the Statute.

2. However, the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled.

*Article 101*

**Request for clarification**

1. Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court.

2. The reply of the referring court or tribunal to that request shall be served on the interested persons referred to in Article 23 of the Statute.

*Article 102*

**Costs of the preliminary ruling proceedings**

It shall be for the referring court or tribunal to decide as to the costs of the preliminary ruling proceedings.

*Article 103*

**Rectification of judgments and orders**

1. Clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders may be rectified by the Court, of its own motion or at the request of an interested person referred to in Article 23 of the Statute made within two weeks after delivery of the judgment or service of the order.

2. The Court shall take its decision after hearing the Advocate General.

3. The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision.

*Article 104*

**Interpretation of preliminary rulings**

1. Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.

2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

Chapter 2

EXPEDITED PRELIMINARY RULING PROCEDURE

*Article 105*

**Expedited procedure**

1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

2. In that event, the President shall immediately fix the date for the hearing, which shall be communicated to the interested persons referred to in Article 23 of the Statute when the request for a preliminary ruling is served.

3. The interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a time-limit prescribed by the President, which shall not be less than 15 days. The President may request those interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the request for a preliminary ruling.

4. The statements of case or written observations, if any, shall be communicated to all the interested persons referred to in Article 23 of the Statute prior to the hearing.

5. The Court shall rule after hearing the Advocate General.

*Article 106*

**Transmission of procedural documents**

1. The procedural documents referred to in the preceding Article shall be deemed to have been lodged on the transmission to the Registry, by telefax or any other technical means of communication available to the Court, of a copy of the signed original and the items and documents relied on in support of it, together with the schedule referred to in Article 57(4). The original of the document and the annexes referred to above shall be sent to the Registry immediately.

2. Where the preceding Article requires that a document be served on or communicated to a person, such service or communication may be effected by transmission of a copy of the document by telefax or any other technical means of communication available to the Court and the addressee.

Chapter 3

URGENT PRELIMINARY RULING PROCEDURE

*Article 107*

**Scope of the urgent preliminary ruling procedure**

1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.

2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred.

3. If the referring court or tribunal has not submitted a request for the urgent procedure to be applied, the President of the Court may, if the application of that procedure appears, prima facie, to be required, ask the Chamber referred to in Article 108 to consider whether it is necessary to deal with the reference under that procedure.

*Article 108*

**Decision as to urgency**

1. The decision to deal with a reference for a preliminary ruling under the urgent procedure shall be taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General. The composition of that Chamber shall be determined in accordance with Article 28(2) on the day on which the case is assigned to the Judge-Rapporteur if the application of the urgent procedure is requested by the referring court or tribunal, or, if the application of that procedure is considered at the request of the President of the Court, on the day on which that request is made.

2. If the case is connected with a pending case assigned to a Judge-Rapporteur who is not a member of the designated Chamber, that Chamber may propose to the President of the Court that the case be assigned to that Judge-Rapporteur. Where the case is reassigned to that Judge-Rapporteur, the Chamber of five Judges which includes him shall carry out the duties of the designated Chamber in respect of that case. Article 29(1) shall apply.

*Article 109*

**Written part of the urgent procedure**

1. A request for a preliminary ruling shall, where the referring court or tribunal has requested the application of the urgent procedure or where the President has requested the designated Chamber to consider whether it is necessary to deal with the reference under that procedure, be served forthwith by the Registrar on the parties to the main proceedings, on the Member State from which the reference is made, on the European Commission and on the institution which adopted the act the validity or interpretation of which is in dispute.

2. The decision as to whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be served immediately on the referring court or tribunal and on the parties, Member State and institutions referred to in

the preceding paragraph. The decision to deal with the reference under the urgent procedure shall prescribe the time-limit within which those parties or entities may lodge statements of case or written observations. The decision may specify the matters of law to which such statements of case or written observations must relate and may specify the maximum length of those documents.

3. Where a request for a preliminary ruling refers to an administrative procedure or judicial proceedings conducted in a Member State other than that from which the reference is made, the Court may invite that first Member State to provide all relevant information in writing or at the hearing.

4. As soon as the service referred to in paragraph 1 above has been effected, the request for a preliminary ruling shall also be communicated to the interested persons referred to in Article 23 of the Statute, other than the persons served, and the decision whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be communicated to those interested persons as soon as the service referred to in paragraph 2 has been effected.

5. The interested persons referred to in Article 23 of the Statute shall be informed as soon as possible of the likely date of the hearing.

6. Where the reference is not to be dealt with under the urgent procedure, the proceedings shall continue in accordance with the provisions of Article 23 of the Statute and the applicable provisions of these Rules.

*Article 110*

**Service and information following the close of the written part of the procedure**

1. Where a reference for a preliminary ruling is to be dealt with under the urgent procedure, the request for a preliminary ruling and the statements of case or written observations which have been lodged shall be served on the interested persons referred to in Article 23 of the Statute other than the parties and entities referred to in Article 109(1). The request for a preliminary ruling shall be accompanied by a translation, where appropriate of a summary, in accordance with Article 98.

2. The statements of case or written observations which have been lodged shall also be served on the parties and other interested persons referred to in Article 109(1).

3. The date of the hearing shall be communicated to the interested persons referred to in Article 23 of the Statute at the same time as the documents referred to in the preceding paragraphs are served.

*Article 111*

**Omission of the written part of the procedure**

The designated Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in Article 109(2).

*Article 112*

**Decision on the substance**

The designated Chamber shall rule after hearing the Advocate General.

*Article 113*

**Formation of the Court**

1. The designated Chamber may decide to sit in a formation of three Judges. In that event, it shall be composed of the President of the designated Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(2) on the date on which the composition of the designated Chamber is determined in accordance with Article 108(1).

2. The designated Chamber may also request the Court to assign the case to a formation composed of a greater number of Judges. The urgent procedure shall continue before the new formation of the Court, where necessary after the reopening of the oral part of the procedure.

*Article 114*

**Transmission of procedural documents**

Procedural documents shall be transmitted in accordance with Article 106.

Chapter 4

LEGAL AID

*Article 115*

**Application for legal aid**

1. A party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court may at any time apply for legal aid.

2. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

3. If the applicant has already obtained legal aid before the referring court or tribunal, he shall produce the decision of that court or tribunal and specify what is covered by the sums already granted.

*Article 116*

**Decision on the application for legal aid**

1. As soon as the application for legal aid has been lodged it shall be assigned by the President to the Judge-Rapporteur responsible for the case in the context of which the application has been made.

2. The decision to grant legal aid, in full or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. The formation of the Court shall, in that event, be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

3. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

4. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

*Article 117*

**Sums to be advanced as legal aid**

Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

*Article 118*

**Withdrawal of legal aid**

The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.

## TITLE IV

## DIRECT ACTIONS

### Chapter 1

### REPRESENTATION OF THE PARTIES

*Article 119*

**Obligation to be represented**

1. A party may be represented only by his agent or lawyer.

2. Agents and lawyers must lodge at the Registry an official document or an authority to act issued by the party whom they represent.

3. The lawyer acting for a party must also lodge at the Registry a certificate that he is authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement.

4. If those documents are not lodged, the Registrar shall prescribe a reasonable time-limit within which the party concerned is to produce them. If the applicant fails to produce the required documents within the time-limit prescribed, the Court shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that procedural requirement renders the application or written pleading formally inadmissible.

### Chapter 2

### WRITTEN PART OF THE PROCEDURE

*Article 120*

**Content of the application**

An application of the kind referred to in Article 21 of the Statute shall state:

(a) the name and address of the applicant;

(b) the name of the party against whom the application is made;

(c) the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law;

(d) the form of order sought by the applicant;

(e) where appropriate, any evidence produced or offered.

*Article 121*

**Information relating to service**

1. For the purpose of the proceedings, the application shall state an address for service. It shall indicate the name of the person who is authorised and has expressed willingness to accept service.

2. In addition to, or instead of, specifying an address for service as referred to in paragraph 1, the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or any other technical means of communication.

3. If the application does not comply with the requirements referred to in paragraphs 1 or 2, all service on the party concerned for the purpose of the proceedings shall be effected, for so long as the defect has not been cured, by registered letter addressed to the agent or lawyer of that party. By way of derogation from Article 48, service shall then be deemed to be duly effected by the lodging of the registered letter at the post office of the place in which the Court has its seat.

*Article 122*

**Annexes to the application**

1. The application shall be accompanied, where appropriate, by the documents specified in the second paragraph of Article 21 of the Statute.

2. An application submitted under Article 273 TFEU shall be accompanied by a copy of the special agreement concluded between the Member States concerned.

3. If an application does not comply with the requirements set out in paragraphs 1 or 2 of this Article, the Registrar shall prescribe a reasonable time-limit within which the applicant is to produce the abovementioned documents. If the applicant fails to put the application in order, the Court shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with these conditions renders the application formally inadmissible.

*Article 123*

**Service of the application**

The application shall be served on the defendant. In cases where Article 119(4) or Article 122(3) applies, service shall be effected as soon as the application has been put in order or the Court has declared it admissible notwithstanding the failure to observe the requirements set out in those two Articles.

*Article 124*

**Content of the defence**

1. Within two months after service on him of the application, the defendant shall lodge a defence, stating:

(a) the name and address of the defendant;

(b) the pleas in law and arguments relied on;

(c) the form of order sought by the defendant;

(d) where appropriate, any evidence produced or offered.

2. Article 121 shall apply to the defence.

3. The time-limit laid down in paragraph 1 may exceptionally be extended by the President at the duly reasoned request of the defendant.

*Article 125*

**Transmission of documents**

Where the European Parliament, the Council or the European Commission is not a party to a case, the Court shall send to them copies of the application and of the defence, without the annexes thereto, to enable them to assess whether the inapplicability of one of their acts is being invoked under Article 277 TFEU.

*Article 126*

**Reply and rejoinder**

1. The application initiating proceedings and the defence may be supplemented by a reply from the applicant and by a rejoinder from the defendant.

2. The President shall prescribe the time-limits within which those procedural documents are to be produced. He may specify the matters to which the reply or the rejoinder should relate.

Chapter 3

PLEAS IN LAW AND EVIDENCE

*Article 127*

**New pleas in law**

1. No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

2. Without prejudice to the decision to be taken on the admissibility of the plea in law, the President may, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, prescribe a time-limit within which the other party may respond to that plea.

*Article 128*

**Evidence produced or offered**

1. In reply or rejoinder a party may produce or offer further evidence in support of his arguments. The party must give reasons for the delay in submitting such evidence.

2. The parties may, exceptionally, produce or offer further evidence after the close of the written part of the procedure. They must give reasons for the delay in submitting such evidence. The President may, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, prescribe a time-limit within which the other party may comment on such evidence.

Chapter 4

INTERVENTION

*Article 129*

**Object and effects of the intervention**

1. The intervention shall be limited to supporting, in whole or in part, the form of order sought by one of the parties. It shall not confer the same procedural rights as those conferred on the parties and, in particular, shall not give rise to any right to request that a hearing be held.

2. The intervention shall be ancillary to the main proceedings. It shall become devoid of purpose if the case is removed from the register of the Court as a result of a party's discontinuance or withdrawal from the proceedings or of an agreement between the parties, or where the application is declared inadmissible.

3. The intervener must accept the case as he finds it at the time of his intervention.

4. Consideration may be given to an application to intervene which is made after the expiry of the time-limit prescribed in Article 130 but before the decision to open the oral part of the procedure provided for in Article 60(4). In that event, if the President allows the intervention, the intervener may submit his observations during the hearing, if it takes place.

*Article 130*

**Application to intervene**

1. An application to intervene must be submitted within six weeks of the publication of the notice referred to in Article 21(4).

2. The application to intervene shall contain:

(a) a description of the case;

(b) a description of the main parties;

(c) the name and address of the intervener;

(d) the form of order sought, in support of which the intervener is applying for leave to intervene;

(e) a statement of the circumstances establishing the right to intervene, where the application is submitted pursuant to the second or third paragraph of Article 40 of the Statute.

3. The intervener shall be represented in accordance with Article 19 of the Statute.

4. Articles 119, 121 and 122 of these Rules shall apply.

*Article 131*

**Decision on applications to intervene**

1. The application to intervene shall be served on the parties in order to obtain any written or oral observations they may wish to make on that application.

2. Where the application is submitted pursuant to the first or third paragraph of Article 40 of the Statute, the intervention shall be allowed by decision of the President and the intervener shall receive a copy of every procedural document served on the parties, provided that those parties have not, within 10 days after the service referred to in paragraph 1 has been effected, put forward observations on the application to intervene or identified secret or confidential items or documents which, if communicated to the intervener, the parties claim would be prejudicial to them.

3. In any other case, the President shall decide on the application to intervene by order or shall refer the application to the Court.

4. If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the parties, save, where applicable, for the secret or confidential items or documents excluded from such communication pursuant to paragraph 3.

*Article 132*

**Submission of statements**

1. The intervener may submit a statement in intervention within one month after communication of the procedural documents referred to in the preceding Article. That time-limit may be extended by the President at the duly reasoned request of the intervener.

2. The statement in intervention shall contain:

(a) the form of order sought by the intervener in support, in whole or in part, of the form of order sought by one of the parties;

(b) the pleas in law and arguments relied on by the intervener;

(c) where appropriate, any evidence produced or offered.

3. After the statement in intervention has been lodged, the President shall, where necessary, prescribe a time-limit within which the parties may reply to that statement.

Chapter 5

EXPEDITED PROCEDURE

*Article 133*

**Decision relating to the expedited procedure**

1. At the request of the applicant or the defendant, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

2. The request for a case to be determined pursuant to an expedited procedure must be made by a separate document submitted at the same time as the application initiating proceedings or the defence, as the case may be, is lodged.

3. Exceptionally the President may also take such a decision of his own motion, after hearing the parties, the Judge-Rapporteur and the Advocate General.

*Article 134*

**Written part of the procedure**

1. Under the expedited procedure, the application initiating proceedings and the defence may be supplemented by a reply and a rejoinder only if the President, after hearing the Judge-Rapporteur and the Advocate General, considers this to be necessary.

2. An intervener may submit a statement in intervention only if the President, after hearing the Judge-Rapporteur and the Advocate General, considers this to be necessary.

*Article 135*

**Oral part of the procedure**

1. Once the defence has been submitted or, if the decision to determine the case pursuant to an expedited procedure is not made until after that pleading has been lodged, once that decision has been taken, the President shall fix a date for the hearing, which shall be communicated forthwith to the parties. He may postpone the date of the hearing where it is necessary to undertake measures of inquiry or where measures of organisation of procedure so require.

2. Without prejudice to Articles 127 and 128, a party may supplement his arguments and produce or offer evidence during the oral part of the procedure. The party must, however, give reasons for the delay in producing such further arguments or evidence.

*Article 136*

**Decision on the substance**

The Court shall give its ruling after hearing the Advocate General.

Chapter 6

COSTS

*Article 137*

**Decision as to costs**

A decision as to costs shall be given in the judgment or order which closes the proceedings.

*Article 138*

**General rules as to allocation of costs**

1. The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.

2. Where there is more than one unsuccessful party the Court shall decide how the costs are to be shared.

3. Where each party succeeds on some and fails on other heads, the parties shall bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

*Article 139*

**Unreasonable or vexatious costs**

The Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.

*Article 140*

**Costs of interveners**

1. The Member States and institutions which have intervened in the proceedings shall bear their own costs.

2. The States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, shall similarly bear their own costs if they have intervened in the proceedings.

3. The Court may order an intervener other than those referred to in the preceding paragraphs to bear his own costs.

*Article 141*

**Costs in the event of discontinuance or withdrawal**

1. A party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance.

2. However, at the request of the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party.

3. Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.

4. If costs are not claimed, the parties shall bear their own costs.

*Article 142*

**Costs where a case does not proceed to judgment**

Where a case does not proceed to judgment the costs shall be in the discretion of the Court.

*Article 143*

**Costs of proceedings**

Proceedings before the Court shall be free of charge, except that:

(a) where a party has caused the Court to incur avoidable costs the Court may, after hearing the Advocate General, order that party to refund them;

(b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the Registry's scale of charges referred to in Article 22.

*Article 144*

**Recoverable costs**

Without prejudice to the preceding Article, the following shall be regarded as recoverable costs:

(a) sums payable to witnesses and experts under Article 73 of these Rules;

(b) expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers.

*Article 145*

**Dispute concerning the costs to be recovered**

1. If there is a dispute concerning the costs to be recovered, the Chamber of three Judges to which the Judge-Rapporteur who dealt with the case is assigned shall, on application by the party concerned and after hearing the opposite party and the Advocate General, make an order. In that event, the formation of the Court shall be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.

2. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.

3. The parties may, for the purposes of enforcement, apply for an authenticated copy of the order.

*Article 146*

**Procedure for payment**

1. Sums due from the cashier of the Court and from its debtors shall be paid in euro.

2. Where costs to be recovered have been incurred in a currency other than the euro or where the steps in respect of which payment is due were taken in a country of which the euro is not the currency, the conversion shall be effected at the European Central Bank's official rates of exchange on the day of payment.

Chapter 7

AMICABLE SETTLEMENT, DISCONTINUANCE, CASES THAT DO NOT PROCEED TO JUDGMENT AND PRELIMINARY ISSUES

*Article 147*

**Amicable settlement**

1. If, before the Court has given its decision, the parties reach a settlement of their dispute and inform the Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141, having regard to any proposals made by the parties on the matter.

2. This provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU.

*Article 148*

**Discontinuance**

If the applicant informs the Court in writing or at the hearing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141.

*Article 149*

**Cases that do not proceed to judgment**

If the Court declares that the action has become devoid of purpose and that there is no longer any need to adjudicate on it, the Court may at any time of its own motion, on a proposal from the Judge-Rapporteur and after hearing the parties and the Advocate General, decide to rule by reasoned order. It shall give a decision as to costs.

*Article 150*

**Absolute bar to proceeding with a case**

On a proposal from the Judge-Rapporteur, the Court may at any time of its own motion, after hearing the parties and the Advocate General, decide to rule by reasoned order on whether there exists any absolute bar to proceeding with a case.

*Article 151*

**Preliminary objections and issues**

1. A party applying to the Court for a decision on a preliminary objection or issue not going to the substance of the case shall submit the application by a separate document.

2. The application must state the pleas of law and arguments relied on and the form of order sought by the applicant; any supporting items and documents must be annexed to it.

3. As soon as the application has been submitted, the President shall prescribe a time-limit within which the opposite party may submit in writing his pleas in law and the form of order which he seeks.

4. Unless the Court decides otherwise, the remainder of the proceedings on the application shall be oral.

5. The Court shall, after hearing the Advocate General, decide on the application as soon as possible or, where special circumstances so justify, reserve its decision until it rules on the substance of the case.

6. If the Court refuses the application or reserves its decision, the President shall prescribe new time-limits for the further steps in the proceedings.

Chapter 8

JUDGMENTS BY DEFAULT

*Article 152*

**Judgments by default**

1. If a defendant on whom an application initiating proceedings has been duly served fails to respond to the application in the proper form and within the time-limit prescribed, the applicant may apply to the Court for judgment by default.

2. The application for judgment by default shall be served on the defendant. The Court may decide to open the oral part of the procedure on the application.

3. Before giving judgment by default the Court shall, after hearing the Advocate General, consider whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with, and whether the applicant's claims appear well founded. The Court may adopt measures of organisation of procedure or order measures of inquiry.

4. A judgment by default shall be enforceable. The Court may, however, grant a stay of execution until the Court has given its decision on any application under Article 156 to set aside the judgment, or it may make execution subject to the provision of security of an amount and nature to be fixed in the light of the circumstances; this security shall be released if no such application is made or if the application fails.

## Chapter 9

## REQUESTS AND APPLICATIONS RELATING TO JUDGMENTS AND ORDERS

*Article 153*

**Competent formation of the Court**

1. With the exception of applications referred to in Article 159, the requests and applications referred to in this Chapter shall be assigned to the Judge-Rapporteur who was responsible for the case to which the request or application relates, and shall be assigned to the formation of the Court which gave a decision in that case.

2. If the Judge-Rapporteur is prevented from acting, the President of the Court shall assign the request or application referred to in this Chapter to a Judge who was a member of the formation of the Court which gave a decision in the case to which that request or application relates.

3. If the quorum referred to in Article 17 of the Statute can no longer be attained, the Court shall, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, assign the request or application to a new formation of the Court.

*Article 154*

**Rectification**

1. Without prejudice to the provisions relating to the interpretation of judgments and orders, clerical mistakes, errors in calculation and obvious inaccuracies may be rectified by the Court, of its own motion or at the request of a party made within two weeks after delivery of the judgment or service of the order.

2. Where the request for rectification concerns the operative part or one of the grounds constituting the necessary support for the operative part, the parties, whom the Registrar shall duly inform, may submit written observations within a time-limit prescribed by the President.

3. The Court shall take its decision after hearing the Advocate General.

4. The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision.

*Article 155*

**Failure to adjudicate**

1. If the Court has failed to adjudicate on a specific head of claim or on costs, any party wishing to rely on that may, within a month after service of the decision, apply to the Court to supplement its decision.

2. The application shall be served on the opposite party and the President shall prescribe a time-limit within which that party may submit written observations.

3. After these observations have been submitted, the Court shall, after hearing the Advocate General, decide both on the admissibility and on the substance of the application.

*Article 156*

**Application to set aside**

1. Application may be made pursuant to Article 41 of the Statute to set aside a judgment delivered by default.

2. The application to set aside the judgment must be made within one month from the date of service of the judgment and must be submitted in the form prescribed by Articles 120 to 122 of these Rules.

3. After the application has been served, the President shall prescribe a time-limit within which the other party may submit his written observations.

4. The proceedings shall be conducted in accordance with Articles 59 to 92 of these Rules.

5. The Court shall decide by way of a judgment which may not be set aside.

6. The original of this judgment shall be annexed to the original of the judgment by default. A note of the judgment on the application to set aside shall be made in the margin of the original of the judgment by default.

*Article 157*

**Third-party proceedings**

1. Articles 120 to 122 of these Rules shall apply to an application initiating third-party proceedings made pursuant to Article 42 of the Statute. In addition such an application shall:

(a) specify the judgment or order contested;

(b) state how the contested decision is prejudicial to the rights of the third party;

(c) indicate the reasons for which the third party was unable to take part in the original case.

2. The application must be made against all the parties to the original case.

3. The application must be submitted within two months of publication of the decision in the *Official Journal of the European Union*.

4. The Court may, on application by the third party, order a stay of execution of the contested decision. The provisions of Chapter 10 of this Title shall apply.

5. The contested decision shall be varied on the points on which the submissions of the third party are upheld.

6. The original of the judgment in the third-party proceedings shall be annexed to the original of the contested decision. A note of the judgment in the third-party proceedings shall be made in the margin of the original of the contested decision.

*Article 158*

**Interpretation**

1. In accordance with Article 43 of the Statute, if the meaning or scope of a judgment or order is in doubt, the Court shall construe it on application by any party or any institution of the European Union establishing an interest therein.

2. An application for interpretation must be made within two years after the date of delivery of the judgment or service of the order.

3. An application for interpretation shall be made in accordance with Articles 120 to 122 of these Rules. In addition it shall specify:

(a) the decision in question;

(b) the passages of which interpretation is sought.

4. The application must be made against all the parties to the case in which the decision of which interpretation is sought was given.

5. The Court shall give its decision after having given the parties an opportunity to submit their observations and after hearing the Advocate General.

6. The original of the interpreting decision shall be annexed to the original of the decision interpreted. A note of the interpreting decision shall be made in the margin of the original of the decision interpreted.

*Article 159*

**Revision**

1. In accordance with Article 44 of the Statute, an application for revision of a decision of the Court may be made only on discovery of a fact which is of such a nature as to be a decisive factor and which, when the judgment was delivered or the order served, was unknown to the Court and to the party claiming the revision.

2. Without prejudice to the time-limit of 10 years prescribed in the third paragraph of Article 44 of the Statute, an application for revision shall be made within three months of the date on which the facts on which the application is founded came to the applicant's knowledge.

3. Articles 120 to 122 of these Rules shall apply to an application for revision. In addition such an application shall:

(a) specify the judgment or order contested;

(b) indicate the points on which the decision is contested;

(c) set out the facts on which the application is founded;

(d) indicate the nature of the evidence to show that there are facts justifying revision, and that the time-limits laid down in paragraph 2 have been observed.

4. The application for revision must be made against all parties to the case in which the contested decision was given.

5. Without prejudice to its decision on the substance, the Court shall, after hearing the Advocate General, give in the form of an order its decision on the admissibility of the application, having regard to the written observations of the parties.

6. If the Court declares the application admissible, it shall proceed to consider the substance of the application and shall give its decision in the form of a judgment in accordance with these Rules.

7. The original of the revising judgment shall be annexed to the original of the decision revised. A note of the revising judgment shall be made in the margin of the original of the decision revised.

Chapter 10

SUSPENSION OF OPERATION OR ENFORCEMENT AND OTHER INTERIM MEASURES

*Article 160*

**Application for suspension or for interim measures**

1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, shall be admissible only if the applicant has challenged that measure in an action before the Court.

2. An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case.

3. An application of a kind referred to in the preceding paragraphs shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for.

4. The application shall be made by a separate document and in accordance with the provisions of Articles 120 to 122 of these Rules.

5. The application shall be served on the opposite party, and the President shall prescribe a short time-limit within which that party may submit written or oral observations.

6. The President may order a preparatory inquiry.

7. The President may grant the application even before the observations of the opposite party have been submitted. This decision may be varied or cancelled even without any application being made by any party.

*Article 161*

**Decision on the application**

1. The President shall either decide on the application himself or refer it immediately to the Court.

2. If the President is prevented from acting, Articles 10 and 13 of these Rules shall apply.

3. Where the application is referred to it, the Court shall give a decision immediately, after hearing the Advocate General.

*Article 162*

**Order for suspension of operation or for interim measures**

1. The decision on the application shall take the form of a reasoned order, from which no appeal shall lie. The order shall be served on the parties forthwith.

2. The execution of the order may be made conditional on the lodging by the applicant of security, of an amount and nature to be fixed in the light of the circumstances.

3. Unless the order fixes the date on which the interim measure is to lapse, the measure shall lapse when the judgment which closes the proceedings is delivered.

4. The order shall have only an interim effect, and shall be without prejudice to the decision of the Court on the substance of the case.

*Article 163*

**Change in circumstances**

On application by a party, the order may at any time be varied or cancelled on account of a change in circumstances.

*Article 164*

**New application**

Rejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts.

*Article 165*

**Applications pursuant to Articles 280 TFEU and 299 TFEU and Article 164 TEAEC**

1. The provisions of this Chapter shall apply to applications to suspend the enforcement of a decision of the Court or of any measure adopted by the Council, the European Commission or the European Central Bank, submitted pursuant to Articles 280 TFEU and 299 TFEU or Article 164 TEAEC.

2. The order granting the application shall fix, where appropriate, a date on which the interim measure is to lapse.

*Article 166*

**Application pursuant to Article 81 TEAEC**

1. An application of a kind referred to in the third and fourth paragraphs of Article 81 TEAEC shall contain:

(a) the names and addresses of the persons or undertakings to be inspected;

(b) an indication of what is to be inspected and of the purpose of the inspection.

2. The President shall give his decision in the form of an order. Article 162 of these Rules shall apply.

3. If the President is prevented from acting, Articles 10 and 13 of these Rules shall apply.

**TITLE V**

**APPEALS AGAINST DECISIONS OF THE GENERAL COURT**

Chapter 1

FORM AND CONTENT OF THE APPEAL, AND FORM OF ORDER SOUGHT

*Article 167*

**Lodging of the appeal**

1. An appeal shall be brought by lodging an application at the Registry of the Court of Justice or of the General Court.

2. The Registry of the General Court shall forthwith transmit to the Registry of the Court of Justice the file in the case at first instance and, where necessary, the appeal.

*Article 168*

**Content of the appeal**

1. An appeal shall contain:

(a) the name and address of the appellant;

(b) a reference to the decision of the General Court appealed against;

(c) the names of the other parties to the relevant case before the General Court;

(d) the pleas in law and legal arguments relied on, and a summary of those pleas in law;

(e) the form of order sought by the appellant.

2. Articles 119, 121 and 122(1) of these Rules shall apply to appeals.

3. The appeal shall state the date on which the decision appealed against was served on the appellant.

4. If an appeal does not comply with paragraphs 1 to 3 of this Article, the Registrar shall prescribe a reasonable time-limit within which the appellant is to put the appeal in order. If the appellant fails to put the appeal in order within the time-limit prescribed, the Court of Justice shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that formal requirement renders the appeal formally inadmissible.

*Article 169*

**Form of order sought, pleas in law and arguments of the appeal**

1. An appeal shall seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

2. The pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested.

*Article 170*

**Form of order sought in the event that the appeal is allowed**

1. An appeal shall seek, in the event that it is declared well founded, the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order. The subject-matter of the proceedings before the General Court may not be changed in the appeal.

2. Where the appellant requests that the case be referred back to the General Court if the decision appealed against is set aside, he shall set out the reasons why the state of the proceedings does not permit a decision by the Court of Justice.

Chapter 2

RESPONSES, REPLIES AND REJOINDERS

*Article 171*

**Service of the appeal**

1. The appeal shall be served on the other parties to the relevant case before the General Court.

2. In a case where Article 168(4) of these Rules applies, service shall be effected as soon as the appeal has been put in order or the Court of Justice has declared it admissible notwithstanding the failure to observe the formal requirements laid down by that Article.

*Article 172*

**Parties authorised to lodge a response**

Any party to the relevant case before the General Court having an interest in the appeal being allowed or dismissed may submit a response within two months after service on him of the appeal. The time-limit for submitting a response shall not be extended.

*Article 173*

**Content of the response**

1. A response shall contain:

(a) the name and address of the party submitting it;

(b) the date on which the appeal was served on him;

(c) the pleas in law and legal arguments relied on;

(d) the form of order sought.

2. Articles 119 and 121 of these Rules shall apply to responses.

*Article 174*

**Form of order sought in the response**

A response shall seek to have the appeal allowed or dismissed, in whole or in part.

*Article 175*

**Reply and rejoinder**

1. The appeal and the response may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the appellant within seven days of service of the response, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable the appellant to present his views on a plea of inadmissibility or on new matters relied on in the response.

2. The President shall fix the date by which the reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may limit the number of pages and the subject-matter of those pleadings.

Chapter 3

FORM AND CONTENT OF THE CROSS-APPEAL, AND FORM OF ORDER SOUGHT

*Article 176*

**Cross-appeal**

1. The parties referred to in Article 172 of these Rules may submit a cross-appeal within the same time-limit as that prescribed for the submission of a response.

2. A cross-appeal must be introduced by a document separate from the response.

*Article 177*

**Content of the cross-appeal**

1. A cross-appeal shall contain:

(a) the name and address of the party bringing the cross-appeal;

(b) the date on which the appeal was served on him;

(c) the pleas in law and legal arguments relied on;

(d) the form of order sought.

2. Articles 119, 121 and 122(1) and (3) of these Rules shall apply to cross-appeals.

*Article 178*

**Form of order sought, pleas in law and arguments of the cross-appeal**

1. A cross-appeal shall seek to have set aside, in whole or in part, the decision of the General Court.

2. It may also seek to have set aside an express or implied decision relating to the admissibility of the action before the General Court.

3. The pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested. The pleas in law and arguments must be separate from those relied on in the response.

Chapter 4

PLEADINGS CONSEQUENT ON THE CROSS-APPEAL

*Article 179*

**Response to the cross-appeal**

Where a cross-appeal is brought, the applicant at first instance or any other party to the relevant case before the General Court having an interest in the cross-appeal being allowed or dismissed may submit a response, which must be limited to the pleas in law relied on in that cross-appeal, within two months after its being served on him. That time-limit shall not be extended.

*Article 180*

**Reply and rejoinder on a cross-appeal**

1. The cross-appeal and the response thereto may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the party who brought the cross-appeal within seven days of service of the response to the cross-appeal, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable that party to present his views on a plea of inadmissibility or on new matters relied on in the response to the cross-appeal.

2. The President shall fix the date by which that reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may limit the number of pages and the subject-matter of those pleadings.

Chapter 5

APPEALS DETERMINED BY ORDER

*Article 181*

**Manifestly inadmissible or manifestly unfounded appeal or cross-appeal**

Where the appeal or cross-appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.

*Article 182*

**Manifestly well-founded appeal or cross-appeal**

Where the Court has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal or cross-appeal and considers the appeal or cross-appeal to be manifestly well founded, it may, acting on a proposal from the Judge-Rapporteur and after hearing the parties and the Advocate General, decide by reasoned order in which reference is made to the relevant case-law to declare the appeal or cross-appeal manifestly well founded.

Chapter 6

EFFECT ON A CROSS-APPEAL OF THE REMOVAL OF THE APPEAL FROM THE REGISTER

*Article 183*

**Effect on a cross-appeal of the discontinuance or manifest inadmissibility of the appeal**

A cross-appeal shall be deemed to be devoid of purpose:

(a) if the appellant discontinues his appeal;

(b) if the appeal is declared manifestly inadmissible for non-compliance with the time-limit for lodging an appeal;

(c) if the appeal is declared manifestly inadmissible on the sole ground that it is not directed against a final decision of the General Court or against a decision disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility within the meaning of the first paragraph of Article 56 of the Statute.

Chapter 7

COSTS AND LEGAL AID IN APPEALS

*Article 184*

**Costs in appeals**

1. Subject to the following provisions, Articles 137 to 146 of these Rules shall apply, *mutatis mutandis*, to the procedure before the Court of Justice on an appeal against a decision of the General Court.

2. Where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court shall make a decision as to the costs.

3. When an appeal brought by a Member State or an institution of the European Union which did not intervene in the proceedings before the General Court is well founded, the Court of Justice may order that the parties share the costs or that the successful appellant pay the costs which the appeal has caused an unsuccessful party to incur.

4. Where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs.

*Article 185*

**Legal aid**

1. A party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid.

2. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

*Article 186*

**Prior application for legal aid**

1. If the application is made prior to the appeal which the applicant for legal aid intends to commence, it shall briefly state the subject of the appeal.

2. The application for legal aid need not be made through a lawyer.

3. The introduction of an application for legal aid shall, with regard to the person who made that application, suspend the time-limit prescribed for the bringing of the appeal until the date of service of the order making a decision on that application.

4. The President shall assign the application for legal aid, as soon as it is lodged, to a Judge-Rapporteur who shall put forward, promptly, a proposal as to the action to be taken on it.

*Article 187*

**Decision on the application for legal aid**

1. The decision to grant legal aid, in whole or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. In that event, the formation of the Court shall be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur. It shall consider, if appropriate, whether the appeal is manifestly unfounded.

2. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

3. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

*Article 188*

**Sums to be advanced as legal aid**

1. Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

2. In its decision as to costs the Court may order the payment to the cashier of the Court of sums advanced as legal aid.

3. The Registrar shall take steps to obtain the recovery of these sums from the party ordered to pay them.

*Article 189*

**Withdrawal of legal aid**

The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.

Chapter 8

OTHER PROVISIONS APPLICABLE TO APPEALS

*Article 190*

**Other provisions applicable to appeals**

1. Articles 127, 129 to 136, 147 to 150, 153 to 155 and 157 to 166 of these Rules shall apply to the procedure before the Court of Justice on an appeal against decisions of the General Court.

2. By way of derogation from Article 130(1), an application to intervene shall, however, be made within one month of the publication of the notice referred to in Article 21(4).

3. Article 95 shall apply, *mutatis mutandis*, to the procedure before the Court of Justice on an appeal against decisions of the General Court.

## TITLE VI

## REVIEW OF DECISIONS OF THE GENERAL COURT

*Article 191*

**Reviewing Chamber**

A Chamber of five Judges shall be designated for a period of one year for the purpose of deciding, in accordance with Articles 193 and 194 of these Rules, whether a decision of the General Court is to be reviewed in accordance with Article 62 of the Statute.

*Article 192*

**Information and communication of decisions which may be reviewed**

1. As soon as the date for the delivery or signature of a decision to be given under Article 256(2) or (3) TFEU is fixed, the Registry of the General Court shall inform the Registry of the Court of Justice.

2. The decision shall be communicated to the Registry of the Court of Justice immediately upon its delivery or signature, as shall the file in the case, which shall be made available forthwith to the First Advocate General.

*Article 193*

**Review of decisions given on appeal**

1. The proposal of the First Advocate General to review a decision of the General Court given under Article 256(2) TFEU shall be forwarded to the President of the Court of Justice and to the President of the reviewing Chamber. Notice of that transmission shall be given to the Registrar at the same time.

2. As soon as he is informed of the existence of a proposal, the Registrar shall communicate the file in the case before the General Court to the members of the reviewing Chamber.

3. As soon as the proposal to review has been received, the President of the Court shall designate the Judge-Rapporteur from among the Judges of the reviewing Chamber on a proposal from the President of that Chamber. The composition of the formation of the Court shall be determined in accordance with Article 28(2) of these Rules on the day on which the case is assigned to the Judge-Rapporteur.

4. That Chamber, acting on a proposal from the Judge-Rapporteur, shall decide whether the decision of the General Court is to be reviewed. The decision to review the decision of the General Court shall indicate only the questions which are to be reviewed.

5. The General Court, the parties to the proceedings before it and the other interested persons referred to in the second paragraph of Article 62a of the Statute shall forthwith be informed by the Registrar of the decision of the Court of Justice to review the decision of the General Court.

6. Notice of the date of the decision to review the decision of the General Court and of the questions which are to be reviewed shall be published in the *Official Journal of the European Union*.

*Article 194*

**Review of preliminary rulings**

1. The proposal of the First Advocate General to review a decision of the General Court given under Article 256(3) TFEU shall be forwarded to the President of the Court of Justice and to the President of the reviewing Chamber. Notice of that transmission shall be given to the Registrar at the same time.

2. As soon as he is informed of the existence of a proposal, the Registrar shall communicate the file in the case before the General Court to the members of the reviewing Chamber.

3. The Registrar shall also inform the General Court, the referring court or tribunal, the parties to the main proceedings and the other interested persons referred to in the second paragraph of Article 62a of the Statute of the existence of a proposal to review.

4. As soon as the proposal to review has been received, the President of the Court shall designate the Judge-Rapporteur from among the Judges of the reviewing Chamber on a proposal from the President of that Chamber. The composition of the formation of the Court shall be determined in accordance with Article 28(2) of these Rules on the day on which the case is assigned to the Judge-Rapporteur.

5. That Chamber, acting on a proposal from the Judge-Rapporteur, shall decide whether the decision of the General Court is to be reviewed. The decision to review the decision of the General Court shall indicate only the questions which are to be reviewed.

6. The General Court, the referring court or tribunal, the parties to the main proceedings and the other interested persons referred to in the second paragraph of Article 62a of the Statute shall forthwith be informed by the Registrar of the decision of the Court of Justice as to whether or not the decision of the General Court is to be reviewed.

7. Notice of the date of the decision to review the decision of the General Court and of the questions which are to be reviewed shall be published in the *Official Journal of the European Union*.

*Article 195*

**Judgment on the substance of the case after a decision to review**

1. The decision to review a decision of the General Court shall be served on the parties and other interested persons referred to in the second paragraph of Article 62a of the Statute. The decision served on the Member States, and the States, other than the Member States, which are parties to the EEA Agreement, as well as the EFTA Surveillance Authority, shall be accompanied by a translation of the decision of the Court of Justice in accordance with the provisions of Article 98 of these Rules. The decision of the Court of Justice shall also be communicated to the General Court and, if applicable, to the referring court or tribunal.

2. Within one month of the date of service referred to in paragraph 1, the parties and other interested persons on whom the decision of the Court of Justice has been served may lodge statements or written observations on the questions which are subject to review.

3. As soon as a decision to review a decision of the General Court has been taken, the First Advocate General shall assign the review to an Advocate General.

4. The reviewing Chamber shall rule on the substance of the case, after hearing the Advocate General.

5. It may, however, request the Court of Justice to assign the case to a formation of the Court composed of a greater number of Judges.

6. Where the decision of the General Court which is subject to review was given under Article 256(2) TFEU, the Court of Justice shall make a decision as to costs.

**TITLE VII**

**OPINIONS**

*Article 196*

**Written part of the procedure**

1. In accordance with Article 218(11) TFEU, a request for an Opinion may be made by a Member State, by the European Parliament, by the Council or by the European Commission.

2. A request for an Opinion may relate both to whether the envisaged agreement is compatible with the provisions of the Treaties and to whether the European Union or any institution of the European Union has the power to enter into that agreement.

3. It shall be served on the Member States and on the institutions referred to in paragraph 1, and the President shall prescribe a time-limit within which they may submit written observations.

*Article 197*

**Designation of the Judge-Rapporteur and of the Advocate General**

As soon as the request for an Opinion has been submitted, the President shall designate a Judge-Rapporteur and the First Advocate General shall assign the case to an Advocate General.

*Article 198*

**Hearing**

The Court may decide that the procedure before it shall also include a hearing.

*Article 199*

**Time-limit for delivering the Opinion**

The Court shall deliver its Opinion as soon as possible, after hearing the Advocate General.

*Article 200*

**Delivery of the Opinion**

The Opinion, signed by the President, the Judges who took part in the deliberations and the Registrar, shall be delivered in open court. It shall be served on all the Member States and on the institutions referred to in Article 196(1).

**TITLE VIII**

**PARTICULAR FORMS OF PROCEDURE**

*Article 201*

**Appeals against decisions of the arbitration committee**

1. An application initiating an appeal under the second paragraph of Article 18 TEAEC shall state:

(a) the name and permanent address of the applicant;

(b) the description of the signatory;

(c) a reference to the arbitration committee's decision against which the appeal is made;

(d) the names of the respondents;

(e) a summary of the facts;

(f) the grounds on which the appeal is based and arguments relied on, and a brief statement of those grounds;

(g) the form of order sought by the applicant.

2. Articles 119 and 121 of these Rules shall apply to the application.

3. A certified copy of the contested decision shall be annexed to the application.

4. As soon as the application has been lodged, the Registrar of the Court shall request the arbitration committee registry to transmit to the Court the file in the case.

5. Articles 123 and 124 of these Rules shall apply to this procedure. The Court may decide that the procedure before it shall also include a hearing.

6. The Court shall give its decision in the form of a judgment. Where the Court sets aside the decision of the arbitration committee it may refer the case back to the committee.

*Article 202*

**Procedure under Article 103 TEAEC**

1. Four certified copies shall be lodged of an application under the third paragraph of Article 103 TEAEC. The application shall be accompanied by the draft of the agreement or contract concerned, by the observations of the European Commission addressed to the State concerned and by all other supporting documents.

2. The application and annexes thereto shall be served on the European Commission, which shall have a time-limit of 10 days from such service to submit its written observations. This time-limit may be extended by the President after the State concerned has been heard.

3. Following the lodging of such observations, which shall be served on the State concerned, the Court shall give its decision promptly, after hearing the Advocate General and, if they so request, the State concerned and the European Commission.

*Article 203*

**Procedures under Articles 104 TEAEC and 105 TEAEC**

Applications under the third paragraph of Article 104 TEAEC and the second paragraph of Article 105 TEAEC shall be governed by the provisions of Titles II and IV of these Rules. Such applications shall also be served on the State to which the respondent person or undertaking belongs.

*Article 204*

**Procedure provided for by Article 111(3) of the EEA Agreement**

1. In the case governed by Article 111(3) of the EEA Agreement, the matter shall be brought before the Court by a request submitted by the Contracting Parties which are parties to the dispute. The request shall be served on the other Contracting Parties, on the European Commission, on the EFTA Surveillance Authority and, where appropriate, on the other interested persons on whom a request for a preliminary ruling raising the same question of interpretation of European Union legislation would be served.

2. The President shall prescribe a time-limit within which the Contracting Parties and the other interested persons on whom the request has been served may submit written observations.

3. The request shall be made in one of the languages referred to in Article 36 of these Rules. Article 38 shall apply. The provisions of Article 98 shall apply *mutatis mutandis*.

4. As soon as the request referred to in paragraph 1 of this Article has been submitted, the President shall designate a Judge-Rapporteur. The First Advocate General shall, immediately afterwards, assign the request to an Advocate General.

5. The Court shall, after hearing the Advocate General, give a reasoned decision on the request.

6. The decision of the Court, signed by the President, the Judges who took part in the deliberations and the Registrar, shall be served on the Contracting Parties and on the other interested persons referred to in paragraphs 1 and 2.

*Article 205*

**Settlement of the disputes referred to in Article 35 TEU in the version in force before the entry into force of the Treaty of Lisbon**

1. In the case of disputes between Member States as referred to in Article 35(7) TEU in the version in force before the entry into force of the Treaty of Lisbon, as maintained in force by Protocol No 36 annexed to the Treaties, the matter shall be brought before the Court by an application by a party to the dispute. The application shall be served on the other Member States and on the European Commission.

2. In the case of disputes between Member States and the European Commission as referred to in Article 35(7) TEU in the version in force before the entry into force of the Treaty of Lisbon, as maintained in force by Protocol No 36 annexed to the Treaties, the matter shall be brought before the Court by an application by a party to the dispute. The application shall be served on the other Member States, the Council and the European Commission if it was submitted by a Member State. The application shall be served on the Member States and on the Council if it was submitted by the European Commission.

3. The President shall prescribe a time-limit within which the institutions and the Member States on which the application has been served may submit written observations.

4. As soon as the application referred to in paragraphs 1 and 2 has been submitted, the President shall designate a Judge-Rapporteur. The First Advocate General shall, immediately afterwards, assign the application to an Advocate General.

5. The Court may decide that the procedure before it shall also include a hearing.

6. The Court shall, after the Advocate General has delivered his Opinion, give its ruling on the dispute by way of judgment.

7. The same procedure as that laid down in the preceding paragraphs shall apply where an agreement concluded between the Member States confers jurisdiction on the Court to rule on a dispute between Member States or between Member States and an institution.

*Article 206*

**Requests under Article 269 TFEU**

1. Four certified copies shall be submitted of a request under Article 269 TFEU. The request shall be accompanied by any relevant document and, in particular, any observations and recommendations made pursuant to Article 7 TEU.

2. The request and annexes thereto shall be served on the European Council or on the Council, as appropriate, each of which shall have a time-limit of 10 days from such service to submit its written observations. This time-limit shall not be extended.

3. The request and annexes thereto shall also be communicated to the Member States other than the State in question, to the European Parliament and to the European Commission.

4. Following the lodging of the observations referred to in paragraph 2, which shall be served on the Member State concerned and on the States and institutions referred to in paragraph 3, the Court shall give its decision within a time-limit of one month from the lodging of the request and after hearing the Advocate General. At the request of the Member State concerned, the European Council or the Council, or of its own motion, the Court may decide that the procedure before it shall also include a hearing, which all the States and institutions referred to in this Article shall be given notice to attend.

**FINAL PROVISIONS**

*Article 207*

**Supplementary rules**

Subject to the provisions of Article 253 TFEU and after consultation with the Governments concerned, the Court shall adopt supplementary rules concerning its practice in relation to:

(a) letters rogatory;

(b) applications for legal aid;

(c) reports by the Court of perjury by witnesses or experts, delivered pursuant to Article 30 of the Statute.

*Article 208*

**Implementing rules**

The Court may, by a separate act, adopt practice rules for the implementation of these Rules.

*Article 209*

**Repeal**

These Rules replace the Rules of Procedure of the Court of Justice of the European Communities adopted on 19 June 1991, as last amended on 24 May 2011 (*Official Journal of the European Union*, L 162 of 22 June 2011, p. 17).

*Article 210*

**Publication and entry into force of these Rules**

These Rules, which are authentic in the languages referred to in Article 36 of these Rules, shall be published in the *Official Journal of the European Union* and shall enter into force on the first day of the second month following their publication.

Done at Luxembourg, 25 September 2012.

I

*(Resolutions, recommendations and opinions)*

# RECOMMENDATIONS

# COURT OF JUSTICE OF THE EUROPEAN UNION

These recommendations follow on from the adoption on 25 September 2012 in Luxembourg of the new Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1). They replace the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011, p. 1) and reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling to the Court of Justice and the procedure for making such a reference.

## RECOMMENDATIONS

## to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2012/C 338/01)

### I — GENERAL PROVISIONS

### The Court's jurisdiction in preliminary rulings

1. The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.

2. Under Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute. However, since no provisions have been introduced into the Statute in that regard, the Court of Justice alone currently has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction in that regard, a number of primary law provisions exist which lay down exceptions to or temporary restrictions on that jurisdiction. This is true, in particular, of Articles 275 TFEU and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2010 C 83, p. 1) ([1]).

([1]) Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts of the Union adopted in the field of police cooperation and judicial cooperation in criminal matters before the entry into force of the Treaty of Lisbon, and which have not since been amended, are to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court or tribunal of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each of those States to determine whether the right to refer a question to the Court is to be available to all of its national courts and tribunals or is to be reserved to the courts or tribunals of last instance.

5. Since the preliminary ruling procedure is based on cooperation between the Court of Justice and the courts and tribunals of the Member States, it may be helpful, in order to ensure that that procedure is fully effective, to provide those courts and tribunals with the following recommendations.

6. While in no way binding, these recommendations are intended to supplement Title III of the Rules of Procedure of the Court of Justice (Articles 93 to 118) and to provide guidance to the courts and tribunals of the Member States as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference.

## The role of the Court of Justice in the preliminary ruling procedure

7. As stated above, under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.

8. When ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw specific conclusions from that reply, if necessary by disapplying the rule of national law in question.

## The decision to make a reference for a preliminary ruling

*The originator of the request for a preliminary ruling*

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

10. Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

*References on interpretation*

11. Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment.

*References on determination of validity*

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals **must** therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

**The appropriate stage at which to make a reference for a preliminary ruling**

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19. It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

**The form and content of the request for a preliminary ruling**

20. The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.

21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.

22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

— a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;

— the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ([1]);

([1]) The referring court or tribunal is requested to provide precise references for those texts and their publication, such as a page of an official journal or a specific law report, or a reference to an internet site.

— a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.

24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.

26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.

27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

28. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

**The effects of the reference for a preliminary ruling on the national proceedings**

29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.

**Costs and legal aid**

31. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

32. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

**Communication between the Court of Justice and the national courts and tribunals**

33. The request for a preliminary ruling and the relevant documents (including, where applicable, the case file or a copy of it) are to be sent by the national court or tribunal making the reference directly to the Court of Justice. They must be sent by registered post to the Registry of the Court of Justice (Rue du Fort Niedergrünewald, L-2925 Luxembourg).

34. Until the decision containing the Court's ruling on the referring court's or tribunal's request for a preliminary ruling is served on that court or tribunal, the Court Registry will stay in contact with the referring court or tribunal, and will send it copies of the procedural documents.

35. The Court of Justice will send its ruling to the referring court or tribunal. It would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision.

II — **SPECIAL PROVISIONS IN RELATION TO URGENT REFERENCES FOR A PRELIMINARY RULING**

36. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure.

**Conditions for the application of the expedited and urgent procedures**

37. The Court of Justice decides whether these procedures are to be applied. Such a decision is generally taken only on a reasoned request from the referring court or tribunal. Exceptionally, the Court may, however, decide of its own motion to determine a reference for a preliminary ruling under an expedited procedure or an urgent procedure where that appears to be required by the nature or the particular circumstances of the case.

38. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an **expedited procedure** derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure ([1]).

39. The same applies *a fortiori* to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

40. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

([1]) For an insight into circumstances that have resulted in the approval or refusal of requests for the application of the accelerated procedure, made on the basis of Article 104a of the Rules of Procedure of the Court of Justice of 19 June 1991, as amended, see the orders made by the President of the Court of Justice, available at www.curia.europa.eu (the orders can be found under 'Case-law', by selecting each of the following in turn in the search form: Documents – Documents not published in the ECR – Orders – Expedited procedure).

**The request for application of the expedited procedure or the urgent procedure**

41. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

42. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

43. The request for the application of the expedited procedure or the urgent procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is asked to specify which of the two procedures is required in that particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court or tribunal can usefully refer to that request.

44. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

**Communication between the Court of Justice, the referring court or tribunal and the parties to the main proceedings**

45. In order to expedite and facilitate communication with the referring court or tribunal and the parties before it, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is asked to state the e-mail address and any fax number which may be used by the Court of Justice, together with the e-mail addresses and any fax numbers of the representatives of the parties to the proceedings.

46. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

**Parties to the main proceedings**

*Appellants:* Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and Local Government

*Respondent:* An Bord Pleanála

**Re:**

Request for a preliminary ruling — Supreme Court, Ireland — Interpretation of Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) — Assessment of the implications for a protected site of a plan or project — Criteria to be applied when assessing the likelihood that such a plan or such a project will adversely affect the integrity of the site concerned — Consequences of application of the precautionary principle — Construction of a road whose route crosses an area proposed as a special area of conservation

**Operative part of the judgment**

*Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.*

---

([1]) OJ C 226, 30.7.2011.

---

**Judgment of the Court (Fourth Chamber) of 11 April 2013 (request for a preliminary ruling from the Supreme Court of the United Kingdom — United Kingdom) — The Queen, on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs**

**(Case C-260/11)** ([1])

***(Environment — Aarhus Convention — Directive 85/337/EEC — Directive 2003/35/EC — Article 10a — Directive 96/61/EC — Article 15a — Access to justice in environmental matters — Meaning of 'not prohibitively expensive' judicial proceedings)***

(2013/C 156/07)

*Language of the case: English*

**Referring court**

Supreme Court of the United Kingdom

**Parties to the main proceedings**

*Applicants:* David Edwards, Lilian Pallikaropoulos

*Defendants:* Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs,

**Re:**

Request for a preliminary ruling — Supreme Court of the United Kingdom — Interpretation of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC — Statement by the Commission (OJ 2003 L 156, p. 17) — Interpretation of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Directive 2003/35/EC — Interpretation of Article 9(4) of the (Aarhus) Convention on access to information, public participation in decision-making and access to justice in environmental matters concluded, on behalf of the European Community, by Decision of the Council of 17 February 2005 (OJ 2005 L 124, p. 1) — An order that the unsuccessful party pay the costs of the proceedings — Meaning of 'not prohibitively expensive' judicial proceedings

**Operative part of the judgment**

*The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required — as courts in the United Kingdom may be — to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.*

*In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of*

*what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.*

*By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.*

*Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.*

---

([1]) OJ C 226, 30.7.2011.

---

**Judgment of the Court (Second Chamber) of 11 April 2013 (request for a preliminary ruling from the Sø- og Handelsret, Denmark) — HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) v HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11)**

**(Joined Cases C-335/11 and C-337/11)** ([1])

***(Social policy — United Nations Convention on the Rights of Persons with Disabilities — Directive 2000/78/CE — Equal treatment in employment and occupation — Articles 1, 2 and 5 — Difference in treatment on grounds of disability — Dismissal — Existence of a disability — Employee absent because of disability — Obligation to provide accommodation — Part-time work — Length of the period of notice)***

(2013/C 156/08)

*Language of the case: Danish*

**Referring court**

Sø- og Handelsret

**Parties to the main proceedings**

*Applicants:* HK Danmark, acting on behalf of Jette Ring (C-335/11), HK Danmark, acting on behalf of Lone Skouboe Werge (C-337/11)

*Defendant:* Dansk almennyttigt Boligselskab DAB (C-335/11), Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11)

**Re:**

Requests for a preliminary ruling — Sø- og Handelsretten — Interpretation of Articles 1, 2 and 5 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment and occupation (OJ 2000 L 303, p. 16) and the judgment of the Court in Case C-13/05 *Chacón Navas* — Prohibition of discrimination on grounds of disability — National legislation under which an employer can dismiss an employee who has been absent because of illness, with his salary being paid, for 120 days during 12 consecutive months — Existence of a disability — Persons having a long-term reduction in their functions not requiring particular equipment and consisting only in an incapacity to work full time — Reasonable accommodation for persons with disabilities

**Operative part of the judgment**

1. *The concept of 'disability' in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.*

2. *Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.*

3. *Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.*

4. *Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.*

---

([1]) OJ C 269, 10.9.2011.

Top of Form

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 12 September 2013 (1)

**Case C-530/11**

**European Commission**

**v**

**United Kingdom of Great Britain and Northern Ireland**

(Aarhus Convention – Directive 2003/35/EC – Access to justice – Concept of 'prohibitively expensive' judicial procedures – Transposition)

## I – Introduction

1. It is well known that in the United Kingdom court proceedings are not cheap. Legal representation in particular can result in considerable cost. As an unsuccessful party is generally ordered to bear the costs of the successful party, litigation involves considerable risks in terms of costs.

2. On the other hand, the Aarhus Convention (2) and the provisions in Directive 2003/35 (3) implementing it in relation to certain procedures require that judicial procedures in environmental law matters not be prohibitively expensive. In *Edwards*, (4) the Court examined the meaning of that requirement in general terms against the background of English law. In the present case, it must be determined specifically whether the United Kingdom has correctly transposed the relevant provisions.

3. At issue in this connection, first, is the discretion of the courts to cap in certain cases the costs of the defendant for which an applicant may be liable in the event that he is unsuccessful. Further, it must be clarified whether it is compatible with European Union law that on exercising that discretion courts at the same time cap the costs of the

applicant for which the defendant – in general a public body – may be liable in the event that it is unsuccessful. Finally, it is contested whether, in the proceedings concerned, the availability of interim relief may be made conditional on an undertaking by the applicant for such relief to pay damages for the losses resulting from the relief granted in the event that he is unsuccessful in the substantive action. As a preliminary matter, the extent to which directives may be transposed by case-law also requires examination.

## II – Legal framework

### A – *International law*

4. The relevant rules on the legal costs of environmental proceedings are contained in the Aarhus Convention, which was signed by the then European Community on 25 June 1998 in Aarhus (Denmark). (5)

5. Article 6 of the Convention provides for public participation in relation to the approval of certain activities.

6. Article 9 of the Convention regulates access to justice in environmental matters. The present case concerns procedures referred to by Article 9(2):

‘Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

…

have access to a review procedure before a court of law and/or another independent and impartial body established by law to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 ...’

7. Article 9(4) refers, inter alia, to costs:

‘In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. …’

### B – *Law of the European Union*

8. In implementing the provisions on access to justice laid down in Article 9(2) of the Aarhus Convention, Article 3(7) of Directive 2003/35 inserted Article 10a into the Environmental Impact Assessment Directive (EIA Directive) (6) and Article 4(4) of Directive 2003/35 inserted Article 15a into the Integrated Pollution and Prevention Control Directive (IPPC Directive). (7) Paragraph 5 of each of those inserted provisions lays down, in identical words, rules on costs:

‘Any such procedure shall be fair, equitable, timely and not prohibitively expensive.’

C – *Law of the United Kingdom*

9. Under rule 44.3.(2) of the Civil Procedure Rules for England and Wales, in general the unsuccessful party will be ordered to pay the costs of the successful party. However, having regard to the circumstances of the case, the court may make a different order. In particular, rule 44.3.(6) allows courts to make orders capping a party’s liability for the costs of another party. A similar legal position applies in Scotland and Northern Ireland.

10. Rule 25 of the Civil Procedure Rules concerns interim remedies. That rule is supplemented by a practice direction which provides in paragraph 5.1 that any order for an injunction must contain an undertaking given by the applicant for the injunction to the court to pay any damages which the opposing party sustains which the court considers the applicant should pay. In addition, pursuant to paragraph 5.1A, the court should consider whether to require such an undertaking also in relation to losses which third parties may suffer as a consequence of the order. However, courts have the discretion not to require those undertakings. Whilst the rules in Northern Ireland are similar, Scots law makes no provision for such an undertaking to pay damages.

11. Following the Court’s judgment in *Edwards*, (8) the United Kingdom supplemented these provisions to take account of the Aarhus Convention and Articles 3(7) and 4(4) of Directive 2003/35; however, *ratione temporis*, those amendments are not the subject of the present proceedings.

**III – Pre-litigation procedure and forms of order sought**

12. As a result of a complaint, the Commission called upon the United Kingdom on 23 October 2007 to submit observations concerning whether it had fulfilled its obligations under Articles 3(7) and 4(4) of Directive 2003/35.

13. Notwithstanding the replies of the United Kingdom of 20 December 2007 and 5 September 2008, the Commission addressed a reasoned opinion to that Member State on 22 March 2010 in which it contended that it had failed to transpose those provisions correctly and, moreover, that it did not apply them correctly. The Commission called upon the United Kingdom to take the necessary measures to comply with the opinion within a period of two months, that is to say, by 22 May 2010.

14. Notwithstanding the United Kingdom’s reply of 19 July 2010 the Commission maintained its assessment and on 18 October 2011 it brought the present action. It claims that the Court should:

(1) declare that, by failing to transpose fully and apply correctly Articles 3(7) and 4(4) of Directive 2003/35, the United Kingdom has failed to fulfil its obligations under that directive;

(2) order the United Kingdom to pay the costs of the proceedings.

15. The United Kingdom contends that the Court should:

(1) declare that the United Kingdom has not failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35;

(2) order the Commission to pay the costs.

16. By order of 4 May 2012, the President of the Court granted the Kingdom of Denmark and Ireland leave to intervene in support of the form of order sought by the United Kingdom.

17. The parties made written submissions and, with the exception of Denmark, took part in the hearing on 11 July 2013.

## IV – Legal appraisal

18. Although the Commission bases its action on Articles 3(7) and 4(4) of Directive 2003/35, in the discussion of the pleas it appears to me more expedient to refer to the provisions thereby introduced, that is to say, Article 10a of the EIA Directive and Article 15a of the IPPC Directive. Pursuant to the identically worded fifth paragraph of each of those provisions, procedures for the review of approvals on the basis of each of those directives are not to be prohibitively expensive. This implements Article 9(4) of the Aarhus Convention in relation to the review procedures specified in Article 9(2) of the Convention.

19. By its action, the Commission contests both the transposition of that rule in all three of the United Kingdom's jurisdictions, that is to say, England and Wales (including Gibraltar), Scotland and Northern Ireland (in this regard see section B below), and its application (in this regard see section C below). First, however, I should like to set out aspects of the recent ruling in *Edwards* (9) of fundamental relevance to the present case and, in the light thereof, consider certain arguments raised by the parties which although concerned with litigation costs do not assist in clarifying the individual pleas advanced by the Commission (in this regard see section A below).

### A – *Preliminary observations*

20. The fifth paragraph of Article 10a of the EIA Directive, the fifth paragraph of Article 15a of the IPPC Directive and Article 9(4) of the Aarhus Convention establish

an obligation referred to here as an obligation of costs protection. Its characteristics were specified in *Edwards*.

21. Pursuant to that judgment, the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. In that connection, account must be taken both of the interest of the person wishing to defend his rights and the public interest in the protection of the environment. (10)

22. In addition, the Court held that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned. (11) These include, in principle, the costs of legal representation.

23. Finally, the Court clarified in *Edwards* that, contrary to the argument advanced by Denmark, the requirement that judicial proceedings should not be prohibitively expensive cannot be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal. (12) However, that finding cannot be interpreted as meaning that in assessing the permissible cost burden in appeal proceedings the costs already incurred in courts below may be ignored. Instead, each court must ensure that the costs at all levels of jurisdiction taken together are not prohibitive or excessive.

24. Denmark is correct to point out, however, that in certain review proceedings professional representation may be unnecessary. This is conceivable, for example, if the competent body concerned has extensive responsibility for the procedure and, for that reason, investigates of its own motion all the relevant arguments and circumstances. However, the possibility that representation may be unnecessary must be assessed in the context of each specific case having regard to all the legal and practical circumstances and custom and practice.

25. In the present proceedings, it is not disputed that legal representation is necessary before the courts of the United Kingdom and that this can result in considerable costs. The Member State explains this by referring to the particular characteristics of the adversarial system under common law which imposes particularly high demands on the legal representatives of the parties.

26. As is the case before the European Union judicature, in the United Kingdom the unsuccessful party is in general ordered to pay the costs of the legal representation. Consequently, if they are unsuccessful, the applicants specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive must, as a rule, cover both their

own costs and those of the opposing party. If the action is successful, however, their costs will be borne by the opposing party.

27. Although the United Kingdom appears to regard the costs arising in this system as justified, the risk in terms of costs may dissuade persons from bringing or pursuing an action specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive. Those proceedings may therefore be excessively or prohibitively expensive for the purpose of those provisions. Consequently, adequate costs protection must be ensured.

28. The United Kingdom identifies various mechanisms to cover, or at least limit, the risks in terms of litigation costs. The Commission does not criticise those mechanisms as such but considers them, in my view correctly, inadequate for the purposes of transposing Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

29. For example, the United Kingdom has a legal aid scheme but does not deny the fact that associations cannot apply for legal aid (13) and that legal aid is means tested. As associations and individuals with the capacity to pay (14) must also be protected against prohibitive costs, this instrument is inadequate to ensure costs protection.

30. Further, the United Kingdom stresses that the risk involved in *applying* for judicial review is in costs terms minimal. Such applications are permitted to proceed only if a summary permission hearing determines that there is merit in the application. According to the United Kingdom, only limited costs may be awarded in conjunction with that procedure.

31. Admittedly, this permission procedure limits the risks in terms of costs in cases with very little chance of success, as they are dismissed at an early stage before generating further costs. However, the Aarhus Convention and its implementation in the European Union are not focused primarily on actions with particularly slim chances of success. (15) The public interest in the protection of the environment is considerably better served if actions with some merit but whose success is uncertain are furthered. In general, those cases are based on a legitimate interest in the protection of the environment but as their outcome is uncertain the risks in terms of cost are particularly substantial.

32. Finally, the United Kingdom also mentions the possibility of taking out insurance against litigation costs known as ‘after the event insurance’. However, it is uncontested that that device too does not cover all cases. It is clear that precisely in cases where the outcome is uncertain, that is to say, where considerable risks in terms of costs are at stake, insurance undertakings will demand premiums that may also be prohibitive.

33. Although the Commission emphasises the need for costs to be predictable, it is unnecessary in the present case to determine the extent to which costs must actually be

known at an early stage of the proceedings. United Kingdom law has a mechanism, the protective costs order, by which the maximum risk in terms of costs may be determined at an early stage.

34. Although the Commission criticises certain consequences of, and criteria for, the application of that instrument, it does not consider the instrument as such inadequate. To the extent that it criticises the uncertainty in relation to the amount of costs involved, its complaint, in fact, is that United Kingdom law does not provide in a sufficiently clear and precise manner for costs protection. I will analyse this problem below.

B – *Transposition*

35. The Commission criticises the absence of legal provisions transposing the concept of costs protection into United Kingdom law. In that connection, it relies on a judgment concerning the legal position in Ireland. The courts in Ireland had a discretion not to order an unsuccessful party to pay the costs and, in addition, to order expenditure incurred by the unsuccessful party to be borne by the other party. As that was mere judicial practice, the Court did not recognise it as transposition. (16)

36. The United Kingdom counters that argument with national case-law. It relies on the fact that, according to the wording of the third paragraph of Article 288 TFEU, a directive, while being binding, as to the result to be achieved, upon each Member State to which it is addressed, leaves to the national authorities the choice of form and methods. (17)

37. Indeed, the Court has held that the transposition of European Union legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision. A general legal context may be sufficient for the purpose if it actually ensures the full application of the provisions of European Union law in a sufficiently clear and precise manner. (18)

38. It is true that it has not yet been determined whether binding judicial precedents, in other words, the case-law that characterises the common law system in the United Kingdom, are accordingly sufficient to transpose a directive. However, the Court has already acknowledged that, also when assessing the transposition of a directive, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts. (19)

39. Nevertheless, it cannot suffice for the transposition of a directive that the courts have the power to comply with the directive's requirements and possibly also do so: it is settled case-law that a discretion which may be exercised in accordance with a directive is not sufficient to implement provisions of a directive since such a practice can be changed at any time. (20) That is precisely what was found in the case cited by

the Commission. Although the Irish courts had a discretion allowing costs protection, they were not obliged to ensure this. Nor did criteria exist specifying the circumstances in which costs protection was to be afforded. Moreover, relevant judicial precedents establishing an obligation of that kind were not adduced in argument in that case.

40. Therefore, what matters is whether the relevant national case-law actually ensures with sufficient clarity and precision and in a binding manner the full application of the costs protection required. (21) If those conditions are satisfied, precedent could ensure transposition. (22)

41. In the present case, the parties refer to various judgments of the United Kingdom courts. Although the Commission criticises these as a failure to apply the provisions adequately in practice, in light of the above considerations they are also crucial for the transposition of the provisions.

42. In this connection, I shall examine, first, the fact that the courts have a discretion in the issue of a protective costs order (on this point, see section 1 below), then the possible capping of the costs that an applicant may recover if he is successful (on this point, see section 2 below) and, finally, interim relief (on this point, see section 3 below).

1. The court's discretion in the issue of a protective costs order

43. The concept of a protective costs order was developed by the Court of Appeal of England and Wales in the case of *Corner House*. (23) The courts in Scotland and Northern Ireland have adopted the practice. In exceptional circumstances, an order of that kind may establish a cap on the costs that the applicant may be ordered to pay in respect of the proceedings before the relevant court in the event that he is unsuccessful. An order of that kind may be made at any stage of the proceedings provided the court is satisfied that:

– the issues raised are of general public importance;

– the public interest requires that those issues should be resolved;

– the applicant has no private interest in the outcome of the case;

– having regard to the financial resources of the applicant and respondents and to the amount of costs that are likely to be involved it is fair and just to make the order;

– if the order is not made the applicant will probably discontinue the proceedings.

44. A consequence of this restrictive approach is that the decision itself whether to cap costs involves considerable time and effort and entails additional costs without furthering the resolution of environmental law issues.

45. This instrument allows the relevant courts, first, a discretion to determine whether the various conditions for the issue of a protective costs order are satisfied and, if so, a discretion concerning the degree of protection to be afforded in the specific case. The latter discretion relates both to the level of costs permissible and the question whether, and if so, to what extent, the risk in terms of costs facing the opposing party should also be limited.

46. Neither of these discretions as such may be criticised. Given the considerable differences between the Member States in their rules on access to justice, there remains a broad discretion with a view to ensuring costs protection. (24) In addition, the Court itself has recognised the need for discretion in the area of costs protection. (25) However, national courts must be placed under an unambiguous obligation to exercise their discretion with the objective of ensuring adequate costs protection in the proceedings at issue. (26)

47. The discretion afforded to the courts in the United Kingdom in issuing a protective costs order does not meet those requirements. Its exercise is intended to determine whether *by way of exception* (27) in an individual case it would be inequitable or unfair to adhere to the general principle that no protection exists in relation to costs. A fundamental obligation to observe the objective of ensuring costs protection in the proceedings concerned is, on the other hand, not apparent.

48. The cases subsequent to *Corner House* to which reference has been made do not alter that assessment. Instead, it is stated in the judgment in *Morgan* delivered in 2009 that the courts' existing discretion as to costs may be incompatible with the requirement to ensure costs protection. (28)

49. Also the 2010 ruling in *Garner*, not delivered until after the expiry of the time-limit laid down in the reasoned opinion, does not suggest that the discretion now focuses on ensuring costs protection. (29)

50. In addition, the criteria applied in the United Kingdom are incompatible with the findings of the Court in *Edwards*.

51. Although the United Kingdom argues that the criteria for granting the necessary costs protection are not the subject-matter of the present case, I am not convinced by that argument. Rather, the criteria for the grant of costs protection go to the very heart of the Commission's allegation that the requirement to ensure costs protection has not been adequately transposed. For that reason, they require examination here.

52. The problems with the criteria applied in the United Kingdom begin with the consideration given to the public and private interest in pursuing the litigation. The Court too requires consideration to be given to those interests, (30) but the United Kingdom concedes that prior to the judgment in *Garner* they were not taken into

consideration in the manner required. (31) The United Kingdom Government thus accepts that prior to that judgment the public interest in enforcing environmental law in the procedures specified in Article 10a of the EIA Directive and Article 15a of the IPPC Directive was not accorded sufficient weight and recognition. As that judgment was not delivered until after the expiry of the time-limit laid down in the reasoned opinion, the United Kingdom did not remedy the infringement within the period prescribed.

53. A further incompatibility with the requirement for costs protection is the fact that the very existence of a private interest in the outcome of the case precludes the issue of protective costs order. Although the Court also requires consideration of an interest of that kind, costs protection is not to be precluded by it. Instead, an individual is to be protected also when enforcing his own rights conferred by European Union law. (32)

54. Although the judgment in *Morgan* – seemingly in an *obiter dictum* – indicates that this criterion should be applied flexibly, (33) it is clear that, in this respect, at least considerable uncertainty prevails.

55. The requirement of costs protection is also infringed if an applicant's capacity to pay, in other words, the lack of proof of inadequate financial resources, operates to preclude protection. Instead, the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable. (34) In other words, even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs and, in the case of applicants with limited financial means, objectively reasonable risks in terms of costs must in certain circumstances be reduced further.

56. Finally, the Court has rejected the ruling out of costs protection on the ground that an applicant will probably not be deterred by the risk in terms of costs. (35) However, according to *Corner House*, such a risk that he will be deterred is a further condition for the issue of a protective costs order.

57. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions.

2. Capping of both parties' liability for costs

58. The Commission also criticises the fact that protective costs orders often cap the risk in terms of costs also for the opposing party. This problem concerns all three jurisdictions in the United Kingdom.

Admissibility

59. The United Kingdom considers this complaint inadmissible as it was not raised in the pre-litigation procedure. In fact, it was only in the reasoned opinion that the Commission first expressly criticised the practice whereby both parties' liability for costs may be capped. (36)

60. The United Kingdom's objection is based on the argument that the letter of formal notice sent by the Commission to the Member State concerned and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the Member State concerned to be able to submit its observations constitutes an essential guarantee adherence to which is an essential formal requirement of the procedure for finding that a Member State has failed to fulfil its obligations. Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure. (37)

61. However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered. (38)

62. In particular, the letter of formal notice cannot be subject to requirements of precision as strict as those applied to the reasoned opinion, since it cannot, of necessity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice. (39)

63. That is what happened in the present case. The Commission is correct in arguing that the costs of a party's own representation are also included within the litigation costs which Member States are under an obligation to limit. (40) Consequently, the complaint that the risk in relation to those costs is not sufficiently limited was included in the allegation that in the United Kingdom the risk in terms of litigation costs as a whole is not sufficiently limited.

64. This view is confirmed by the United Kingdom's reply to the letter of formal notice, that is to say, the first letter sent by that Member State in the pre-litigation procedure. That letter mentions the possibility for a party of concluding a conditional fee agreement with his lawyer, under which fees are paid only if an action is successful, as a means of limiting the risk in terms of costs. (41) Thus, the Commission's submission set out in the reasoned opinion that protective costs orders undermine the effectiveness of such agreements as they cap the costs that the applicant can recover in the event of being successful is simply a counterargument to refute that position. As a result, this point became included within the subject-matter of the case.

65. Thus, this submission is admissible and requires examination.

Substance

66. The Commission criticises the fact that in certain cases protective costs orders may be structured on a reciprocal basis such that, in addition to capping the applicant's risk in relation to the costs of the opposing party in the event that he is unsuccessful, they also cap the risk for the opposing party, in the event that the action is successful, of an order to pay the applicant's costs.

67. A *one-way* protective costs order which benefits simply the applicant, capping his liability for the costs of the opposing party, may contribute significantly to the prevention of excessive or prohibitive litigation costs. However, simply the costs of a party's *own* representation may dissuade the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles.

68. Consequently, as regards the costs of a party's own representation, both the United Kingdom and Ireland refer to the possibility that the lawyer agrees to waive his fees. However, only in exceptional cases can a waiver of that kind reduce the risk in terms of costs, as in general lawyers need to earn income. To call for the representation of applicants in the legal procedures specified in Article 10a of the EIA Directive and in Article 15a of the IPPC Directive to be provided, as a rule, free of charge would destroy the economic basis on which lawyers can develop the necessary specialisation in these areas.

69. Conditional fee agreements provide lawyers an opportunity of earning the necessary income in the case of applicants with limited financial resources who are not in receipt of legal aid. In England and Wales and in Scotland, conditional fee agreements are allowed under which the applicant's lawyer is paid a fee only if the action is successful. In both systems, the unsuccessful opposing party must normally bear the costs that would have been payable in the absence of such an agreement. In England and Wales an additional success payment for the applicant's lawyer is also borne by that party, whereas in Scotland such payment would be borne by the applicant. In Northern Ireland conditional fee agreements do not exist. Although such agreements are also not free from criticism, in particular in so far as they involve a premium over standard fees, (42) according to the United Kingdom's submissions in many of the cases covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive they appear necessary in order to ensure the required protection in terms of costs in that legal system.

70. However, a reciprocal protective costs order caps the costs that an opposing party is required to bear in the event that the action is successful. Where there is such a cap, the applicant will in all probability have to be responsible for part of the costs of his own

representation. In the case of conditional fee agreements the success fee that the unsuccessful opposing party would have to bear is capped. Either the applicant's lawyers agree to accept this capped level of fees or, in the event that the applicant's action is successful, he must top-up these fees at his own expense. Such additional costs may also have a dissuasive effect. Consequently, reciprocal protective costs orders have the potential to undermine the objective of costs protection.

71. However, in assessing reciprocal protective costs orders a distinction must though be made between private and public parties.

72. In the case of private parties, in certain circumstances the reciprocal cap on costs may be justified in the name of procedural equality of arms, one of the elements of the fundamental right to a fair hearing, (43) a right explicitly mentioned as a procedural principle in Article 9(4) of the Aarhus Convention. One may have doubts as to that equality of arms (44) if one party has been largely exempted from the risk of having to bear the costs of the opposing party, whereas the other party must always bear most of his own costs and, in the event that he is unsuccessful, must bear the entire costs of the proceedings. It is conceivable even that where the risk in terms of costs is distributed so unevenly this may influence the parties' litigation strategies. A party who is largely exempt from risks in terms of costs could be tempted to widen the subject-matter of the dispute unnecessarily in order to increase the costs of the opposing party and, thus, his willingness to agree to a compromise.

73. However, the Commission is correct to emphasise that the present case only concerns the actions covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. By their very nature, these are challenges to decisions taken by public bodies, that is so say, development consents given to projects following an environmental impact assessment or permits for certain industrial activities granted under the integrated approach.

74. In actions brought against public bodies, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive. To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.

75. Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.

76. Finally, under the Aarhus Convention particular emphasis is placed on the public interest in upholding the law. (45) That interest prohibits, at least in the proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive, detriment to an instrument such as the conditional fee agreement which can help an applicant to avoid prohibitive costs for his own representation.

77. Moreover, that objective of the Aarhus Convention serves to refute the argument of the United Kingdom in relation to the limited resources of the relevant authorities. It is admittedly the case that funds spent by the authorities on legal proceedings cannot be used to fulfil their primary tasks. However, the Convention accepts this. That is also appropriate since the judicial enforcement of environmental law or the risk of a legal challenge forces the authorities to exercise particular care in applying the law in this area.

78. This of course does not mean that public bodies should be afforded no costs protection. There is no reason to impose an obligation on those bodies to pay success-related fees of the opposing party's lawyers that considerably exceed the standard fees payable where no conditional fee agreement applies. Thus, in the name of procedural equality of arms, in actions against public bodies too the possibility of making an 'asymmetrical' reciprocal protective costs order that caps the risk in terms of costs for both parties but allows all the same for a reasonable success fee cannot be entirely rejected.

79. However, the order must not provide an incentive to the public body – which is endowed with greater financial resources – to widen unnecessarily the subject-matter of the dispute such as to increase the applicant's own legal costs to the point that they exceed considerably the level at which costs have been capped. (46) Therefore, what constitutes a reasonable success fee can only be determined in the circumstances of an individual case.

80. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for the representation of the persons and associations covered by those provisions from being imposed upon the opposing party if the action is successful.

3. Interim relief

81. Finally, the Commission complains that in England and Wales as well as Gibraltar and in Northern Ireland interim relief is usually granted only if the applicant for relief undertakes to pay any damages resulting from the order.

82. It is not clear from the case-file what this undertaking to pay damages includes. I presume that it does not relate to loss and damage caused by culpable unlawful conduct. No specific undertaking in damages would be necessary in that case, as the general law of tort would apply.

83. Instead, I assume that this undertaking has effect if the claim protected by means of the interim injunction proves in the course of the subsequent proceedings to be unfounded. It would appear that in this case the applicant for relief must compensate for the loss and damage caused by the interim injunction. (47) Thus, in the kinds of proceedings at issue in the present case, the applicant risks having to pay the costs resulting from project delays.

84. The parties' first point of disagreement is whether this risk in terms of costs even falls within the scope of the costs protection required by the fifth paragraph of Article 10a of the EIA Directive and the fifth paragraph of Article 15a of the IPPC Directive. According to the wording of those provisions, it is simply the judicial procedure that must not be prohibitively expensive. On a strict interpretation, an obligation to compensate for delays resulting from interim relief is not included within the notion of litigation costs.

85. The Court has, however, already held that the guarantee of effectiveness of the right to bring an action provided for in Article 10a of the EIA Directive and Article 15a of the IPPC Directive requires that the members of the public concerned should have the right to apply for interim measures. (48) Correspondingly, the document 'The Aarhus Convention: An Implementation Guide', published in 2000 by the United Nations Economic Commission for Europe, also includes interlocutory relief ('preliminary injunctive relief') within the judicial decisions (49) that are specified in Article 9(4) of the Convention as part of review procedures. (50)

86. Moreover, it is to be remembered that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned. (51) In addition, the Court has held that the persons covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. (52)

87. As an application for interim relief also constitutes such a legal remedy and as any damages claims would increase the resulting financial burden, they, too, must be included within the principle of costs protection. Otherwise, persons might be prevented from applying for relief of that kind by reason of the risk that they will have to pay damages.

88. Admittedly, the United Kingdom contends in response to the Commission that, even in the absence of interim relief, projects covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive are generally not advanced further while legal proceedings are pending. Expensive works are often not carried out if there is a chance that the consent will be overturned.

89. This argument mitigates the practical significance of the Commission's criticism but in the cases in which interim relief is necessary does not invalidate it.

90. Furthermore, the United Kingdom contends that in public law cases the courts generally exercise their discretion in such a way that no undertaking in damages is required. Here too, however, the mere possibility that discretion may be exercised in accordance with the requirement for costs protection is not sufficient to implement the fifth paragraph of Article 10a of the EIA Directive and the fifth paragraph of Article 15a of the IPPC Directive.

91. Of greater significance is the United Kingdom's argument that the obligation to pay damages is compatible with the principle of effectiveness, that is to say, it does not render excessively difficult or impossible in practice the exercise of rights conferred by European Union law.

92. That argument is based on the valid premiss that, subject to compliance with the principles of equivalence and effectiveness, the Member States have discretion in implementing Article 10a of the EIA Directive and Article 15a of the IPPC Directive. (53) Moreover, that discretion is also not called into question by the principle of effective legal protection – to which the principle of effectiveness is related – set out in the first paragraph of Article 47 of the Charter of Fundamental Rights. (54)

93. For that reason, the possibility cannot be excluded that, in principle, the Member States may provide for an obligation to pay damages in connection with interim relief measures which pertains also to the exercise of rights conferred by European Union law. This applies in particular in proceedings between private parties as a measure of that kind necessarily interferes with the rights of the opposing party.

94. In that regard, the United Kingdom refers correctly to the protection of the property rights of the beneficiary of the contested approval.

95. I should like to point out that an approval that may still be challenged before the courts does not establish property rights. (55) Prior to that, what is involved is simply the prospect of being able to exploit the approval. Mere prospects, however, are not protected as property rights, (56) at any rate when their realisation is contested. (57) On the other hand, the obligations imposed as a result of the court proceedings may limit the exercise of certain property rights, (58) for example, by preventing land from being used in a certain manner for the implementation of a project.

96. However, protection of the environment is capable of justifying a restriction on the use of the right to property. (59) This applies also to interim measures to preserve the status quo whilst a court reviews an environmental law permit. The restriction on the right to property and other freedoms is founded primarily on the fact that the projects which it is sought to pursue require approval on grounds of environmental protection. If the requirement for approval is justified, that justification extends in principle also to interim relief with a view to preventing the *de facto* pre-emption of the main proceedings while the approval is subject to ongoing judicial review.

97. Moreover, it is likely that similar considerations underlie the judicial practice mentioned by the United Kingdom not to require an undertaking in damages in most public law cases.

98. In the proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive, additional weight is attached to those considerations as the public interest in the enforcement of environmental law is given *special* recognition there. Consequently, applicants in those proceedings deserve protection against excessive or prohibitive costs which goes further than the protection afforded by the principle of effectiveness and the right to effective legal protection. (60)

99. This conclusion is not called into question by the judgment in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, (61) which the United Kingdom cites. Admittedly, in that judgment, the Court called for a guarantee to be provided in the event that interim relief involves a financial risk for the European Union. However, that decision cannot be applied to proceedings covered by Article 10a of the EIA Directive and Article 15a of the IPPC Directive.

100. The action in that case did not seek to pursue the public interest in the enforcement of environmental law but was directed – in pursuit simply of the applicant's own private interest – against a levy payable to the then Community. Moreover, the guarantee in question was intended primarily to ensure payment of the contested levy itself and not to compensate for any losses arising from the delay caused by the interim relief. Losses of that kind would most probably have been covered by the default interest ordinarily payable.

101. None the less, the possibility of taking action against the misuse of interim relief is not precluded. However, the need to prevent or punish misuse does not require the grant of interim relief to be conditional on an undertaking to pay damages. Instead, in cases of that kind, it would suffice to refuse the interim relief or, where the misuse is discovered only subsequently, to grant damages on the normal basis.

102. Consequently, the United Kingdom has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35 by reason of the fact that the courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary

measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages.

C – *Application*

103. In addition to its allegation of a failure to transpose Articles 3(7) and 4(4) of Directive 2003/35, the Commission contests the application of those provisions by the courts of the United Kingdom.

104. This plea cannot be interpreted to mean that the Commission challenges certain individual court decisions as infringing Articles 3(7) and 4(4) of Directive 2003/35. The information provided by the Commission in relation to each case is inadequate to assess whether, in fact, those provisions have been infringed.

105. However, one could understand the Commission to mean that by this plea it criticises a practice of the United Kingdom courts that is, to some degree, of a consistent and general nature. (62) For this it would have to adduce sufficient evidence to show that in the Member State concerned a repeated and persistent practice has developed. (63)

106. At first sight, the findings concerning the inadequate transposition of Articles 3(7) and 4(4) of Directive 2003/35 through case-law appear to indicate that the United Kingdom courts consistently infringe those provisions.

107. However, that conclusion does not bear closer examination. The findings at issue rest on the fact that the case-law does not ensure the necessary costs protection with sufficient clarity and precision. On the other hand, a consistent practice would presuppose that the judgments also ultimately infringe the requirement for costs protection.

108. The Commission has not proved this. Although it mentions numerous individual court decisions, what that argument shows, above all, is that these decisions do not yet adequately transpose costs protection under Articles 3(7) and 4(4) of Directive 2003/35 in the United Kingdom. As I set out above, the central problem in that connection is the discretion afforded to the courts in the relevant matters and the resulting uncertainty in relation to costs.

109. On the other hand, the Commission has not attempted to prove on the basis of the various individual decisions certain consistent practices that are incompatible with specific requirements of costs protection.

110. The Commission comes closest to attempting such proof when it criticises four of the judgments cited on the ground that the applicants were ordered to bear certain costs by the United Kingdom courts. (64)

111. However, that argument is inadequate to prove that it is a consistent practice of the United Kingdom courts to order the applicants covered by Articles 3(7) and 4(4) of Directive 2003/35 to bear excessive or prohibitive costs.

112. First, four decisions from two jurisdictions of the United Kingdom are insufficient to prove a consistent practice. Second, the Commission also does not describe those cases precisely enough to assess whether the costs awarded in each case were in fact too high.

113. If, by its allegation that Articles 3(7) and 4(4) of Directive 2003/35 are not properly applied, the Commission wishes to challenge a consistent and general practice of the United Kingdom courts, that plea must be rejected.

114. I presume, however, that this plea simply contests the inadequate transposition of Articles 3(7) and 4(4) of Directive 2003/35 by a system of judicial precedent. (65) For that reason, a separate rejection of the plea is unnecessary.

## V – Costs

115. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for the United Kingdom to be ordered to pay the costs and the United Kingdom has essentially been unsuccessful, the latter must be ordered to pay the costs. Under Article 140(1) of the Rules of Procedure, Ireland and the Kingdom of Denmark, which have intervened in the case, must bear their own costs.

## VI – Conclusion

116. I propose that the Court should:

(1) declare that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 3(7) and 4(4) of Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, by reason of the fact that:

– the courts' discretion to grant costs protection is not tied to the objective of costs protection and the criteria to be applied in that connection are incompatible with those provisions,

– in proceedings covered by those provisions the courts may order reciprocal costs protection which prevents the costs of a reasonable success fee for

the representation of the persons and associations covered by those provisions from being imposed upon the opposing party if the action is successful, and

– the courts in England and Wales, as well as Gibraltar, and in Northern Ireland may make necessary measures granting interim relief in proceedings covered by those provisions conditional on an undertaking to pay damages;

(2) order the United Kingdom to pay the Commission's costs and order the Kingdom of Denmark and Ireland each to bear their own costs.

---

1 – Original language: German.

---

2 – Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4).

---

3 – Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17).

---

4 – Case C-260/11 [2013] ECR I-0000.

---

5 – Approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

---

6 – Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

---

7 – Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8) and replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

---

8 – Cited in footnote 4.

---

9 – Cited in footnote 4.

---

10 – *Edwards*, cited in footnote 4, paragraph 35.

---

11 – *Edwards*, cited in footnote 4, paragraphs 27 and 28.

---

12 – *Edwards*, cited in footnote 4, paragraph 45.

---

13 – On the possibility of more extensive rights under the third paragraph of Article 47 of the Charter of Fundamental Rights, see my Opinion in *Edwards*, cited above in footnote 4, point 38, and Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 60 and 61.

---

14 – *Edwards*, cited in footnote 4, paragraph 40.

---

15 – Cf. *Edwards*, cited in footnote 4, paragraph 42, and my Opinion in that case, point 47.

---

16 – Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraphs 93 and 94.

---

17 – Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 157, and Case C-535/07 *Commission* v *Austria* [2010] ECR I-9483, paragraph 60.

---

18 – Case 252/85 *Commission* v *France* [1988] ECR 2243, paragraph 5; Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939, paragraph 89; and judgment of 27 October 2011 in Case C-311/10 *Commission* v *Poland*, paragraph 40.

---

19 – Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others* [1992] ECR I-6577, paragraph 39; Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraph 36; Case C-129/00 *Commission* v *Italy* [2003] ECR I-14637, paragraph 30; and *Commission* v *Ireland*, cited in footnote 17, paragraph 166.

---

20 – My Opinion in *Commission* v *Ireland*, cited in footnote 16, point 99 and the case-law referred to.

---

21 – Cf. Case C-456/08 *Commission* v *Ireland* [2010] ECR I-859, paragraph 65, and my Opinion in that case, point 60 et seq.

---

22 – Cf. the Opinion of Advocate General Mengozzi in Case C-127/05 *Commission* v *United Kingdom* [2007] ECR I-4619, point 130 et seq.

---

23 – *R (on the application of Corner House Research)* v *Secretary of State for Trade & Industry* [2005] 1 WLR 2600, paragraphs 72 and 74.

---

24 – *Edwards*, cited in footnote 4, paragraphs 30, 37 and 38, and my Opinion in that case, points 19 et seq. and 45 et seq.

---

25 – Cf. *Edwards*, cited in footnote 4, in particular paragraph 40, and my Opinion in that case, in particular point 36.

---

26 – *Edwards*, cited in footnote 4, in particular paragraphs 35 and 40, and my Opinion in that case, in particular point 24.

---

27 – *Corner House*, cited in footnote 23, paragraph 72.

---

28 – Judgment of the Court of Appeal in *Morgan and Baker* v *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, paragraph 47(ii).

---

29 – Judgment of the Court of Appeal in *R (on the application of Garner)* v *Elmbridge Borough Council and Others* [2010] EWCA Civ 1006, paragraph 50.

---

30 – *Edwards*, cited in footnote 4, paragraphs 35 and 39.

---

31 – Defence, paragraph 70, which makes reference to *Garner*, cited in footnote 29, paragraph 39. See also paragraph 44 of the defence.

---

32 – *Edwards*, cited in footnote 4, paragraph 33.

---

33 – Judgment cited in footnote 28, paragraph 35 et seq.

---

34 – *Edwards*, cited in footnote 4, paragraph 40.

---

35 – *Edwards*, cited in footnote 4, paragraph 43.

---

36 – P. 12 (p. 111 of the annexes to the Commission's application).

---

37 – Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 55; Case C-358/01 *Commission* v *Spain* [2003] ECR I-13145, paragraph 27; and Case C-186/06 *Commission* v *Spain* [2007] ECR I-12093, paragraph 15.

---

38 – *Commission* v *Germany*, cited in footnote 37, paragraph 56; Case C-358/01 *Commission* v *Spain*, cited in footnote 37, paragraph 28; and Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 24.

---

39 – *Commission* v *Germany*, cited in footnote 37, paragraph 54; Case C-358/01 *Commission* v *Spain*, cited in footnote 37, paragraph 29; and Case C-20/09 *Commission* v *Portugal* [2011] ECR I-2637, paragraph 20.

---

40 – *Edwards*, cited in footnote 4, paragraphs 27 and 28.

---

41 – Reply of 20 December 2007, paragraph 31 (p. 83 of the annexes to the application).

---

42 – On the possible threat to the freedom of the press as a result of excessive success fees, see the judgment of the European Court of Human Rights in *MGNLimited v. United Kingdom*, no. 39401/04, § 192 et seq.

---

43 – Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraphs 29 to 31.

---

44 – Cf., on the exemption of the prosecuting authorities from the liability to pay litigation costs, the judgment of the European Court of Human Rights in *Stankiewiczv.Poland*, no. 46917/99, § 60 et seq., ECHR 2006-VI.

---

45 – Cf. my Opinion in *Edwards*, cited in footnote 4, point 40 et seq.

---

46 – It appears from paragraph 26 of the Commission's reply that a strategy of that kind may have been pursued in *R (on the application of Birch)* v *Barnsley MBC*.

---

47 – In German law of civil procedure, Paragraph 945 of the Zivilprozessordnung (Code of Civil Procedure) establishes a right to damages of that kind. However, following the judgment of the Bundesgerichtshof (Federal Court of Justice) of 23 September 1980 (Case VI ZR 165/78, *Neue Juristische Wochenschrift* 1981, p. 349) that right does not apply to loss and damage caused to third party interveners in the procedure under administrative law.

---

48 – Case C-416/10 *Križan and Others* [2013] ECR I-0000, paragraph 109.

---

49 – The German version of the Convention, which under Article 22 of the Convention is not an authentic text, misleadingly refers in this regard to 'vorläufige[r] Rechtsschutz'. The authentic versions in English and French use the terms 'injunctive relief' and 'redressement par injonction'.

---

50 – P. 133 of the English version and p. 170 of the French version (both available at http://www.unece.org/index.php?id=21437). According to Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 27, the implementation guide can be taken into consideration but is not binding.

---

51 – *Edwards*, cited in footnote 4, paragraphs 27 and 28.

---

52 – *Edwards*, cited in footnote 4, paragraph 35.

---

53 – See *Križan and Others*, cited in footnote 48, paragraph 106.

---

54 – *DEB*, cited in footnote 13, paragraphs 28 and 29, and Case C-93/12 *Agrokonsulting* [2013] ECR I-0000, paragraphs 59 and 60.

55 – See my Opinion in *Križan and Others*, cited in footnote 48, point 181.

56 – Cf. Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14; Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraphs 79 and 80; and the judgment of the European Court of Human Rights in *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 51, Series A no. 222.

57 – Judgment of the European Court of Human Rights in *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, §§ 64 and 65, ECHR 2007-I.

58 – *Križan and Others*, cited in footnote 48, paragraph 112.

59 – *Križan and Others*, cited in footnote 48, paragraph 114.

60 – See my Opinion in *Edwards*, cited in footnote 4, point 39 et seq.

61 – Joined Cases C-143/88 and C-92/89 [1991] ECR I-415, paragraph 32.

62 – See Case C-387/99 *Commission* v *Germany* [2004] ECR I-3751, paragraph 42; Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 28; and Case C-88/07 *Commission* v *Spain* [2009] ECR I-1353, paragraph 54.

63 – *Commission* v *Ireland*, cited in footnote 62, paragraph 47.

64 – Paragraphs 122 and 123 of the Commission's application.

65 – See above, point 41.

Bottom of Form

V

*(Announcements)*

# COURT PROCEEDINGS

# COURT OF JUSTICE

**Judgment of the Court (Grand Chamber) of 15 January 2013 (request for a preliminary ruling from the Najvyšší súd Slovenskej republiky — Slovakia) — Jozef Križan and Others v Slovenská inšpekcia životného prostredia**

**(Case C-416/10)** [1]

***(Article 267 TFEU — Annulment of a judicial decision — Referral back to the court concerned — Obligation to comply with the annulment decision — Request for a preliminary ruling — Whether possible — Environment — Aarhus Convention — Directive 85/337/EEC — Directive 96/61/EC — Public participation in the decision-making process — Construction of a landfill site — Application for a permit — Trade secrets — Non-communication of a document to the public — Effect on the validity of the decision authorising the landfill site — Rectification — Assessment of the environmental impact of the project — Final opinion prior to accession of the Member State to the European Union — Application in time of Directive 85/337 — Effective legal remedy — Interim measures — Suspension of implementation — Annulment of the contested decision — Right to property — Interference)***

(2013/C 63/02)

*Language of the case: Slovak*

**Referring court**

Najvyšší súd Slovenskej republiky

**Parties to the main proceedings**

*Appellants:* Jozef Križan, Katarína Aksamitová, Gabriela Kokošková, Jozef Kokoška, Martina Strezenická, Jozef Strezenický, Peter Šidlo, Lenka Šidlová, Drahoslava Šidlová, Milan Šimovič, Elena Šimovičová, Stanislav Aksamit, Tomáš Pitoňák, Petra Pitoňáková, Mária Križanová, Vladimír Mizerák, Ľubomír Pevný, Darina Brunovská, Mária Fišerová, Lenka Fišerová, Peter Zvolenský, Katarína Zvolenská, Kamila Mizeráková, Anna Konfráterová, Milan Konfráter, Michaela Konfráterová, Tomáš Pavlovič, Jozef Krivošík, Ema Krivošíková, Eva Pavlovičová, Jaroslav Pavlovič, Pavol Šipoš, Martina Šipošová, Jozefína Šipošová, Zuzana Šipošová, Ivan Čaputa, Zuzana Čaputová, Štefan Strapák, Katarína Strapáková, František Slezák, Agnesa Slezáková, Vincent Zimka, Elena Zimková, Marián Šipoš, Mesto Pezinok

*Respondent:* Slovenská inšpekcia životného prostredia

*Intervener:* Ekologická skládka as

**Re:**

Request for a preliminary ruling — Najvyšší súd Slovenskej republiky — Interpretation of Articles 191(1) and (2) TFEU and 267 TFEU, Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), in particular Articles 1, 6, 15 and 15a, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), in particular Articles 2 and 10a, and Articles 6 and 9 of the (Aarhus) Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on behalf of the European Community by Council Decision of 17 February 2005 (OJ 2005 L 124, p. 1) — Establishment of a landfill site — Assessment of the environmental effects of the project — Public participation in the decision-making process — Possibility for a court of a Member State to make a reference to the Court of Justice for a preliminary ruling on the application, of its own motion, of European Union law on the protection of the environment, even if the Constitutional Court of that State has excluded such application by a decision binding on the referring court

**Operative part of the judgment**

1. *Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice of the European Union even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.*

2. *Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006, must be interpreted as meaning that it:*

— *requires that the public concerned have access to an urban planning decision, such as that at issue in the main proceedings, from the beginning of the authorisation procedure for the installation concerned,*

— *does not allow the competent national authorities to refuse the public concerned access to such a decision by relying on the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, and*

— *does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned an urban planning decision, such as that at issue in the main proceedings, during the administrative procedure at first instance, provided that all options and solutions remain possible and that regularisation at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine.*

3. *Article 15a of Directive 96/61, as amended by Regulation No 166/2006, must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that directive, pending the final decision.*

4. *A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61, as amended by Regulation No 166/2006, and from Article 9(2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.*

(1) OJ C 301, 6.11.2010.

## Judgment of the Court (First Chamber) of 17 January 2013 (request for a preliminary ruling from the Oberster Gerichtshof — Austria) — Georg Köck v Schutzverband gegen unlauteren Wettbewerb

**(Case C-206/11)** (1)

***(Consumer protection — Unfair business-to-consumer commercial practices in the internal market — Legislation of a Member State providing for prior authorisation of announcements of sales)***

(2013/C 63/03)

*Language of the case: German*

### Referring court

Oberster Gerichtshof

### Parties to the main proceedings

*Applicant:* Georg Köck

*Defendant:* Schutzverband gegen unlauteren Wettbewerb

### Re:

Request for a preliminary ruling — Oberster Gerichtshof — Interpretation of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), in particular Articles 3(1) and 5(5) — Legislation of a Member State prescribing prior authorisation for the announcement of a clearance sale

### Operative part of the judgment

*Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to that directive on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of that directive.*

(1) OJ C 226, 30.7.2011.

at issue are not strictly identical. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

5. The third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

In Case 283/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the First Civil Division of the Corte Suprema di Cassazione [Supreme Court of Cassation] for a preliminary ruling in the proceedings pending before that court

SRL CILFIT — in liquidation — and 54 Others, Rome,

v

MINISTRY OF HEALTH, in the person of the Minister, Rome,

and

LANIFICIO DI GAVARDO SPA, Milan,

v

MINISTRY OF HEALTH, in the person of the Minister, Rome,

on the interpretation of the third paragraph of Article 177 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

## JUDGMENT

## Facts and issues

### I — Facts and procedure

By a summons served on the Italian Minister for Health on 18 September 1974, the plaintiffs in the main proceedings, which are textile firms, contended that since the adoption of Law No 30 of 30 January 1968 they had paid, by way of fixed health inspection levy, LIT 700 per quintal of imported wool, until the entry into force of Law No 1239 of 30 December 1970, which amended the levy, although they should have been required to pay only a sum of LIT 70 per quintal "according to the correct interpretation of the Law of 30 January 1968 and, in any event, according to the authentic interpretation of that law given by Law No 1239 of 1970".

After the Tribunal di Roma [District Court, Rome] had dismissed their applications by judgment of 27 October 1976, the plaintiffs in the main proceedings lodged an appeal based on the argument rejected by the Tribunale. They also contended that Law No 1968 was inapplicable as a result of the adoption of Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (Official Journal, English Special Edition 1968 (I) p. 209).

By judgment of 12 December 1978, the Corte d'Appello [Court of Appeal], Rome, rejected all the submissions relied upon by the plaintiffs and accepted the Ministry of Health's argument concerning the compatibility of Law No 30 of 1968 with the aforesaid regulation.

On 4 October 1979, the plaintiff in the main proceedings appealed against that judgment. In support of its submission that the appeal should be dismissed, the Ministry of Health, sharing the view held by the Court of Appeal, argued that since wool is not included in Annex II to the EEC Treaty, it is not subject to the common organization of the markets and cannot therefore come within the scope of the regulation in question.

The Ministry of Health urged the Court of Cassation to "decide the case along the lines suggested on the ground that the factual circumstances are so obvious as to rule out the possibility of their being capable of any other interpretation and that obviates the need to refer the matter for a preliminary ruling to the Court of Justice of the European Communities".

The Court of Cassation took the view that counsel for the Ministry of Health had raised a question concerning the interpretation of Article 177 of the Treaty in so far as he contended that that provision must be understood as meaning that the Court of Cassation, against whose decisions there is no judicial remedy under national law, is not obliged to refer a matter to the Court of Justice "when the solution of a question on the interpretation of acts performed by the Community institutions is so obvious as to preclude the very possibility of their being open to another interpretation".

Therefore the Court of Cassation, by order of 27 March 1981, stayed the proceedings and submitted to the Court of Justice a reference for a preliminary ruling on the following question:

"Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?"

The order making the reference was registered at the Court on 30 October 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main proceedings, represented by G. Scarpa, G. Stella Richter, G. M. Ubertazzi and F. Capelli; by the Government of the Kingdom of Denmark, represented by its Legal Adviser, Laurids Mikaelsen, acting as Agent; by the Government of the Italian Republic, represented by S. Laporta, Avvocato dello Stato, and by A. Squillante, acting as Agent; and by the Commission of the European Communities, represented by G. Olmi, Deputy Director General, and Miss Mary Minch, a member of the Commission's Legal Department, acting as Agents.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

## II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

### *A — Observations of the plaintiffs in the main proceedings*

The *plaintiffs in the main proceedings* define the problem raised in the question submitted by the national court and express the view that it is concerned solely with the following three points:

"Does the obligation to make a reference for a preliminary ruling depend on a decision of the court hearing the case which establishes that the question raised before it is concerned with the interpretation rather than the application of Community law?

Must the Court of Cassation seek a ruling on interpretation from the Court of Justice even though the matter is not in any doubt?

Irrespective of the clarity of the text, must the question of interpretation appear *prima facie* to be substantially justified, fair and plausible?"

(a) Questions concerning interpretation and questions concerning application

The plaintiffs observe that the EEC Treaty is concerned only with questions of interpretation; therefore, the courts referred to in the third paragraph of Article 177 are required to make a reference for a preliminary ruling only in respect of such questions. Thus it is for those courts to determine beforehand whether the question raised before them is concerned with interpretation or rather with application.

However, in disputes brought before them national courts must apply Community law and it is for that purpose that they may refer questions concerning its interpretation to the Court of Justice.

Thus any doubts concerning the application of Community law relate above all to its interpretation with the result that the court would have to look beyond the external appearance of the question raised by the parties regarding the application of Community law "and discover the underlying question of interpretation".

(b) Must the Court of Cassation seek a ruling on interpretation from the Court even though the matter is not in any doubt?

The plaintiffs consider, in the first place, that under national law the maxim *in claris non fit interpretatio* "does not authorize the court to confine itself to the apparent meaning of a provision, on the basis of its literal purport", but implies that "if a provision is clear and unequivocal and there is no possible scope for divergence between the letter and the spirit, then (and only then) is an interpretation other than that suggested by the wording of the provision prohibited".

Next, the plaintiffs maintain that the rules of interpretation of classical international law which enable the principle of the *acte clair* to be applied should not be followed in Community law on the ground that Community law is a legal system in evolution and should be interpreted in a sense "which transcends the wording of the various specific provisions" and is therefore teleological, thus ensuring that the system is effectively applied.

Furthermore, the expressions used in legislation are not sufficiently clear to eliminate the risk of differing interpretations, especially since in the case of Community law the national court has to

overcome numerous difficulties resulting from the technical nature thereof, from the fact that the national court does not always have access to all the sources which make up the Community legal system and from the uncertainties "due to the sometimes complex interaction of national law and Community law".

In view of those difficulties, the courts referred to in the third paragraph of Article 177 are under an obligation to make a reference "whenever the interpretation of a Community provision is necessary, even though the meaning is apparently clear".

(c) Must the question of interpretation appear *prima facie* to be substantially justified, fair and plausible?

The last paragraph of Article 177 requires courts of last instance to bring a matter before the Court of Justice "if and only if 'a question' is raised before them".

The word "question" should be understood in the broad sense, that is to say not necessarily as referring to a disagreement between the parties but as meaning that an interpretative doubt in a case constitutes a necessary and sufficient condition for creating an obligation to make a reference to the Court of Justice.

However, the purpose of the question submitted by the Court of Cassation is not so much to ascertain the meaning of the term in question as to determine whether it is "reasonable" to use it. One answer may be obtained from the wording of the third paragraph of Article 177 "which makes no distinction between questions which are reasonable and those which are not".

A comparative study of the second and third paragraphs of Article 177 lends weight to that initial answer since both those provisions lead to the adoption of an interpretation designed to widen the obligation to make a reference, in other words to deprive the national court or tribunal referred to in the third paragraph of any discretion.

That argument is also supported by the objective of Article 177, which is to ensure the uniform application of Community law in the Member States, especially since that objective is constantly growing in importance and since the task of the Court of Cassation is, *inter alia*, to ensure "that the law is uniformly applied".

Moreover, the decisions of the Court of Justice are also consistent with a broad interpretation of Article 177; in particular in its judgment of 27 March 1953 in Joined Cases 28 to 30/62 *Da Costa en Schaake* [1963] ECR 31, the Court held that "the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation raised before them".

That view is endorsed by leading academic lawyers and finally, as regards judicial policy, there would be a "serious risk" in allowing national supreme courts to determine whether questions raised before them are reasonable, inasmuch as they might inhibit or distort the process of integration between Community law and national law. To allow national supreme courts such a discretion would

also involve "the risk of creating an atmosphere of tension between national courts and Community institutions" and might promote discord.

*B — Observations of the Italian Government*

After outlining the facts of the case, the *Italian Government* observes that it stated before the Court of Cassation that there was in the present case "a factual circumstance so clear and so important as to preclude the very possibility of there being any interpretative doubt, thus making it unnecessary to refer the matter for a preliminary ruling to the Court of Justice of the European Communities".

The Italian Government considers that, in spite of the differences in the wording of the second and third paragraphs of Article 177, the third paragraph is no different "in scope and that consequently the purpose of that provision is not to deprive the national court of last instance of the power to determine whether a preliminary ruling is necessary".

The authors of the Treaty considered it appropriate to provide for a filter for questions of interpretation which might be submitted to the Court, as is shown by the retention of the ordinary procedure for making a reference to the Court even in proceedings before the national court of last instance.

Furthermore, when the Court of Justice stated in the *Da Costa en Schaake* judgment cited above that the obligation imposed by the third paragraph of Article 177 upon national courts or tribunals of last instance may be deprived of its purpose and emptied of its substance by the authority of an interpretation given by the Court in an earlier preliminary ruling in a similar case, it recognized that a national court of last instance is empowered to define the scope of the proceedings and thus to disclaim jurisdiction over a question or problem of interpretation concerning Community law by relying on the answer given by the Court to the same question.

Since Community law forms part of the legal system of each of the Member States "it would be absurd to take the view that a national court is prohibited from interpreting a provision which it is nevertheless obliged to apply". That consideration disposes of the argument that the national court of last instance must confine itself to taking note of the existence of arguments put forward by the parties which are based on Community law and referring them to the Court of Justice for scrutiny. That court must therefore formulate a question which is capable of being referred to the Court of Justice and, to that end, it must determine whether an interpretative doubt actually exists; that is supported by the opinion of Mr Advocate General Lagrange in the *Da Costa en Schaake* case (cited above), in which he pointed out that "before the procedure of referring a question for a preliminary ruling on interpretation can be set in motion, there must clearly be a question".

Thus, according to the Italian Government, a provision may be described as "clear" not only when it has already been interpreted by the Court of Justice in connection with a related question but also "when it cannot reasonably have more than one meaning having regard to its letter and context".

In the Italian Government's opinion, it seems highly improbable that the national court of last instance has, in Community matters, been divested of

some of its conventional instruments of interpretation and must therefore restrict itself exclusively to the letter of a provision in order to determine whether or not the meaning is obscure, whilst refraining *a priori* from considering any lingering doubts merely by comparing the results of a literal interpretation with those which a logical and systematic interpretation would yield.

Therefore it must be acknowledged that the provisions of Article 177 imply the need for an effective filter for the reference of questions of interpretation to the Court. It necessarily follows that the national court of last instance must give proper consideration to the question whether or not a genuine doubt exists.

It remains to define the limits of the court's discretion in this matter. The question is more complex in theory than it is in practice, at least at the present stage of development of Community law and given the degree of "Community awareness" attained in each of the Member States. Furthermore, the objective embodied in Article 177 of achieving a uniform interpretation of Community law and "the notion that any resistance will ultimately be overcome by the force of law" raise the question of the extent to which in practice a national court of last instance may deny in good faith the existence of a genuine preliminary question.

The Italian Government therefore proposes that the answer to the question submitted should be "that the EEC Treaty requires national courts of last instance to seek a preliminary ruling from the Court of Justice in cases in which, after due consideration, they recognize that the question of interpretation raised before them is not manifestly unfounded".

*C — Observations of the Danish Government*

After describing the objective of Article 177 and the way in which it operates the *Danish Government* expresses the view that the third paragraph of that article "cannot be understood as meaning that a national court against whose decisions there is no judicial remedy must refer to the Court of Justice any question concerning the interpretation or validity of a provision of Community law merely because the parties wish it to do so".

Such an approach would transform that article into a remedy available to private individuals, which is by no means the purpose of that provision.

It is clear from the Court's judgment of 22 November 1978 in Case 93/78 *Mattheus* ([1978] ECR 2203) that "national courts are under an obligation to determine whether it is necessary to make a reference to the Court of Justice of the European Communities". Accordingly, it is for the national court to decide whether a doubt really exists which justifies referring a question to the Court of Justice for a preliminary ruling; that view is supported by the Court's judgment of 16 December 1981 in Case 244/80 *Foglia* v *Novello* ([1981] ECR 3045).

Next, the Danish Government, like the Italian Government, maintains that the decisions of the Court, in particular the *Da Costa en Schaake* judgment cited above, reaffirm that the obligation to make a reference to the Court of Justice for a preliminary ruling, as provided for

by the third paragraph of Article 177, is not an absolute one.

The Danish Government observes that even where there are no previous decisions by the Court, the national court may none the less decide a point directly, without requesting a preliminary ruling, if the provision of Community law at issue does not give rise to any difficulties of interpretation.

With regard to the theory of the *acte clair,* the Danish Government recalls that the Commission, in reply to Written Question No 608/78 (Official Journal 1979, C 28 pp. 8 and 9) stated that the courts "may decline to make a reference and decide the matter themselves in cases where such questions are perfectly straightforward and the answer is obvious to any lawyer with a modicum of experience".

The Danish Government informs the Court that the above criterion is also applied by the Danish courts, including courts of last instance.

It observes that, in its opinion, "a theoretical interpretative doubt does not in itself justify systematic recourse to the procedure for obtaining a preliminary ruling. For that, there must be a genuine interpretative doubt".

If, however, the *acte clair* test is to be adopted it must be applied with caution and the national supreme court must take a number of factors into account, especially as the provisions of Community law are drafted in several languages and the aim of Article 177 is to ensure the uniform application of Community law. In conclusion, therefore, that national court may not, on its own authority, set aside a Community measure which it regards as unlawful; similarly, it may not discard an interpretation previously adopted by the Court of Justice.

The Danish Government therefore proposes that the Court should give the following answer to the question referred to it:

"National courts against whose decisions there is no judicial remedy are under an obligation to refer to the Court of Justice of the European Communities for a preliminary ruling questions on the validity or interpretation of Community law if they consider that a decision on the question is necessary to enable them to give judgment in a particular case. It is neither necessary nor sufficient, for the purposes of that obligation, for a party to make a request to that effect. However, a court against whose decisions there is no judicial remedy and whose authority is such that its decisions are capable of constituting precedents must, for reasons based on the need to apply Community law in a uniform manner, avoid resolving such questions itself wherever possible".

*D — Observations of the Commission*

As a preliminary remark, the *Commission* expresses the view that the question submitted to the Court of Justice by the Italian Supreme Court of Cassation "is fundamental".

In the first place, the Commission relies on the theory of the *acte clair* which states that "there must be a genuine difficulty, raised by the parties or perceived by the Court itself, such as to insinuate a doubt into an alert mind"; it

also refers to a similar concept which exists in Italy and in the Federal Republic of Germany regarding the obligation on the part of courts to refer to the constitutional court questions relating to the constitutionality of national legislation. The position in Italy and in the Federal Republic of Germany is that "a court is not obliged to refer a matter to the constitutional court if it considers that the grounds relied upon before it for declaring a measure unconstitutional are manifestly devoid of all substance".

Next, after examining the principal arguments for and against the view that a court of last instance has a margin of discretion in relation to Community law, the Commission considers that such a view is acceptable under Community law.

In this connection it recalls that in its reply to Written Question No 608/78 by Mr Krieg (Official Journal 1979 C 28) it has already stated that in its opinion:

"National courts are not required, under Article 177 of the EEC Treaty, to stay proceedings and systematically refer to the Court of Justice all questions concerning the interpretation of Community law which are submitted to them. They can decline to make a reference and decide the matter themselves in cases where such questions are perfectly straightforward and the answer is obvious to any lawyer with a modicum of experience."

After analysing the third paragraph of Article 177, the Commission expresses the conviction that its earlier standpoint is correct. It takes the view that before there can be an obligation to make a reference for a preliminary ruling a question must arise before the national court of last instance and that question must relate to the interpretation of a text. According to the Commission, the word "question" is synonymous with "problem" and the verb "to interpret" means to comprehend and explain the wording of a text or a speech, the meaning of which is obscure or which creates uncertainty".

If therefore a provision is quite unequivocal "no question can arise and there is no need to seek an interpretation".

Admittedly, it is true that interpretation is a continuing process, even in relation to provisions which are unequivocal and therefore immediately comprehensible, but "it is clear however that only genuine problems, intellectual difficulties which need to be overcome can form the subject-matter of the questions of interpretation referred to in the third paragraph of Article 177".

The discretion which the Commission thus attributes to the court hearing the case falls into the same category as the discretionary powers which have already been entrusted to it. National courts must therefore decide cases brought before them and apply Community law, whilst recognizing the jurisdiction of the Court of Justice to interpret Community law. The Court of Justice's recognition of the national court's margin of discretion "would bear witness to its confidence in national courts"; moreover, only in a spirit of mutual confidence can the procedures provided for by Article 177 be applied successfully.

Of course, mistakes may be made by national courts in interpreting a provision of Community law but, in the Court's opinion, the drawbacks which may result from such errors are limited and offset by the advantages, especially

for the proper administration of justice, of not compelling the courts of last instance of the Member States to refer to the Court of Justice all questions concerning provisions of Community law".

However, the Commission wishes to "emphasize categorically that, in view of the peculiarities of Community law, the national court's discretion in relation to Community law must be exercised only with the greatest caution".

The Commission recalls in this regard that Community legislation is drafted in seven languages and frequently reflects political compromises with the result that "the exercise of a discretion by a national court in relation to Community legislation calls for much greater caution than recourse to the theory of the *acte clair* in a national context". Thus, before it exercises its discretion, a national court must first and foremost acquaint itself with the decisions of the Court of Justice and, if the slightest doubt exists, the supreme court must refer the matter to the Court of Justice for a preliminary ruling.

In the Commission's opinion, the result would be that "cases in which it is legitimate to refrain from referring a matter to the Court of Justice would in practice be very few".

The Commission therefore proposes that, the question referred to the Court of Justice for a preliminary ruling should be answered as follows:

"Under the third paragraph of Article 177 of the EEC Treaty courts against whose decisions there is no judicial remedy under national law must refer to the Court of Justice any question raised before them regarding the meaning of a provision of Community law, unless they have established that that provision does not give rise to any reasonable interpretative doubt."

### III — Oral procedure

At the sitting on 8 June 1982, the plaintiffs in the main action, represented by G. M. Ubertazzi and F. Capelli, the Italian Government, represented by S. Laporta, Avvocato dello Stato, and the Commission of the European Communities, represented by G. Olmi, Deputy Director General of its Legal Department, and by Miss Mary Minch, a member of its Legal Department, acting as Agents, presented oral argument and replied to the questions put to them by the Court.

The Advocate General delivered his opinion at the sitting on 13 July 1982.

## Decision

1 By order of 27 March 1981, which was received at the Court on 31 October 1981, the Corte Suprema di Cassazione [Supreme Court of Cassation] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the third paragraph of Article 177 of the EEC Treaty.

2 That question was raised in connection with a dispute between wool importers and the Italian Ministry of Health concerning the payment of a fixed health inspection levy in respect of wool imported from outside the Community. The firms concerned relied on Regulation (EEC) No 827/68 of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (Official Journal, English Special Edition 1968 (I) p. 209). Article 2 (2) of that regulation prohibits Member States from levying any charge having an effect equivalent to a customs duty on imported "animal products", not specified or included elsewhere, classified under heading 05.15 of the Common Customs Tariff. Against that argument the Ministry for Health contended that wool is not included in Annex II to the Treaty and is therefore not subject to a common organization of agricultural markets.

3 The Ministry of Health infers from those circumstances that the answer to the question concerning the interpretation of the measure adopted by the Community institutions is so obvious as to rule out the possibility of there being any interpretative doubt and thus obviates the need to refer the matter to the Court of Justice for a preliminary ruling. However, the companies concerned maintain that since a question concerning the interpretation of a regulation has been raised before the Corte Suprema di Cassazione, against whose decisions there is no judicial remedy under national law, that court cannot, according to the terms of the third paragraph of Article 177, escape the obligation to bring the matter before the Court of Justice.

4 Faced with those conflicting arguments, the Corte Suprema di Cassazione referred to the Court the following question for a preliminary ruling:

"Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?"

5 In order to answer that question it is necessary to take account of the system established by Article 177, which confers jurisdiction on the Court of Justice to give preliminary rulings on, *inter alia,* the interpretation of the Treaty and the measures adopted by the institutions of the Community.

6 The second paragraph of that article provides that any court or tribunal of a Member State *may,* if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall,* bring the matter before the Court of Justice.

7 That obligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177.

8 In this connection, it is necessary to define the meaning for the purposes of Community law of the expression "where any such question is raised" in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.

9 In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

10 Secondly, it follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

11 If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

12 The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by the third paragraph of Article 177 might none the less be subject to certain restrictions.

13 It must be remembered in this connection that in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 *(Da Costa* v *Nederlandse Belastingadministratie* [1963] ECR 31) the Court ruled that: "Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

14 The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

15 However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

16 Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17 However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

18 To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

19 It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

20 Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

21 In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of

Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

## Costs

22 The costs incurred by the Italian Government, the Danish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Corte Suprema di Cassazione, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Corte Suprema di Cassazione by order of 27 March 1981, hereby rules:

**The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community**

**provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.**

| | | | |
|---|---|---|---|
| | Mertens de Wilmars | Bosco | Touffait |
| Due | Pescatore | Mackenzie Stuart | O'Keeffe |
| Koopmans | Everling | Chloros | Grévisse |

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

## OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 13 JULY 1982 [1]

*Mr President,*
*Members of the Court,*

The request for a preliminary ruling now before the Court concerns one of the provisions of the EEC Treaty relating to the powers of the Court, namely the third paragraph of Article 177. The Italian Corte Suprema di Cassazione [Supreme Court of Cassation] wishes to ascertain whether that provision lays down an obligation to submit a case to the Court of Justice which precludes the national court from determining whether the question raised is justified or whether, and if so within what limits, it makes that obligation conditional on the prior finding of a reasonable interpretative doubt.

I shall briefly summarize the facts of the case. In September 1974 a large number

1 — Translated from the Italian.

Joined Cases C-397/01 to C-403/01

Bernhard Pfeiffer and Others

v

Deutsches Rotes Kreuz, Kreisverband Waldshut eV

(Reference for a preliminary ruling from the Arbeitsgericht Lörrach)

(Social policy – Protection of the health and safety of workers – Directive 93/104/EC – Scope – Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross – Definition of 'road transport' – Maximum weekly working time – Principle – Direct effect – Derogation – Conditions)

## Summary of the Judgment

1. Social policy – Protection of the health and safety of workers – Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work – Directive 93/104 concerning certain aspects of the organisation of working time – Scope – Activity of emergency workers – Included – Activity not forming part of civil protection services or road transport excluded from such scope

   (Council Directives 89/391, Art. 2, and 93/104, Art. 1(3))

2. Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Maximum weekly working time – Derogation – Worker's consent – Employment contract referring to a collective agreement permitting the extension of that time – Insufficient

   (Council Directive 93/104, Art. 18(1)(b)(i))

3. Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Activity of emergency workers – National legislation permitting the extension of the maximum weekly working time by means of a collective or works agreement – Not permissible

   (Council Directive 93/104, Art. 6(2))

4. Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Article 6(2) – Direct effect – Powers and duties of the national court – Non-application of national provisions permitting the extension of the maximum weekly working time set by that article

   (Council Directive 93/104, Art. 6(2))

1. Article 2 of Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Directive 93/104 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, falls within the scope of those directives.

   In that regard, that activity does not come within the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 relating to certain specific activities within the public service. That exclusion was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in

cases the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

Likewise, the activity of emergency workers, even if it includes, at least in part, using a vehicle and accompanying a patient on his journey to hospital, cannot be regarded as 'road transport' and therefore must be excluded from the scope of Article 1(3) of Directive 93/104.

(see paras 55, 63, 72, 74, operative part 1)

2. The first indent of Article 18(1)(b)(i) of Directive 93/104 concerning certain aspects of the organisation of working time, which confers the right not to apply Article 6 of that directive containing the rule as to the maximum weekly working time, is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of that directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension, since it is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

(see paras 85-86, operative part 2)

3. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time must be interpreted as precluding legislation in a Member State the effect of which, as regards periods of duty time completed by emergency workers in the framework of an emergency medical service, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

First, it follows both from the wording of Article 6(2) of Directive 93/104 and from the purpose and scheme of that directive, that the 48-hour upper limit on weekly working time constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health, so that national legislation which authorises weekly working time in excess of 48 hours, including periods of duty time, is not compatible with the requirements of Article 6(2) of the directive. Second, periods of duty time completed by emergency workers must be taken into account in their totality in the calculation of maximum daily and weekly working time, regardless of the fact that they necessarily include periods of inactivity of varying length between calls.

(see paras 94-95, 100-101, 120, operative part 3)

4. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time fulfils all the conditions necessary for it to have direct effect, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum as regards average weekly working time. The fact that the directive leaves the Member States a degree of latitude to adopt rules in order to implement Article 6, and that it permits them to derogate from it, do not alter the precise and unconditional nature of Article 6(2).

Accordingly, when hearing a case between individuals, a national court, which is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by it, must do whatever lies within its jurisdiction to ensure that the maximum

period of weekly working time, which is set at 48 hours by the said Article 6(2), is not exceeded.

(see paras 104-106, 119-120, operative part 3)

JUDGMENT OF THE COURT (Grand Chamber)
5 October 2004(1)

(Social policy – Protection of the health and safety of workers – Directive 93/104/EC – Scope – Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross – Definition of 'road transport' – Maximum weekly working time – Principle – Direct effect – Derogation – Conditions)

In Joined Cases C-397/01 to C-403/01,REFERENCES for a preliminary ruling under Article 234 EC,from the Arbeitsgericht Lörrach (Germany), made by orders of 26 September 2001, received at the Court on 12 October 2001, in the proceedings

Bernhard Pfeiffer (C-397/01),Wilhelm Roith (C-398/01),Albert Süß (C-399/01),Michael Winter (C-400/01),Klaus Nestvogel (C-401/01),Roswitha Zeller (C-402/01),Matthias Döbele (C-403/01)

v

Deutsches Rotes Kreuz, Kreisverband Waldshut eV,

THE COURT (Grand Chamber),,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen (Rapporteur), F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure,after considering the observations submitted on behalf of:

–
Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler, Rechtsanwalt,

–
the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

after considering the observations submitted on behalf of:

–
Mr Pfeiffer, Mr Roith, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler,

–
Mr Süß and Mr Winter, by K. Lörcher, Gewerkschaftssekretär,

–
the German Government, by W.-D. Plessing, acting as Agent,

–
the French Government, by R. Abraham, G. de Bergues and C. Bergeot-Nunes, acting as Agents,

–
the Italian Government, by I.M. Braguglia, acting as Agent, and A. Cingolo, avvocato del Stato,

–
the United Kingdom Government, by C. Jackson, acting as Agent, and A. Dashwood, Barrister,

–
the Commission, by J. Sack and H. Kreppel,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2004,

gives the following

## Judgment

1
These references for a preliminary ruling concern the interpretation of Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and of Articles 1(3), 6 and 18(1)(b)(i) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2
The references were made to the Court in various sets of proceedings between (i) Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, who work or used to work as emergency workers, and (ii) Deutsches Rotes Kreuz, Kreisverband Waldshut eV (German Red Cross, Waldshut section ('Deutsches Rotes Kreuz')), a body which employs or employed the claimants in the main actions. The proceedings concern German legislation providing for weekly working time in excess of 48 hours.

## Legal framework

### Community legislation

3
Directives 89/391 and 93/104 were adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

4
Directive 89/391 is the framework directive which lays down general principles concerning the health and safety of workers. Those principles were subsequently developed by a series of specific directives, including Directive 93/104.

5
Article 2 of Directive 89/391 defines the scope of the directive as follows:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.’

6
Article 1 of Directive 93/104, entitled ‘Purpose and scope’, provides as follows:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training;

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.’

7
Under the heading ‘Definitions’, Article 2 of Directive 93/104 provides:

‘For the purposes of this Directive, the following definitions shall apply:

1. “working time” shall mean any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. “rest period” shall mean any period which is not working time;

…’

8
Section II of the directive lays down the measures which the Member States must take to ensure that all workers are afforded, inter alia, daily minimum rest periods and weekly rest periods and it also regulates maximum weekly working time.

9
So far as maximum weekly working time is concerned, Article 6 of Directive 93/104 provides:

‘Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

…

2. the average working time for each 7-day period, including overtime, does not exceed 48 hours.’

10
Article 15 of Directive 93/104 provides:

‘This Directive shall not affect Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.’

11
Article 16 of the directive provides:

‘Member States may lay down:

…

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

…’

12
Directive 93/104 sets out a set of exceptions to a number of its basic rules, in view of the specific features of certain activities and subject to compliance with certain conditions. In that connection, Article 17 provides:

‘1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a)
managing executives or other persons with autonomous decision-taking powers;

(b)
family workers; or

(c)
workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1 from Articles 3, 4, 5, 8 and 16:

…

(c)
in the case of activities involving the need for continuity of service or production, particularly;

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

…

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

…

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

…

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

…

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1 and 2.2 and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

…'

13
Article 18 of Directive 93/104 is worded as follows:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

– no employer requires a worker to work more than 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

– no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

– the employer keeps up-to-date records of all workers who carry out such work,

– the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

– the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

…'

National legislation

14
German labour law distinguishes between duty time ('Arbeitsbereitschaft'), on-call time ('Bereitschaftsdienst') and stand-by time ('Rufbereitschaft').

15
The three concepts are not defined by national legislation but their features derive from case-

law.

16
Duty time (‘Arbeitsbereitschaft’) covers the situation in which the worker must make himself available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to act immediately should the need arise.

17
While a worker is on call (‘Bereitschaftsdienst’), he must be present at a place determined by his employer, either on or outside the latter’s premises, and must keep himself available to take up his duties if so requested by his employer but he is authorised to rest or occupy himself as he sees fit as long as his services are not required.

18
Stand-by time (‘Rufbereitschaft’) is characterised by the fact that the worker is not obliged to remain waiting in a place designated by the employer: it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks.

19
Under German labour law only duty time (‘Arbeitsbereitschaft’) is, as a general rule, deemed to constitute full working time. Conversely, both on-call time (‘Bereitschaftsdienst’) and stand-by time (‘Rufbereitschaft’) are categorised as rest time, save for the part of the time during which the worker has in fact performed his professional tasks.

20
The German legislation on working time and rest periods is contained in the Arbeitszeitgesetz (Law on Working Time) of 6 June 1994 (BGBl. 1994 I, p. 1170; ‘the ArbZG’), which was enacted to transpose Directive 93/104.

21
Paragraph 2(1) of the ArbZG defines working time as the period between the beginning and end of work, with the exception of breaks.

22
Paragraph 3 of the ArbZG provides:

‘Employees’ daily working time must not exceed eight hours. It may be extended to a maximum of 10 hours but only on condition that an average 8-hour working day is not exceeded over 6 calendar months or 24 weeks.’

23
Paragraph 7 of the ArbZG is worded as follows:

‘(1) Under a collective agreement, or a works agreement based on a collective agreement, provision may be made:

1. by way of derogation from Paragraph 3,

   (a)
   to extend working time beyond 10 hours per day, even without offset, where working time regularly includes significant periods of duty time (“Arbeitsbereitschaft”),

   (b)

to determine a different period of offset,

(c)

to extend working time to 10 hours per day, without offset, for a maximum period of 60 days per year,

…'

24
Paragraph 25 of the ArbZG provides:

'Where, at the date of entry into force of this law, an existing collective agreement or one continuing to produce effects after that date contains derogating rules under Paragraph 7(1) and (2) …, which exceed the maximum limits laid down in the provisions cited, those rules shall not be affected. Works agreements based on collective agreements are deemed equivalent to collective agreements such as those mentioned in the first sentence …'

25
The Tarifvertrag über die Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes (Collective agreement on working conditions for German Red Cross employees, workers and apprentices; 'the DRK-TV') includes the following provision:

'Paragraph 14 Normal working time

(1)

Normal working time, exclusive of breaks, shall be on average 39 hours (from 1 April 1990 38 and a half hours) per week. As a general rule, the average weekly working time shall be calculated on the basis of a period of 26 weeks.

In the case of workers who work in rotas or on shifts a longer period may be set.

(2) Normal working time may be extended …

(a)

to 10 hours per day (49 hours per week on average) if it regularly includes duty time ("Arbeitsbereitschaft") of at least 2 hours per day on average:

(b)

to 11 hours per day (54 hours per week on average) if it regularly includes duty time ("Arbeitsbereitschaft") of at least 3 hours per day on average,

(c)

to 12 hours per day (60 hours per week on average) if the employee must merely be present at the work-place in order to carry out his duties should the need arise.

...

(5)

The employee shall be required, if so directed by his employer, to remain outside normal working hours in a particular place selected by the employer, from where he may be called to work if the need arises (on-call time, "Bereitschaftsdienst"). The employer may require such on-call service only when some work is expected but, on the basis of experience, work-free time will predominate.

...'

26
An observation in the following terms is made in respect of Paragraph 14(2) of the DRK-TV:

'Where Annex 2 concerning staff in the emergency and ambulance services applies, regard is to be had to the notice concerning Paragraph 14(2) of the [DRK-TV].'

27
Annex 2 includes special provisions under the collective agreement for staff in the emergency and ambulance services. The relevant notice provides that the maximum weekly working time of 54 hours provided for in Paragraph 14(2)(b) of the DRK-TV is to be progressively reduced. As a consequence, with effect from 1 January 1993, provision is made for the maximum period to fall from 54 to 49 hours.

## The main proceedings and the questions referred for a preliminary ruling

28
Seven cases have given rise to these references for a preliminary ruling.

29
According to the documents available to the Court, the Deutsches Rotes Kreuz operates inter alia the land-based emergency service in a part of the Landkreis of Waldshut. The Deutsches Rotes Kreuz maintains the stations at Waldshut (Germany), Dettighoffen (Germany) and Bettmaringen (Germany), which are manned round the clock, and a station at Lauchringen (Germany), which is manned for 12 hours per day. Land-based emergency rescue is carried out by means of ambulances and emergency medical vehicles. An ambulance crew consists of two paramedics, whilst an emergency medical vehicle consists of an emergency worker and a doctor. When they are alerted of an emergency, these vehicles go to the relevant place in order to provide medical assistance to the patients. Subsequently, the patients are usually taken to hospital.

30
Mr Pfeiffer and Mr Nestvogel were formally employed by the Deutsches Rotes Kreuz as emergency workers, whilst the other claimants in the main proceedings were still employed by that body at the time when their actions before the national court were commenced.

31
The parties to the main proceedings are at odds in essence over whether, in calculating the period of maximum weekly working time, account should be taken of periods of duty time ('Arbeitsbereitschaft') which the workers concerned have been required to do in the course of their employment in the service of the Deutsches Rotes Kreuz.

32
The actions brought by Mr Pfeiffer and Mr Nestvogel before the Arbeitsgericht Lörrach claim payment for hours they worked in excess of 48 hours per week. They claim that they were wrongly required to work more than 48 hours per week on average from June 2000 to March 2001. As a consequence, they asked the national court to order the Deutsches Rotes Kreuz to pay them DEM 4 335.45 gross (for 156.85 hours at the overtime rate of DEM 29.91 gross) and DEM 1 841.88 gross (for 66.35 hours at the overtime rate of DEM 27.76), together with interest for late payment.

33
As regards the actions brought by the other claimants in the proceedings before the national court, they seek to determine the maximum period which they must work per week for the Deutsches Rotes Kreuz.

34
The parties to the main proceedings agreed in their various contracts of employment that the DRK-TV should apply.

35
The Arbeitsgericht Lörrach found that, on the basis of the rules of the collective agreement, weekly working time in the emergency service operated by the Deutsches Rotes Kreuz was, on average, 49 hours. Normal working time was extended pursuant to Paragraph 14(2)(b) of the DRK-TV, given the obligation of those concerned to be available for duty ('Arbeitsbereitschaft') for at least 3 hours per day on average.

36
The claimants in the main proceedings submit that the provision made by the Deutsches Rotes Kreuz to set weekly working time at 49 hours is unlawful. They rely in that connection on Directive 93/104 and on the judgment in Case C-303/98 Simap [2000] ECR I-7963. In their submission, Paragraph 14(2)(b) of the DRK-TV infringes Community law by providing for working time in excess of 48 hours per week. Furthermore, the rules of the collective agreement are not permissible under the derogation provided for in Paragraph 7(1)(i)(a) of the ArbZG. Indeed, the claimants in the main proceedings argue that the ArbZG does not correctly implement the provisions of Directive 93/104 in that respect. Accordingly, they submit that the derogation in the ArbZG must be interpreted in conformity with Community law and that if it is not, it does not apply at all.

37
Conversely, the Deutsches Rotes Kreuz contends that the actions should be dismissed. It maintains inter alia that its rules on the extension of working time comply with national legislation and the collective agreements.

38
With these cases before it, the Arbeitsgericht Lörrach is in doubt, first, as to whether the activity of the claimants in the main proceedings falls within the scope of Directive 93/104.

39
In the first place, Article 1(3) of Directive 93/104, which refers, as regards the directive's scope, to Article 2 of Directive 89/391, excludes from that scope a number of areas to the extent to which characteristics peculiar to certain specific activities inevitably conflict with it. However, in the referring court's view, that exclusion is intended to cover only those activities which aim to secure public safety and order, which are indispensable to the common good or which, owing to their nature, do not lend themselves to planning. It mentions, by way of example, major catastrophies. By contrast, emergency services should not be excluded from the scope of the two directives, even though emergency workers must be ready to respond round the clock, since the duties and working time of each of them remain amenable to planning.

40
Second, it is necessary to ascertain whether work in a land-based emergency service must be regarded as 'road transport' for the purposes of Article 1(3) of Directive 93/104. If that term were to be construed as including any activity in a vehicle travelling on the public highways, a

service operated by means of ambulances and emergency medical vehicles would also have to be subsumed thereunder, since a significant part of that activity entails going to places where emergencies have occurred and conveying patients to hospital. However, the emergency service normally operates within a limited geographical area, in general within a Landkreis (provincial district), so the distances are not great and the operations are of limited duration. The work of a land-based emergency service is thus to be distinguished from the typical line of work in the road transport sector. Doubts none the less subsist on this point on account of the judgment in Case C-76/97 Tögel [1998] ECR I-5357, paragraph 40).

41
The referring court then asks whether the non-application of the 48-hour limit for the average working week as provided for under Article 18(1)(b)(i) of Directive 93/104 requires the express and unambiguous consent of the employee concerned or whether the employee's general consent to the application of a collective agreement as a whole is sufficient, since the latter provides inter alia for the possibility of weekly working time being extended beyond the 48-hour limit.

42
Finally, the Arbeitsgericht Lörrach asks whether Article 6 of Directive 93/104 is unconditional and sufficiently precise to be capable of being relied on by an individual before a national court in the event of a Member State having failed to implement the directive correctly. Under German law, if the provision at Paragraph 14(2)(b) of the DRK-TV, which is applicable to the employment contracts concluded by the parties to the main proceedings, were covered by the provision made by the legislature in Paragraph 7(1)(i)(a) of the ArbZG, the latter would permit the employer to extend daily working time without compensation, with the result that the restriction of weekly working time to 48 hours on average which derives from Paragraph 3 of the ArbZG and from Article 6(2) of Directive 93/104 would be negated.

43
Taking the view that in those circumstances an interpretation of Community law was necessary to enable it to reach a decision in the cases before it, the Arbeitsgericht Lörrach decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which are cast in identical terms in Cases C-397/01 to C-403/01:

'1. (a) Is the reference in Article 1(3) of Directive 93/104 ... to Article 2(2) of Directive 89/391 ..., under which [those] directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the claimants' activity as emergency workers is caught by this exclusion?

2. In view of the judgment of the Court in ... Simap (paragraphs 73 and 74), is Article 18(1)(b)(i) of Directive 93/104 to be construed as meaning that consent given individually by a worker must expressly refer to the extension of working time to more than 48 hours per week, or may such consent also reside in the worker's agreeing with the employer, in the contract of employment, that working conditions are to be governed by a collective agreement which itself allows working time to be extended to more than 48 hours on average?

3. Is Article 6 of Directive 93/104 in itself unconditional and sufficiently precise to be capable of being relied on by individuals before national courts where the State has not properly transposed the directive into national law?'

44
By order of the President of the Court of 7 November 2001, Cases C-397/01 to C-403/01 were joined for the purposes of the written and oral procedure and the judgment.

45
By decision of 14 January 2003, the Court stayed proceedings in those cases until the hearing in Case C-151/02 Jaeger [2003] ECR I-8389, in which judgment was delivered on 9 September 2003. That hearing took place on 25 February 2003.

46
By order of the Court of 13 January 2004, the oral procedure in Cases C-397/01 to C-403/01 was re-opened.

## The questions referred for a preliminary ruling

### Question 1(a)

47
By Question 1(a), the national court is essentially asking whether Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be interpreted as meaning that the activity of emergency workers, performed within an emergency medical service such as the service at issue in the main proceedings, falls within the scope of the directives.

48
In order to reply to that question, it must be borne in mind at the outset that Article 1(3) of Directive 93/104 defines the scope of the directive by referring expressly to Article 2 of Directive 89/391. Therefore, before determining whether an activity such as that of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of a service run by the Deutsches Rotes Kreuz falls within the scope of Directive 93/104, it is first necessary to examine whether that activity is within the scope of Directive 89/391 (see the judgment in Simap, paragraphs 30 and 31).

49
By virtue of Article 2(1) of Directive 89/391, the latter applies to ‘all sectors of activity, both public and private’, which include service activities as a whole.

50
However, as is clear from the first subparagraph of Article 2(2), the directive is not applicable where characteristics peculiar to certain specific activities, particularly in the civil protection services, inevitably conflict with it.

51
It must none the less be held that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an emergency service for the injured or sick, run by a body such as the Deutsches Rotes Kreuz, is not covered by the exclusion referred to in the preceding paragraph.

52
It is clear both from the purpose of Directive 89/391 (encouraging the improvement of the health and safety of workers at work) and from the wording of Article 2(1) thereof that the directive must be taken to be broad in scope. It follows that the exclusions from its scope provided for in

the first subparagraph of Article 2(2) must be interpreted restrictively (see the judgment in Simap, paragraphs 34 and 35, and the order of 3 July 2001 in Case C-241/99 CIG [2001] ECR I-5139, paragraph 29).

53
Furthermore, the first subparagraph of Article 2(2) of Directive 89/391 excludes from the directive's scope not the civil protection services as such but solely 'certain specific activities' of those services, whose characteristics are such as inevitably to conflict with the rules laid down by the directive.

54
This exclusion from the broadly-defined field of application of Directive 89/391 must therefore be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect.

55
In that regard, the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

56
However, the civil protection service in the strict sense thus defined, at which the provision is aimed, can be clearly distinguished from the activities of emergency workers tending the injured and sick which are at issue in the main proceedings.

57
Even if a service such as the one with which the national court is concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are none the less capable of being organised in advance, including, in so far as they are concerned, the working hours of its staff.

58
The service thus exhibits no characteristic which inevitably conflicts with the application of the Community rules on the protection of the health and safety of workers and therefore is not covered by the exclusion in the first subparagraph of Article 2(2) of Directive 89/391, the directive instead applying to such a service.

59
It is apparent from the wording of Article 1(3) of Directive 93/104 that it applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific activities which are exhaustively listed.

60
None of those activities is relevant in relation to a service such as the one at issue in the main proceedings. In particular, it is clear that the activity of workers who, in the framework of an emergency medical service, attend on patients in an ambulance or emergency medical vehicle is not comparable to the activity of trainee doctors, to which Directive 93/104 does not apply by virtue of Article 1(3) thereof.

61
Consequently, an activity such as that with which the national court is concerned also falls within the scope of Directive 93/104.

62
As the Commission rightly pointed out, further support is lent to that finding by the fact that Article 17(2), point 2.1(c)(iii), of Directive 93/104 expressly refers to, inter alia, ambulance services. Such a reference would be redundant if the activity referred to was already excluded from the scope of Directive 93/104 in its entirety by virtue of Article 1(3). Instead, that reference shows that the Community legislature laid down the principle that the directive is applicable to activities of such a kind, whilst providing for the option, in given circumstances, to derogate from certain specific provisions of the directive.

63
In those circumstances, the answer to be given to Question 1(a) is that Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service such as that at issue before the national court, falls within the scope of the directives.

Question 1(b)

64
By Question 1(b), the national court is essentially asking whether, on a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 encompasses the activity of an emergency medical service, on account of the fact that the activity consists, at least in part, of using a vehicle and attending the patient during the journey to hospital.

65
In that regard, it must be observed that under Article 1(3) of Directive 93/104, the latter '[applies] to all sectors of activity … with the exception of air, rail, road, sea, inland waterway and lake transport …'.

66
In its judgment in Case C-133/00 Bowden and Others [2001] ECR I-7031, the Court ruled that on a proper construction of Article 1(3) all workers employed in the road transport sector, including office staff, are excluded from the scope of that directive.

67
Since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the exclusions from the scope of the directive provided for in Article 1(3) must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which the exclusions are intended to protect (see, by analogy, the judgment in Jaeger, paragraph 89).

68
The transport sector was excluded from the scope of Directive 93/104 on the grounds that a Community regulatory framework already existed in that sector, which laid down specific rules for, inter alia, the organisation of working time on account of the special nature of the activity in question. That legislation does not apply, however, to transport for emergencies or assistance.

69
Furthermore, the judgment in Bowden is based on the fact that the employer belonged to one of

the transport sectors specifically listed in Article 1(3) of Directive 93/104 (see paragraphs 39 to 41 of the judgment). However, it can hardly be argued that when the Deutsches Rotes Kreuz operates an emergency medical service such as that at issue in the main proceedings its activity pertains to the road transport sector.

70
The fact that that activity includes using an emergency vehicle and accompanying the patient on his journey to hospital is not decisive, since the main purpose of the activity concerned is to provide initial medical treatment to a person who is ill or injured and not to carry out an operation relating to the road transport sector.

71
Furthermore, it is necessary to bear in mind that ambulance services are specifically included in Article 17(2), point 2.1(c)(iii), of Directive 93/104. Their inclusion, which is intended to enable there to be a derogation from certain specific provisions of the directive, would be redundant if such services were already excluded from the field of application of the directive in its entirety pursuant to Article 1(3) thereof.

72
In those circumstances, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass an emergency medical service such as that at issue in the main proceedings.

73
That interpretation is not undermined by the judgment in Tögel, to which the national court refers, since the subject-matter of the judgment was not the interpretation of Directive 93/104 but rather that of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (JO 1992 L 209, p. 1), the contents and purpose of which are wholly irrelevant for the purpose of determining the scope of Directive 93/104.

74
In the light of all of the foregoing considerations, the answer to Question 1(b) must be that, on a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on his journey to hospital.

The second question

75
By its second question, the national court is asking in substance whether the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended or whether it is sufficient in that regard that the relevant person's employment contract refers to a collective agreement which permits such an extension.

76
In order to reply to the question formulated in this manner, it must be borne in mind, first, that it is apparent from Article 118a of the Treaty, the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive and from the actual wording of Article 1(1) of the directive that its objective is to guarantee the better protection of the safety and health of workers by affording them minimum rest periods – especially on a daily and

weekly basis –and adequate breaks and by providing for an upper limit on weekly working time.

77
Second, under the system established by Directive 93/104, only some of its provisions, which are exhaustively listed, may form the subject-matter of derogations by the Member States or the two sides of industry. Furthermore, the implementation of such derogations is subject to strict conditions intended to secure effective protection for the safety and health of workers.

78
Thus, Article 18(1)(b)(i) of Directive 93/104 provides that Member States have the right not to apply Article 6 provided that they observe the general principles of the protection of the safety and health of workers and that they satisfy a certain number of conditions set out cumulatively in Article 18(1)(b)(i).

79
In particular, the first indent of Article 18(1)(b)(i) requires that working time should not exceed 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16 of Directive 93/104, the worker none the less being able to agree to work more than 48 hours per week.

80
In that regard, the Court has already held, in paragraph 73 of the judgment in Simap, that, as is apparent from its actual wording, the first indent of Article 18(1)(b)(i) of Directive 93/104 requires the consent of the individual worker.

81
In paragraph 74 of Simap, the Court concluded that the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

82
That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.

83
Those considerations are equally relevant so far as the situation described in the second question is concerned.

84
It follows that, for a derogation from the maximum period of weekly working time laid down in Article 6 of Directive 93/104 (48 hours) to be valid, the worker's consent must be given not only individually but also expressly and freely.

85
Those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

86
The answer to the second question must therefore be that the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

The third question

87
By its third question, the national court is essentially asking whether, if Directive 93/104 has been implemented incorrectly, Article 6(2) thereof may be taken to have direct effect.

88
As is clear both from its wording and from the context in which it occurs, there are two aspects to that question: the first concerns the interpretation of Article 6(2) of Directive 93/104 for the purpose of enabling the national court to decide whether the relevant rules of national law are compatible with the requirements of Community law, whilst the second concerns whether, if the Member State concerned has transposed Article 6(2) into national law incorrectly, that provision satisfies the conditions which would enable an individual to rely on it before the national courts in circumstances such as those in the main proceedings.

89
Those two issues must be examined in turn.

The import of Article 6(2) of Directive 93/104

90
As a preliminary point, it must be observed that Article 6(2) of Directive 93/104 requires the Member States to take the measures necessary to ensure, as a function of the requirement for the protection of workers' safety and health, that the average working time for each 7-day period, including overtime, does not exceed 48 hours.

91
It is apparent from Article 118a of the Treaty, which is the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive, from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, points 8 and 19, first subparagraph, thereof, which are referred to in the fourth recital to the directive, and from the actual wording of Article 1(1) of the directive that the latter's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. This Community-level harmonisation of the organisation of working time seeks to guarantee a better level of protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods – particularly daily and weekly – and adequate breaks (see Jaeger, paragraphs 45 to

47).

92
Thus, Directive 93/104 imposes more specifically (in Article 6(2)) a 48-hour limit for the average working week, a maximum which is expressly stated to include overtime.

93
In that context, the Court has already held that on-call time ('Bereitschaftsdienst'), where the worker is required to be physically present at a place specified by his employer, must be regarded as wholly working time for the purposes of Directive 93/104, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity (see Jaeger, paragraphs 71, 75 and 103).

94
The same must be true of periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of an emergency service, which necessarily entails periods of inactivity of varying length in between calls.

95
Such periods of duty time must accordingly be taken into account in their totality in the calculation of maximum daily and weekly working time.

96
Furthermore, it is evident that under the system established by Directive 93/104, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, only certain specifically mentioned provisions of the directive may form the subject-matter of derogations by the Member States or social partners (see Jaeger, paragraph 80).

97
However, in the first place, Article 6 of Directive 93/104 is referred to only in Article 17(1) and it is undisputed that the latter provision covers activities which bear no relation at all to those carried out by emergency workers such as the claimants in the main proceedings. By contrast, Article 17(2), point 2.1(c)(iii), refers to 'activities involving the need for continuity of service', including in particular 'ambulance services', but this provision gives scope for derogating from only Articles 3, 4, 5, 8 and 16 of the directive.

98
In the second place, Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of the safety and health of workers and that they satisfy a number of conditions set out cumulatively in Article 18(1)(b)(i), but it is not disputed that the Federal Republic of Germany has not availed itself of that option to derogate (see Jaeger, paragraph 85).

99
Moreover, by virtue of the Court's case-law the Member States cannot unilaterally determine the scope of the provisions of Directive 93/104 by attaching conditions or restrictions to the implementation of the workers' right under Article 6(2) of the directive not to work more than 48 hours per week (see, to that effect, Jaeger, paragraphs 58 and 59). Any other interpretation would misconstrue the purpose of the directive, which is intended to secure effective protection of the safety and health of workers by allowing them to enjoy minimum periods of rest (see Jaeger, paragraphs 70 and 92).

100
In those circumstances, it must be concluded that, in view of both the wording of Article 6(2) of Directive 93/104 and the purpose and scheme of the directive, the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health (see, by analogy, Case C-173/99 BECTU [2001] ECR I-4881, paragraphs 43 and 47), and therefore national legislation, such as that at issue in the main proceedings, which authorises weekly working time in excess of 48 hours, including periods of duty time ('Arbeitsbereitschaft'), is not compatible with the requirements of Article 6(2) of the directive.

101
Accordingly, the answer to the third question, as regards the first aspect, is that Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

The direct effect of Article 6(2) Directive 93/104 and the ensuing consequences in the cases before the national court

102
Since, in circumstances such as those in the main proceedings, the relevant national legislation is not compatible with the requirements of Directive 93/104 as regards maximum weekly working time, it remains to be considered whether Article 6(2) of the directive fulfils the conditions for it to have direct effect.

103
In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 11, and Case C-62/00 Marks & Spencer [2002] ECR I-6325, paragraph 25).

104
Article 6(2) of Directive 93/104 satisfies those criteria, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time.

105
Even though Directive 93/104 leaves the Member States a degree of latitude when they adopt rules in order to implement it, particularly as regards the reference period to be fixed for the purposes of applying Article 6 of that directive, and even though it also permits them to derogate from Article 6, those factors do not alter the precise and unconditional nature of Article 6(2). First, it is clear from the wording of Article 17(4) of the directive that the reference period can never exceed 12 months and, second, the Member States' right not to apply Article 6 is subject to compliance with all the conditions set out in Article 18(1)(b)(i) of the directive. It is

therefore possible to determine the minimum protection which must be provided in any event (see, to that effect, Simap, paragraphs 68 and 69).

106
As a consequence, Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to produce direct effect.

107
It still remains to determine the legal consequences which a national court must derive from that interpretation in circumstances such as those in the main proceedings, which involve individuals.

108
In that regard, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, Case 152/84 Marshall [1986] ECR 723, paragraph 48; Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 20; and Case C-201/02 Wells [2004] ECR I-0000, paragraph 56).

109
It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.

110
However, it is apparent from case-law which has also been settled since the judgment of 10 April 1984 in Case 14/83 Von Colson and Kamann [1984] ECR 1891, paragraph 26, that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, inter alia, Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Faccini Dori, paragraph 26; Case C-126/96 Inter-Environnement Wallonie [1997] ECR I-7411, paragraph 40; and Case C-131/97 Carbonari and Others [1999] ECR I-1103, paragraph 48).

111
It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112
That is a fortiori the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20).

113
Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the

directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in Von Colson and Kamann, paragraph 26; Marleasing, paragraph 8, and Faccini Dori, paragraph 26; see also Case C-63/97 BMW [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C-408/01 Adidas-Salomon and Adidas Benelux [2003] ECR I-0000, paragraph 21).

114
The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 Mau [2003] ECR I-4791, paragraph 34).

115
Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, Carbonari, paragraphs 49 and 50).

116
In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

117
In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 Centrosteel [2000] ECR I-6007, paragraphs 16 and 17).

118
In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, Marleasing, paragraphs 7 and 13).

119
Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2)

of Directive 93/104, is not exceeded.

120
In view of all the foregoing reasoning, the answer to the third question must be that:

– Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

– the provision fulfils all the conditions necessary for it to have direct effect;

– when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

## Costs

121
Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. The costs incurred by parties other than those to the main proceedings in submitting observations to the Court are not recoverable.

On those grounds, the Court (Grand Chamber) rules:

1. (a) Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, such as that at issue before the national court, falls within the scope of the directives.

   b) On a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on the journey to hospital.

2. – The first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as

requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

3. – Article 6, point 2, of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

Signatures.

---

1 – Language of the case: German.

Case C-240/09

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky

(Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

Summary of the Judgment

1. Preliminary rulings – Jurisdiction of the Court – Interpretation of an international agreement concluded by the Community and the Member States on the basis of joint competence – Convention on access to information, public participation in decision-making and access to justice on environmental matters (Aarhus Convention) – Jurisdiction to determine the distribution of competences between the Community and the Member States

(Art. 234 EC; Aarhus Convention, Art. 9(3); Council Decision 2005/370)

2. Preliminary rulings – Jurisdiction of the Court – Limits – Interpretation requested on account of the applicability of a provision both to situations falling within the scope of national law and to situations falling within the scope of EU law – Jurisdiction to provide that interpretation

(Aarhus Convention, Art. 9(3); Council Decision 2005/370)

3. International agreements – Agreements concluded by the Community – Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) – Article 9(3) – Direct effect – None

(Art. 10 EC; Aarhus Convention, Art. 9(3); Council Decision 2005/370)

1. Since the Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to draw the line dividing the obligations the Community has assumed from those remaining the sole responsibility of the Member States and to interpret that convention.

Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that should not be the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, Union law neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply

that rule of their own motion.

However, if it were to be held that the Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, Union law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

In that connection, it must be observed first of all, that, in the field of environmental protection, the Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC.

Furthermore, the Court has held that a specific issue which has not yet been the subject of Union legislation is part of Union law, when that issue is regulated in agreements concluded by the Union and the Member State and concerns a field in large measure covered by Union law.

(see paras 31-33, 35-36)

2. The Court has jurisdiction to interpret the provisions of Article 9(3) of the Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) and, in particular, to give a ruling on whether or not they have direct effect.

When a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Union law, there is a certain interest in that provision's being interpreted uniformly, whatever the circumstances in which it is to apply, in order to forestall future differences of interpretation.

(see paras 42-43)

3. Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) does not have direct effect in Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, so as to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

Failing EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding the rights that individuals derive from Union law, in this case the Habitats Directive, the Member States being responsible for ensuring that those rights are effectively protected in every case.

On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law (principle of effectiveness).

(see paras 47-48, 51-52, operative part)

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

In Case C-240/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 22 June 2009, received at the Court on 3 July 2009, in the proceedings

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2010,

after considering the observations submitted on behalf of:

– Lesoochranárske zoskupenie VLK, by I. Rajtáková, advokátka,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Polish Government, by M. Dowgielewicz, D. Krawczyk and M. Nowacki, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the United Kingdom Government, by L. Seeboruth and J. Stratford, acting as Agents,

– the European Commission, by P. Oliver and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

2 The reference has been made in proceedings between Lesoochranárske zoskupenie VLK ('zoskupenie'), an association established in accordance with Slovak law whose objective is the protection of the environment, and the Ministerstvo životného prostredia Slovenskej republiky (Ministry of the Environment of the Slovak Republic) ('the Ministerstvo životného prostredia'), concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

### Legal context

#### International law

3 Article 9 of the Aarhus Convention states:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in

accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

4 Article 19(4) and (5) of the Aarhus Convention states:

'4. Any organisation referred to in Article 17 which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation's Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in Article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

European Union ('EU') law

5 Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 Article 16(1) of the Habitats Directive further states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in

their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7 Annex IV to the Habitats Directive relating to animal and plant species of Community interest in need of strict protection, mentions, in particular, the species 'Ursus arctos'.

8 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) states in recital 5 in the preamble thereto:

'On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.'

9 Article 6 of Directive 2003/4 implements Article 9(1) of the Aarhus Convention, and reproduces almost word for word its provisions.

10 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC states in recitals 5, 9 and 11 in the preamble thereto:

'(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Århus Convention"). Community law should be properly aligned with that Convention with a view to its ratification by the Community;

…

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

…

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985 L 175, p. 40], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [OJ 1996 L 257, p. 26] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4)

thereof.'

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

12 Decision 2005/370 states, in recitals 4 to 7 in the preamble thereto:

'(4) Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention.

(5) The Community, in accordance with the Treaty, and in particular Article 175(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 of the Treaty.

(6) The Community and most of its Member States signed the Aarhus Convention in 1998 and since then have pursued their efforts in view of their approval of the Convention. In the meantime, relevant Community legislation is being made consistent with the Convention.

(7) The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States.'

13 Article 1 of Decision 2005/370 provides:

'The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.'

14 In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

15 Articles 10 to 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) aim to ensure access to justice by non-governmental organisations with respect to administrative acts adopted by the institutions and bodies of the European Union or omissions by the latter, in accordance with Article 9(3) of the Aarhus Convention.

Slovak law

16 Pursuant to Article 82(3) of Law No 543/2002 on the protection of nature and the countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings, an association having legal personality is to be regarded as a

'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

17 In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.

18 Under Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok) any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.

19 According to Article 250(m) of the Code of Civil Procedure, persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.

## The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of locus standi by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

3. If the answer to the first or the second question is in the affirmative, is it then possible to

interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?'

24 By order of the President of the Court of 23 October 2009, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

## Consideration of the questions referred

### Admissibility

25 The Polish and United Kingdom Governments submit that the questions are admissible only in so far as they concern the provisions of Article 9(3) of the Aarhus Convention, and are inadmissible for the remainder on the ground that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose.

26 In answer to those arguments, it is sufficient to note that the questions referred relate essentially only to Article 9(3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

27 In those circumstances, there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Aarhus Convention.

### The first and second questions

28 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Habitats Directive for a species mentioned in Annex IV thereto, may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Aarhus Convention on direct effect, to which its questions relate.

29 A preliminary point to be made is that Article 300(7) EC provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 36, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 Haegeman [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 Demirel [1987] ECR 3719, paragraph 7).

31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 Dior and Others [2000] ECR I-11307, paragraph 33, and Case C-431/05 Merck Genéricos – Produtos Farmacêuticos [2007] ECR

I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, Dior and Others, paragraph 48 and MerckGenéricos – Produtos Farmacêuticos, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, MerckGenéricos – Produtos Farmacêuticos, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, Commission v Ireland, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03 Commission v France [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a ‘party’ to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that ‘the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations’.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 Giloy [1997] ECR I-4291, paragraph 28, and Case C-53/96 Hermès [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 Simutenkov [2005] ECR I-2579, paragraph 21, and Case C-372/06 Asda Stores [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 Impact [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (Impact, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental

protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 44, and Impact, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

The third question

53 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

[Signatures]

---

* Language of the case: Slovak.

JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

# Comet BV
# v Produktschap voor Siergewassen
# (preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

**Case 45/76**

Summary


1. *Customs duties on exports — Charges having equivalent effect — Abolition — Direct effect — Individual rights — Protection by the national courts*
*(EEC Treaty, Article 16; Regulation No 234/68, Article 10)*

2. *Community law — Direct effect — Individual rights — Protection by the national courts — Legal proceedings — National procedural rules — Application*

1. The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.
2. In the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter. The position would be different only if those rules made it impossible in practice to exercise rights which the national courts have a duty to protect.


In Case 45/76,

Reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: Dutch.

COMET BV, Sassenheim,

and

PRODUKTSCHAP VOOR SIERGEWASSEN,

on the interpretation of the Community provisions for the free movement of goods,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

### I — Facts and procedure

A Netherlands regulation of 1956 by the 'Produktschap voor Siergewassen' (Ornamental Plants Production Board) provides for a levy on exports of bulbs and corms of flowering plants to West Germany.

The levy, which amounts to 0.5 % of the invoiced amount of each consignment is used to finance sales publicity for the said products (Blumenwerbung) in the Federal Republic of Germany. The levy is payable by the German importer to the Netherlands exporter who has to pass it on to the Produktschap. The regulation was repealed on 8 July 1969 with effect from 1 June 1969. By levy notices of 7 July 1969 and 19 September 1969, the Comet BV company was notified that it owed several amounts in respect of flower bulb exports effected before 1 June 1969.

Comet did not initiate proceedings against these levy notices or against a reminder of 8 July 1971 and it paid the amounts claimed. It subsequently maintained that it had paid these amounts in error and claimed to set

them off against sums which it had been called upon to pay under a different head in 1975.

When the Produktschap refused to agree to this set-off, Comet brought proceedings against this refusal before the College van Beroep voor het Bedrijfsleven.

Before that court, the Produktschap did not dispute that the contested charges were incompatible with Community law but it maintains that the application for set-off should be rejected because proceedings were not taken against the 1969 levy notices and the 1971 reminder within the period of 30 days prescribed by Article 33 of the Law concerning administrative jurisdiction over trade organizations (wet administratieve rechtspraak bedrijfsorganisatie).

By order of 25 May 1976, the College van Beroep voor het Bedrijfsleven has referred the following question to the Court:

'Does any provision or any principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

The order making the reference was entered at the Court Registry on 26 May 1976.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Comet company, the Commission of the European Communities and the Government of the Federal Republic of Germany.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

## II — Written observations submitted before the Court

### *A — Observations of the Comet company*

The plaintiff in the main action agrees that as a rule, the expiry of the limitation period for an appeal can, under national law, be pleaded against a litigant and that it prevents the administrative act from being contested.

The question which arises under Netherlands law involves the application of this principle to a situation in which an administrative act is claimed or is found to be incompatible with Community law and, in consequence, this question concerns the relationship between Community law and national law.

Has a party an independent right of action to end a situation in which Community law is being infringed? Is such an action beyond the reach of national provisions with the result that it can validly be brought even after expiry of the limitation periods for proceedings under national law? Or, on the other hand, must the time-limits for bringing proceedings be held to apply since, as is suggested in the order making the reference, 'acceptance of the plaintiff's point of view would mean that decisions of the national administration could be contested in the national courts without any limitation as to time on grounds of alleged incompatibility with Community law — in this case on grounds of alleged invalidity of EEC provisions — on which

the relevant decision is based, thereby depriving the administration of the protection necessary to enable it to carry out properly its own duties as well as those assigned to it in a Community context'.

The plaintiff in the main action contends that the abolition of a situation of incompatibility with Community law is a consideration which takes precedence over the submission based on expiry of the limitation period for bringing proceedings.

The general legal principle that Community law prevails over national law is one which implies that the Community legal order would be undermined if the Member States were still in practice able to promulgate measures the practical effect of which would be to frustrate the application of the Treaty on the basis of the direct effect of certain provisions. A Member State ought not to be able to rely on procedural requirements if this means that the legal position of a party is not wholly and unreservedly consistent with the objectives of Community law. On this point the plaintiff in the main action refers to Article 5 of the Treaty and to decisions of the Court concerning 'the effectiveness' of Community law.

As regards the question whether a party has a right of action the plaintiff in the main action considers that the answer depends not only on procedural rules but also on the duty of the Member States, of individuals and of the Community institutions to contribute to the practical application of Community law. All subject to Community law possess a right corresponding to this duty; this is the right to obtain a 'Folgenbeseitigung', that is to say, the annulment, whatever form it may take, of the consequences of a situation which is contrary to Community law. In this connexion the plaintiff in the main action refers to the arguments developed by the Rewe concern in Case 33/76 and to the judgment of the Court in Case 39/72 *Commission* v *Italy* [1973] ECR 101 in which it was held that the default of a Member State can constitute the basis of liability on its part towards individuals. Individual action is, therefore, necessary and must necessarily prevail over the rules of national law so as to ensure full and uniform application of Community law. The plaintiff in the main action ought therefore to be considered as having the right to be heard and the defendant in the main action cannot avail itself of the lapse of the limitation period for bringing proceedings under national law as justification for refusing to rescind the contested decision. The incompatibility of the national provision is something separate from a finding by the Court that Community provisions have been infringed. The judgment of the Court is declaratory and does not confer rights.

As regards the consequences for the State authorities of the independent existence of a right of action and the misgivings expressed by the national court, the plaintiff in the main action points out that if practical considerations concerning the financial consequences of entertaining an individual action were taken into account it would once again be the Member State which, in practice, determined the extent of the legal consequences of its actions. The protection which should be available to the administration to enable it to fulfil its tasks ought primarily to be determined by the administration itself which should take care to ensure that administrative acts accord with Community law.

*B — Observations of the Commission of the European Communities*

While noting that it is common ground between the parties in the main action that the contested levies are charges having an effect equivalent to duties on exports, which are prohibited by Article 16 of the EEC Treaty as from the end of the first stage (1 January 1962), the

Commission points out that this does not mean that when such a charge has been levied, the undertaking concerned must be recognized as having an independent right of action whereby the latter may claim reimbursement of the charge imposed regardless of any principle of national law.

There can be no doubt about the direct applicability of Article 16 but the mere fact that the accountable party is recognized as being able, on its own account, to claim the illegality of the charge in the light of the Treaty is insufficient indication in what circumstances, in what manner and on what legal basis that party can claim repayment of a charge collected contrary to the Treaty.

Article 16 of the Treaty first confers on a person called upon to pay a charge the right not to pay it, or if he has paid it, the right to have it repaid to him. The Court of Justice has in any case laid down that a claim for repayment of charges, whether national or Community, which have been paid without lawful cause must be submitted on the basis of the provisions made for such actions under national law. In this connexion the Commission quotes the judgment of 19 December 1968 in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453 at p. 463 in which it was held that 'in so far as the provisions in question [Articles 31 and 32 of the EEC Treaty] confer on persons subject to the jurisdiction rights which national courts must protect, those courts must ensure that the said rights are indeed protected, but that it is for the legal system of each Member State to decide which court has jurisdiction and for this purpose to classify those rights with reference to the criteria of national law'.

Similarly, in its judgment of 16 December 1960 in Case 6/60 *(Humblet,* Rec., p. 1131) the Court held that it was for the national legislature to determine whether an unlawful imposition of tax gave rise to a claim for compensatory interest, while it is clear from the judgment of 21 May 1976 in Case 26/74 *(Roquette* [1976] ECR 677) that actions brought in connexion with the common agricultural policy for reimbursement of levies improperly collected on imports must first be brought, in accordance with the rules of national law, against the Member State which collected them, before proceedings may be brought against the Community under Article 215 of the EEC Treaty.

Undoubtedly, the need to base applications for a refund on the provisions of national law has the effect of making repayment dependent on rules which vary from one Member State to another, but this is the position at the present stage of harmonization on the subject of the protection of individual rights.

It fully accords with the system of legal protection provided for by the Treaty under which Community and national guarantees of legal protection shall be complementary and interdependent instead of being in conflict with each other by being mutually exclusive, to appraise the legality or otherwise of the collection of a charge having equivalent effect on the basis of criteria supplied by the Treaty while at the same referring the party concerned to the provisions of national law for the protection of its right to repayment.

The right to be repaid provided for under national law may be asserted by the party concerned only to the extent and under the conditions laid down by that national law. This applies to the actual conditions for the right to repayment as it does to questions of jurisdiction and procedure and the question remains whether a single legal basis is adequate in the case of an application for refund of a payment made or whether, in addition to an action for repayment properly so-called, a separate action should be brought for

annulment of the payment notices issued to the party concerned.

In this connexion it would be reasonable to accept the principle that while substantive national law continues to apply this does not rule out the possibility of considering in a particular case, whether certain provisions of national law, which, *a priori*, make full and unconditional repayment of the amounts collected out of the question, may be incompatible with the guarantee of legal protection given by Article 16 of the EEC Treaty and, if the answer is in the affirmative, to what extent.

Taken by itself, the statement that Article 16 of the EEC Treaty creates rights for the benefit of individuals which national courts must protect could imply that this article provides not only a means for reviewing the legality of a particular charge but also the substantive foundation for an independent and individual right to repayment. The conditions for repayment would thus be based on a single legal foundation and would be freed from the conditions, variations and fortunes of national legal systems. In this way the legal protection of individuals against action taken contrary to the Treaty would be standardized in one important respect. In these circumstances, the Member States could not make repayment of improperly collected charges subject to different conditions laid down under national law but the consequence would be that the individuals concerned could not avail themselves of the legal remedies provided by their national law. In the Commission's view, this notion would obviously be alien to the precedence established by the Court of Justice concerning the direct effect of Articles 13 (2) and 16, failing acceptance of the concept of parallel actions which gives a litigant the choice between national and Community means of legal redress. Apart from the fact that this would involve something totally new in Community law it is likely that, because it would be stricter, the less advantageous means of redress would be replaced by the other.

As regards the applicability of national rules of procedure the Commission considers that, whether the action is based on national or Community law, proceedings for recovery of the overpayment must be brought before the Netherlands court in accordance with rules of procedure applicable in the Netherlands.

In respect of procedural matters, there are no Community provisions which explicitly or by their nature take precedence over the provisions of national law. The question remains, however, whether and to what extent Article 16 of the EEC Treaty prevents the application of the provisions of the Netherlands ARBO Law (Law concerning administrative jurisdiction over trade organizations).

If Article 16 of the Treaty is interpreted as a straightforward statement that charges on exports are illegal, the national rules of procedure continue to apply unconditionally, there being no conflict with the paramountcy of Community law.

If, on the other hand, Article 16 is interpreted as conferring on the applicant a right to recovery of the overpayment, there may, in the Commission's view, be a conflict between the purpose of the rule laid down in Article 16 and the conditions for exercise of the right of action laid down by the Netherlands Law.

If, on the one hand, an action brought under Article 16 is fully discharged only after all the overpayments have been reimbursed and, on the other, the effect of the provisions of the ARBO Law is in fact to make recovery impossible after a certain period, the conditions laid down by the ARBO Law cannot be pleaded against the applicant. A consideration which argues in favour of this solution is

that, for individuals, as a result of direct applicability, the object and the effect of legal protection would, as far as individuals are concerned, be to make repayment subject to uniform conditions in all the Member States.

It must, however, be emphasized that adoption of this solution implies, in the present state of the law, a straightforward abandonment of any rules governing time-limits and the conditions under which proceedings can be brought in view of, first, the lack of any relevant Community rules and, secondly, the possible non-application of national rules.

Such a fundamental and comprehensive abandonment of national rules of procedure cannot easily be reconciled with the principle hitherto recognized by the Court of Justice that national courts must take their decisions in accordance with national rules of procedure.

In the Commission's view, the declared precedence of Article 16 of the EEC Treaty over national law does not absolutely preclude the application of national rules of procedure.

The principle on which the provisions of the ARBO Law are based and which makes the protection of the right of individuals subject to the requirements of legal certainty is recognized in the legal systems of all the Member States. In this connexion the Commission refers to the judgment of the Court of 8 April 1976 in Case 43/75 *Defrenne*, [1976] ECR 455 in which it was held that the individual rights of private parties arising directly out of a provision of the EEC Treaty may, for considerations of legal certainty, be exercised only within prescribed time-limits, even if none have been expressly laid down by Community law.

Nevertheless, rules of procedure which, *a priori*, make it impossible for an applicant to assert his right to repayment in the courts or which make this subject to conditions which cannot be fulfilled are illegal. But the application of Article 33 of the ARBO Law gives rise to no criticism on that account.

The Commission concludes with the statement that, until uniform Community regulations have been adopted, a right to repayment based either on national or Community law is subject to the national rules of procedure relating to the conditions of admissibility and time-limits.

*C — Observations of the Government of the Federal Republic of Germany*

The Government of the Federal Republic of Germany refers to its observations in Case 33/76, *Rewe*.

These observations are to the effect that no rule of Community law confers on an individual the right to have an administrative act of a Member State annulled or withdrawn if under the national law of that Member State, the act can no longer be contested and has become final.

Individuals are able to rely on the direct effect of a Community provision only in so far as they may do so under the provisions of the administrative law and the procedural law of the Member State concerned.

The absence of Community rules governing procedure in administrative cases is due not to the fact that the component bodies of the Community have not yet completed the task of harmonization but to the fact that the Community was constructed by the Treaty of Rome in such a way that, with the exception of the fields which come under the direct control of the Community and the general task of harmonization assigned to it, the application of Community law was entrusted to the authorities and courts of the Member States.

The distribution of responsibility between the Community and the Member States inherent in the constitution of the Community makes it clear that the rights of individuals to have administrative acts annulled or withdrawn or to recover over-payments are laid down and defined by the relevant national provisions.

There is no question of conflict between Community law and national law since the conditions laid down by national law in respect of procedure in fact constitute a rule of Community law.

Rules governing the existence, in terms of form and finality, of administrative acts, help to ensure legal certainty and stability, principles which form part of the legal order of the Member States and thereby constitute unwritten principles of Community law.

The Government of the Federal Republic of Germany accepts that the legal rights of an individual may differ from one Member State to another. However, the existence of a uniform right to have administrative acts which conflict with a Community provision annulled would produce the scarcely acceptable result that the administrative law of the Member States would have to contain, in respect of certain aspects of administrative action, rules providing for derogations therefrom.

Such a uniform Community law is inconceivable in the absence of complete standardization of the law governing administrative procedure.

Neither Article 3 of the Treaty nor the 'general principles' recognized by the Member States in the field of administrative procedure justify the conclusion that there exists a right under Community law to have administrative acts which have become final withdrawn.

The precedents established by the Court of Justice have, on many occasions, recognized the power of the national legislature to lay down rules on the procedural aspects of rights arising under Community instruments in so far as such rights come within the ambit of the application of Community law by the Member States.

The German Government concludes that neither the provisions prohibiting charges having effect equivalent to customs duties nor other rules of Community law confer on individuals the right to have annulled an administrative act which, under the provisions of the Member State which promulgated it, can no longer be impugned because of non-compliance with the prescribed time-limit.

The plaintiff in the main action, represented by Hattinga Verschure, of The Hague Bar, the Government of the Federal Republic of Germany, represented by its Agent, Mr Seidel, and the Commission of the European Communities, represented by its Agent, Mr Bourgeois, submitted their oral observations at the hearing on 9 November 1976.

The Advocate-General delivered his opinion at the hearing on 13 November 1976.

## Law

1 By order of 25 May 1976, received at the Court Registry on 26 May 1976, the College van Beroep voor het Bedrijfsleven referred the following question to the Court under Article 177 of the EEC Treaty: 'Does any provision or any

principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

2 The question was submitted in connexion with proceedings brought before that court by the plaintiff in the main action for a declaration that, on exports of bulbs and corms of flowering plants to West Germany effected during the concluding months of 1968 and the early months of 1969, it made an undue payment to the Produktschap voor Siergewassen (hereinafter referred to as 'the Produktschap'), the defendant in the main action, of levies constituting charges having an effect equivalent to customs duties on exports which are contrary to Article 16 of the Treaty and are, moreover, prohibited by Article 10 of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, which was applicable with effect from 1 July 1968.

3 The plaintiff in the main action asks the national court to recognize that it is entitled to set off the undue payments made against amounts being claimed from it by the Produktschap under a different head.

4 The Produktschap does not dispute that the contested levy constitutes a charge having an effect equivalent to a customs duty on exports and concedes that the national provisions for its imposition had, with effect from 1 July 1968, the date of entry into force of Regulation No 234/68, become incompatible with Article 10 of the Regulation which, in the internal trade of the Community in the horticultural products covered by the regulation, prohibited the levying of any customs duty or charge having equivalent effect.

5 It must, however, be observed that this incompatibility came into being on 1 January 1962 by virtue of Article 16 of the Treaty, under which the Member States are enjoined to abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

6 There can, therefore, be no doubt that the levies imposed on the plaintiff in the main action by the levy notices and by the reminder sent to it on 7 July 1969, 19 September 1969 and on 8 July 1971 were in breach of the prohibition in Article 16 of the Treaty.

7 Nevertheless these levies were paid by the plaintiff in the main action which, on the ground that it paid them in error, is claiming reimbursement by way of set-off before the national court.

8 The Produktschap contends that the plaintiff in the main action can no longer impugn the contested levies or claim their reimbursement because it failed to bring proceedings against the levy notices and the reminder which had been sent to it within the period prescribed by national law for such proceedings.

9 The applicant in the main action contends, on the other hand, that the primacy of Community law means that it overrules any decision which constitutes an infringement of it and that, before the national courts, which are bound to protect the rights conferred on it by Article 16, it possesses, in consequence, an independent right of action which is unaffected by limitations provided for under national law which are liable to weaken the impact of the direct effect of that article in the legal order of the Member States.

10 Thus, the question referred seeks to establish whether the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire as the result of the direct effect of a Community provision, in the present case Article 16 of the Treaty and Article 10 of Regulation No 234/68, especially the rules concerning the period within which an action must be brougt are governed by the national law of the Member State where the action is brought or whether, on the other hand, they are independent and fall to be determined only by Community law itself.

11 The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.

12 Thus, in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.

13 Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter.

14 Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eleminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.

15 In default of such harmonization measures, the rights conferred by Community law must be exerciced before the national courts in accordance with the rules of procedure laid down by national law.

16 The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect.

17 This does not apply to the fixing of a reasonable period of limitation within which an action must be brought.

18 The fixing, as regards fiscal proceedings, of such a period is in fact an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed.

19 The answer must therefore be that, in the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under

national law from being raised against him, provided that the procedural rules applicable to his case are not less favourable than those governing the same right of action on an internal matter.

## Costs

20 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable.

21 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven by order of 25 May 1976, hereby rules:

**In the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under national law from being raised against him, provided that the procedural rules applicable in his case are not less favourable than those governing the same right of action on an internal matter.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

# Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (preliminary ruling requested by the Bundesverwaltungsgericht)

**Case 33/76**

Summary

*1. Customs duties — Charges having effect equivalent — Abolition — Direct effect — Rights of individuals — Protection by national courts*
*(EEC Treaty, Article 13, Regulation No 159/66/EEC, Article 13)*

*2. Community law — Direct effect — Rights of individuals — Protection by national courts — Recourse to the courts — National procedural rules — Application*

1. The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.
2. In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect.

In Case 33/76

Reference to the Court under Article 177 of the EEC Treaty by the VIIth Senate of the Bundesverwaltungsgericht for a preliminary ruling in the action pending before that court between

1. REWE-ZENTRALFINANZ eG, Cologne,

2. REWE-ZENTRAL AG, Cologne,

1 — Language of the Case: German.

and

LANDWIRTSCHAFTSKAMMER FÜR DAS SAARLAND, Saarbrücken (Agricultural Chamber for the Saar),

on the interpretation of Articles 5, 9 and 13 (2) of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore (Presidents of Chambers), J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts

The order making the reference, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

### I — Facts and procedure

In 1968 the German companies Rewe-Zentralfinanz eG and Rewe-Zentral AG paid in respect of the import of French apples charges for phyto-sanitary inspection which were found by the judgment of the Court of 11 October 1973 in Case 39/73 [1973] ECR 1039 to be equivalent to customs duties.

In 1973 the said companies applied to the Landwirtschaftskammer für das Saarland to annul the decisions imposing the charges and to refund the amounts paid including interest. This claim was dismissed as inadmissible on the ground that it was out of time under Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Court). The actions brought by the two companies before the Verwaltungsgericht für das Saarland (Saarland Administrative Court) were dismissed as was the appeal made by them to the Oberverwaltungsgericht (Higher Administrative Court).

Rewe-Zentralfinanz and Rewe-Zentral then appealed to the Bundesverwaltungsgericht (Federal Administrative Court). The latter took the view that the question whether it is possible to rely on an infringement of Community law irrespective of the expiry of time-limits

in general national procedural provisions required the interpretation of the EEC Treaty and by order dated 23 January 1976 stayed the appeal and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Where an administrative body in one State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) of the EEC Treaty) has the Community citizen concerned a right under Community law
   (a) to the annulment or revocation of the administrative measure;
   (b) and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past?
2. Is this the case at least if the European Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law?
3. If a right to a refund is held to exist under Community law, is interest to be paid on the amount and if so from what date and at what rate?

The order of the VIIth Senate of the Bundesverwaltungsgericht was registered at the Court on 6 April 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the companies Rewe-Zentralfinanz and Rewe-Zentral, by the Commission of the European Communities, by the Government of the Federal Republic of Germany, by the Government of the Italian Republic and by the Government of the United Kingdom.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preparatory inquiry.

## II — Summary of written observations

The *appellants* first of all say that the courts of the Member States have so far refrained from submitting to the Court of Justice the question whether charges collected contrary to Community law may exceptionally be retained because no claim has been brought within the prescribed period against the decision to impose the charges.

In its judgment of 7 February 1973 in Case 39/72 [1973] ECR 101 the Court stated that an infringement by a Member State of a rule of Community law which is directly applicable could be the basis of possible liability on the part of the State as against the person concerned. Further in the judgment of 12 July 1973 in Case 70/72 [1973] ECR 813 the Court stated that the aim of the Treaty is to achieve the practical elimination of infringements by Member States and the consequences thereof, past and future.

It is true that in the judgment of 22 January 1976 in Case 60/75 [1976] ECR 45 the Court stated that where there has been an infringement of Community law it will be for the State, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the State. Nevertheless there can be no question in this case of simply referring a trader affected by an infringement of Article 13 to national remedies relating to administrative liability for the following reasons:

(a) if the effect of the Community rules *per se* is all-embracing and uniform no other provision can apply to the legal consequences arising from their infringement by a Member State. Otherwise traders would be subject to unequal treatment according to the idiosyncrasies of each national legal system;
(b) the requirements of effective legal protection and the logic of the system of the Treaty imply likewise

that directly applicable Community rules should be characterized as rules the infringement of which by Member States gives the individual under Community law rights to have the effects of the administrative act annulled,

(c) if the legal consequences of such an infringement were to become established in accordance with national law they would be annulled only in part: thus under German law on administrative liability (Article 34 of the Grundgesetz (Basic Law)) in conjunction with Article 839 of the Bürgerliches Gesetzbuch (Civil Code) only infringements committed by the administration in the exercise of public authority are covered. Further German law requires a wilful or negligent breach of official duty.

In its judgment of 17 December 1970 in Case 11/70 [1970] ECR 1125 the Court declared that the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. The absolute precedence of Community law likewise extends in particular to national procedure (Case 66/73 [1974] ECR 33 and Case 146/73 [1974] ECR 139). It would be contrary to the nature of the Community system for Member States to be able to take or maintain in force measures likely to compromise the effectiveness of the Treaty. The mandatory nature of the Treaty and measures adopted to implement it cannot vary from one State to another by the effect of internal measures without the functioning of the Community system being impeded and without the attainment of the aims of the Treaty being jeopardized.

It follows that a party has not only a right to the refund of charges exacted contrary to Community law but also to the annulment or setting aside of the decision imposing the charge. According to German national law this annulment or setting aside ot the decision imposing the charge constitutes a condition precedent to the refund of the charges.

With regard to the second question raised by the Bundesverwaltungsgericht it is not permissible to limit the Member States' duty to make a refund to the date on which the Court of Justice declared that the levying of the charge in question was incompatible with Community law. This follows from the fact that in general the Court of Justice does not give a ruling on this matter but, in the procedure under Article 177, on questions of interpretation raised by the national court.

With regard to the third question, since the aim of the Treaty is to achieve the practical elimination of infringements by Member States, the action in Community law for the annulment of the effects of an administrative measure also covers the entitlement of the trader injured to interest, which is only a special application of this action.

The *Commission* stresses that it does not follow from the direct effect of Article 13 (2) of the EEC Treaty that after the contested charge has been levied notwithstanding the prohibition in question the appellants must be recognized as having an independent right of action enabling them to claim the repayment of the said charge independently of any substantive ground in national law. Article 13 (2) was not conceived as authority in Community law for claims for repayment brought by citizens against a Member State. The Court has always recognized that the action for repayment of national or Community charges wrongly levied may be based on the law of the Member State concerned. Thus in Case 13/68 [1968] ECR 453 it was held that in these circumstances 'it is for the national legal system to determine which court or

tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified'. The same is true moreover for actions for compensation under the second paragraph of Article 215 of the EEC Treaty. No doubt the necessity of basing claims for refund on the provisions of national law may make the refund dependent on rules which vary according to the Member States but this position is in accord with the present state of integration with regard to the protection of individual rights. Since the Member States are in principle required to facilitate the exercise of such a right, it can be claimed by a party only to the extent and subject to the conditions laid down by this same national law.

To interpret Article 13 (2) of the Treaty as meaning that it gives an independent substantive right to refund would raise the question of the connexion between such a right based on Community law and those provided for by national laws. To prohibit parties from basing their claims to refund of the provisions of their national law would be contrary to the previous case-law of the Court on the direct effect of Article 13 (2). Further, concurrent actions would constitute an innovation in the sphere of Community law and would lead in practice to the more favourable action prevailing over the other because governed by less strict conditions.

There are in the context of the main action no Community rules on procedure and time-limits which preclude, either expressly or by their nature as provisions having precedence in governing time-limits, the application of national rules of procedure. But to what extent could Article 13 (2) of the Treaty, as a substantive provision of Community law having precedence, prohibit the application of the German Code of administrative procedure? If the effect of the latter were indeed to exclude the repayment after the expiry of a given period, the conditions of admissibility and the time-limits for annulment laid down by it could not be a valid objection to the claim in the main action. In fact the direct effect of Article 13 (2) would mean that the person concerned thus enjoys by means of a Community provision, which by its nature has precedence, an absolute entitlement unlimited in point of time to bring an action for a refund; the full and unconditional assertion of this right, by reason of its proprietary nature, must not be impeded or prevented in fact or in law by any measure or any obstacle relating to the sphere of the States' internal powers. However it is right to object to such a conclusion that in the present situation of the law the uniformity thus achieved in the protection of the rights of individuals with regard to refunds would be nothing other than a refusal to accept any conditions of admissibility and time-limits for bringing actions. Such a general exclusion of any national rule of procedure would be incompatible with the legal principle that the national court gives a decision based on the rules of national procedure even where the plaintiff bases his claims and arguments on Community law.

There is no conflict between Community law and national law since Community law does not claim pre-emincence but recognizes the complementary application of rules of national law or integrates them into its legal system. Such a reference to national law may be indirectly inferred here from the dicta in case-law with regard to direct effect according to which directly applicable provisions give individuals rights 'which national courts must protect'. National courts can do so only by referring to their own rules of procedure, so long as Community law does not itself govern these matters, and thus subject to the conditions on admissibility and the time-limits for bringing actions which they contain. The principle making the protection of parties' rights subject to the

requirements of certainty in legal relations given expression by the German Code of administrative procedure is recognized in the legal systems of all the Member States and likewise recognized to a large extent in the Community legal system. The judgment given in Case 43/75 [1976] ECR 455 has even set specific time-limits in cases where Community law has not expressly prescribed them.

This position is certainly hardly satisfactory since the time-limits laid down by national law vary between 1 month and 30 years (in this respect it may be asked whether each Member State can, in so far as it is concerned, decide which is the right laid down by national law to which such a Community right must be assimilated). But to lay down at a Community level uniform time-limits for the assertion of the rights in question in the main action would lead to taking into consideration all the other claims on Member States based on Community law and involving other spheres of national law.

There is no purpose in the second question since rights to refund are based on Article 13 (2) of the Treaty. At most the Court could give an answer similar to that contained in the judgment in Case 43/75 to which reference has already been made.

The third question has not been settled in Community law and in similar cases the Court has referred to national law. If the main action fails because of German procedural rules there will be no purpose in this question.

The *Government of the Federal Republic of Germany* considers that the absence of Community rules on the organization of administrative procedure or the system of legal protection to which Member States must conform when applying substantive Community law is due to the fact that, apart from the sectors governed directly by the Community and the general task of harmonization given to it, the execution of Community law has been entrusted to the authorities and courts of the Member States. The division of tasks between the Community and the Member States is explained by the fact that the rights of individuals to the annulment or withdrawal of administrative measures or to the refund of sums paid are given concrete form and limited by the national provisions on the subject. The limitation afforded by the national law on procedure to the assertion of Community rights is therefore in the true sense a rule of Community law.

Under German law when an administrative measure can no longer be the subject of a legal action for annulment because it has become definitive it is also as a rule no longer possible to require the authority to withdraw the administrative measure which has become unassailable or to refund the sum paid. This explains why administrative measures which have become unassailable are not affected when the Bundesverfassungsgericht (Federal Constitutional Court) declares that the legal provision on which they are based is unconstitutional.

The fact that therefore the legal position of parties may differ from one Member State to another is only the result of the implementation of Community law by Member States.

The provision in Article 5 of the EEC Treaty referred to in the question certainly requires Member States to adopt appropriate measures in Community matters but it cannot give rights to parties. The same is true of the 'general principles' of Member States with regard to administrative procedure: they do not allow the conclusion either, by analogy with the second paragraph of Article 215 of the Treaty, that there is a Community right to the withdrawal of administrative measures which have become final. In particular it is not proved that the other

Member States, in contrast to the Federal Republic of Germany, generally recognize a right to the withdrawal of administrative measures which have become definitive.

The *Government of the Italian Republic* states that in the absence of Community rules it must necessarily be recognized that the means and conditions for protecting subjective rights which the Community creates in favour of individuals are always governed by the laws of the various Member States.

In fact the order of reference clearly shows that the national court assumes that the sums exacted in contravention of the prohibition on levying charges having equivalent effect must be refunded. It is this assumption which must be examined. Thus it may be asked whether and if so to what extent national administrations are bound to refund sums exacted in contravention of the prohibition on levying charges having an equivalent effect. It is to be observed that the Commission imposes no obligation on Member States to recover from individuals sums paid for aid which has not been authorized or refunds on exports which have exceeded the amount of refunds authorized. Similarly an obligation to reimburse sums paid to individuals as a result of a wrong interpretation of Community rules has been expressly excluded. Accordingly it would seem that the same criterion should apply in the case of the obligation to refund sums wrongly levied in contravention of the prohibition against charges having an effect equivalent to customs duties. This view accords with that adopted by the Court in the aforementioned Case 43/75.

It is not necessary to stress the serious financial consequences which would ensue for the budgets of the various Member States to note that an obligation to refund would give rise to an unjustified discrimination between Member States and Community citizens according to the rules issued by each legal system regarding recovery of customs duties improperly charged.

Moreover refund would lead in practice to an unforeseen increase in the profit margin or in any event in the assets of the dealers concerned since the amounts in question have obviously already been taken into account in determining costs and therefore in the repercussions on purchasers arising from the increase in resultant charges. A refund would lead in practice to an 'aid' benefiting national dealers and to the very sort of change in the market and in the conditions of competition which Community rules are intendent to prevent; above all the result would be a new disadvantage to the exporters of other Member States who have already had to suffer the practical disadvantage arising from the obstacle constituted by the increase in customs duties provided for by the national law of the importing State.

As a result the Italian Government thinks that the direct applicability of Community rules to the prohibition against levying charges having an effect equivalent to customs duties cannot be relied on in respect of sums which have been paid as particular customs duties before these duties have been the subject of a relevant decision intended to establish their nature as charges having an equivalent effect. As regards the specific questions raised by the order of reference a ruling may be given that the exercise of the right to the refund of sums paid as charges having an equivalent effect is governed, just as in the case of submissions of inadmissibility as regards time-limits, estoppel or prescription, by national laws in the same way as national laws determine whether, from which date and at what rate interest may be payable on sums to be refunded to those entitled to them.

The *Government of the United Kingdom* points out that the importance of

time-limits is frequently acknowledged in Community law and that the Court (Second Chamber) stated in Case 79/70 [1971] ECR 689 that they were matters of public policy. It cannot be denied that they may have the effect of limiting substantive rights. The only satisfactory remedy lies in the adoption of Community legislation to harmonize the relevant rules of prescription and limitation. But the invalidation of national time-limits in advance of appropriate Community legislation would create uncertainty and add disproportionately to the complexities of accounting and to the cost of collection borne by national and Community funds.

The answers given by the Court in this case will lay down principles of general application likely to apply equally to any case in which a Community customs duty, an agricultural levy, value-added tax or an excise duty collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action has been collected contrary to the relevant Community provisions.

During the oral procedure which took place on 9 November 1976 the appellants, represented by Dietrich Ehle, Advocate of the Cologne Bar, the Government of the Federal Republic of Germany, represented by its Legal Adviser, Mr Seidel, the Government of the Italian Republic represented by Mr Marzano, Avvocato dello Stato, and the Commission of the European Communities represented by its Legal Adviser, Mr Kalbe, acting as Agent, expanded the arguments which they set out in the written procedure.

The Advocate-General delivered his opinion at the hearing on 30 November 1976.

## Law

1 By order dated 23 January 1976, received at the Court Registry on 6 April 1976, the Bundesverwaltungsgericht referred to the Court three questions on Articles 5, 9 and 13 (2) of the EEC Treaty for a preliminary ruling under Article 177 of the EEC Treaty.

2 These questions have arisen in a case relating to the payment in 1968 on the importation by the appellants of French apples of charges for phytosanitary inspection, regarded as equivalent to customs duties by the judgment of the Court of 11 October 1973 in Case 39/73 *(Rewe Zentralfinanz eGmbH* [1973] ECR 1039).

The respondent to the appeal rejected the appellants' claims to have the decisions imposing the charges annulled and the amounts paid refunded (with interest) on the ground that they were inadmissible because the time-limits laid down by Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts) had not been observed.

3 The first question asks whether where an administrative body in a State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) or the EEC Treaty) the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past.

The second question asks whether this is so if the Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law.

The third question asks whether, if a right to refund is held to exist under Community law, interest is to be paid on the amount and if so from what date and at what rate.

## The first question

4 Both the respondent and the national court accept that the charges in question had been unlawfully exacted.

Although it has been possible to rely on the direct effect of Article 13 (2) of the EEC Treaty only as from 1 January 1970, the end of the transitional period, it should be stated however that the levying of the said charges was already previously unlawful by virtue of Article 13 (1) of Regulation No 159/66/EEC of the Council of 25 October 1966 (JO 192 of 27 October 1966) which abolished them in respect of fruit and vegetables as from 1 January 1967.

5 The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.

Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions

cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.

In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

This is not the case where reasonable periods of limitation of actions are fixed.

The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned.

6 The answer to be given to the first question is therefore that in the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.

## The second question

7 The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.

## The third question

8 In view of the reply given to the first question the third question does not arise.

## Costs

9 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic, the Government of the United Kingdom and the Commission of the European Communities, which have made observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

## THE COURT

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 23 January 1976, hereby rules:

1. **In the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.**

2. **The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

# Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

Final version, February 2007

## TABLE OF CONTENTS


FOREWORD 4

I. CONTEXT 6

***I.1 Species conservation within a wider legal and political context*** 6

**I.1.1 Political context** 6
**I.1.2 Legal context** 7

***I.2 Species conservation within the overall scheme of Directive 92/43/EEC*** 8

**I.2.1 Primary aim of the Directive: the role of Article 2** 8
**I.2.2 Favourable conservation status** 9
**I.2.3 Species conservation instruments** 11
*I.2.3.a) The Annexes* 13
*I.2.3.b) The protection of animal species listed under both Annexes II and IV in Natura 2000 sites* 15
**I.2.4 Basic principles of species conservation** 17
*I.2.4.a) Good knowledge and surveillance of conservation status* 17
*I.2.4.b) Appropriate and effective character of measures taken* 19

II. ARTICLE 12 23

***II.1 General legal considerations*** 23

***II.2 Requisite measures for a system of strict protection*** 26

**II.2.1 Measures to establish and effectively implement a system of strict protection** 26
**II.2.2 Measures to ensure favourable conservation status** 27
**II.2.3 Measures regarding the situations described in Article 12** 28
**II.2.4 Provisions of Article 12(1)(a)-(d) in relation to ongoing activities** 30

***II.3 The specific protection provisions under Article 12*** 35

**II.3.1 Deliberate capture or killing of specimens of Annex IV(a) species** 35
**II.3.2 Deliberate disturbance of Annex IV(a) species, particularly during periods of breeding, rearing, hibernation and migration** 37
*II.3.2.a) Disturbance* 37
*II.3.2.b) Periods of breeding, rearing, hibernation and migration* 38
**II.3.3 Deliberate destruction or taking of eggs from the wild** 39
**II.3.4 Deterioration or destruction of breeding sites or resting places** 39
*II.3.4.a) Consequences of the word "deliberate" not being included in Article 12(1)(d)* 39

*II.3.4.b) Identification of "breeding sites and resting places"* 41
*II.3.4.c) Concept of "deterioration"* 46
*II.3.4.d) Measures to ensure the continued ecological functionality of breeding sites and resting places* 47

**II.3.5 Keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild** 49
**II.3.6 Incidental capture and killing of Annex IV(a) species** 49

III. ARTICLE 16 50

***III.1 General legal considerations*** 51
**III.1.1 Obligation to ensure full, clear and precise transposition of Article 16** 51
**III.1.2 Appropriate overall application of derogations** 53

***III.2 A carefully controlled system for granting derogations: the 3 tests*** 54
**III.2.1 Demonstration of one of the reasons under Article 16(1)(a) to (e) (Test 1)** 54
**III.2.2 Absence of a satisfactory alternative (Test 2)** 58
**III.2.3 Impact of a derogation on conservation status (Test 3)** 60
*III.2.3.a) Scale of assessment* 61
*III.2.3.b) Derogations and conservation status* 61
**III.2.4 Monitoring the impacts of derogations / Reporting on derogations** 65

**Annex I: Court case references** 67
**Annex II: List of animal species covered by Annex II, IV and V** 69
**Annex III: Example of a species dossier for *Triturus cristatus*** 87

## FOREWORD

### Why a guidance document on the protection of animal species?

Up until now, most of the attention regarding the implementation of the Habitats Directive[1] has focused on the establishment of the Natura 2000 network (of protected areas). This "1st pillar" of the Directive refers to the conservation of natural habitats and the habitats of species. However, the Directive also has a "2nd pillar", covering the protection of species. In particular, Articles 12 and 16 aim to establish and implement a strict protection regime for species within the whole territory of Member States. It has become evident that the precise content of the type of measures needed to ensure a "system of strict protection" as well as the correct application of the derogation provisions pose problems. In addition, certain technical terms used in the articles need better definition. Clearly, therefore, guidance is needed on the provisions for species protection and the specific terms used.

### Purpose of the guidance document

The essential focus of this document is on the main obligations under Articles 12 and 16 of Directive 92/43/EEC, which establish a system of strict protection for the animal species listed in Annex IV(a), but allow for derogation from these provisions under defined conditions. Particular consideration is given to the definition of a "system of strict protection" specified in Article 12(1), examining it in the context of the overall objectives of the Directive. The document is mainly based on relevant Court judgments (see Annex 1), opinions given by the Commission's Legal Service on some specific questions, and input from the Working Group on Article 12. This Working Group, an ad hoc working group formed under the Habitats Committee, met eight times from June 2002 to February 2005. The Group's final report can be viewed on the Commission's website (http://ec.europa.eu/environment/nature/home.htm).

This document is intended to ensure a common understanding of the relevant provisions among national and regional authorities, conservation bodies and other structures responsible for or involved in the implementation of the Habitats Directive. It aims to assist in devising pragmatic and flexible ways of applying the provisions and making them effective and practical, while fully respecting the legal framework.

### Limitations of the guidance document

This guide has been drafted by the Environment Directorate-General of the European Commission. It is intended to be bound by, and faithful to, the text of the Directive and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, the document reflects only the views of the Commission services and is not of a binding nature. Member States have been consulted on various drafts of this guidance document and were invited to comment on it. There are some parts of the guidance in which some Member States hold differing views on the interpretation of Article 12 and Article 16.

It should be stressed that it rests with the European Court of Justice to provide a definitive interpretation of a Directive. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject, and also with experience arising from the implementation of Articles 12 and 16 in the Member States.

---

[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22 July 1992, p. 7).

Also, as with any directive, the interpretation needs to consider the different language versions of the texts, all of which are valid. On this specific issue, we note that some phrases in the different language versions merit careful attention. It is important when looking at the different language versions to elicit a meaning that best reflects the purpose and context of the terms under examination.

**Structure of the document**

The document is presented in three main chapters. The first chapter reviews species protection within the EC under the Directive and international framework. The second chapter takes a more in-depth look at the relevant legal provisions of Article 12 of the Directive, while the third chapter examines the derogation possibilities under Article 16 of the Directive.

The key points arising from the analyses are summarised (in italics) at the end of each section, in order to highlight the relevant conclusions. Full references for the Court cases quoted throughout the text are provided in an annex at the end of the document.

## I. CONTEXT

### *I.1 Species conservation within a wider political and legal context*

#### I.1.1 Political context

(1) Preserving, protecting and improving the environment, including biodiversity, are essential objectives of general interest pursued by the European Community, as provided for in Article 174 of the Treaty.

(2) In 2001, the EU Heads of State and Government made a commitment at the Spring Summit in Göteborg to *'halt the decline of biodiversity by 2010'*[2]. The same Göteborg Council adopted the EU Sustainable Development Strategy, which again stressed the need *'to protect and restore habitats and natural systems and halt the loss of biodiversity by 2010'.* The Sixth Environmental Action Programme (6th EAP)[3], which constitutes the EU's "environmental work plan" from 2002 to 2012 was adopted in 2002. The issue of nature and biodiversity conservation is one of the four priorities in the 6th EAP, with the focus on '*protecting, conserving, restoring and developing the functioning of natural ecosystems, natural habitats, wild flora and fauna with the aim of halting … the loss of biodiversity, including diversity of genetic resources, both in the European Union and at the global scale*' with a particular view to '*halting biodiversity decline with the aim to reach this objective by 2010'*.

(3) These EU efforts go hand in hand with the EC Biodiversity Conservation Strategy adopted in 1998, which was developed to meet the EC's obligations as a Party to the Convention on Biological Diversity (1992). Under this Strategy, four Biodiversity Action Plans were adopted in 2001 in various policy areas (natural resources, fisheries, agriculture, economic and development cooperation). With the latest Communication of May 2006 on halting the loss of Biodiversity by 2010[4], the Commission launches a new effort to pull together EU actors to meet the 2010 target and foster recovery of biodiversity.

(4) Within all these initiatives, the issue of species protection is at the forefront of debate and has an indicator role in judging the health of ecosystems. Our ability to ensure that species survive over the long term as part of our European natural heritage will show the extent to which our conservation and biodiversity policies are truly effective. The 'target date' of 2010 is very likely to accelerate progress. Accordingly, the full and proper implementation of both the Birds[5] Directive and the Habitats Directive, which seeks to '*… maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'*, is of major importance and a test case as to how far our commitments can be achieved in practice.

---

2 'The European Council agrees that biodiversity decline should be halted with the aim of reaching this objective by 2010 as set out in the Sixth Environmental Action Programme.' Presidency Conclusions, Göteborg Council, 15 and 16 June 2001. SN/200/1/01 REV1, page 8. http://ue.eu.int/newsroom/newmain.asp?lang=1.

3 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242 of 10/9/2002.

4 Communication from the Commission: Halting the loss of Biodiversity by 2010 – and beyond ; Sustaining ecosystem services for human well-being; 22 May 2006, COM (2006) 216 final

5 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 5 April 1979, p. 1).

*Summary: There are a wide range of political commitments within the EU aiming to protect nature and biodiversity, with species conservation at the forefront. With a view to meeting the objective of halting the decline of biodiversity by 2010, the full and proper implementation of both the Birds Directive and the Habitats Directive is a test case as to how far EU conservation policies are truly effective.*

### I.1.2 Legal context

(5) The Habitats Directive and its provisions for species protection should however be seen not only in a political context but also in the context of international conventions and other EC legal instruments.

(6) The legal instrument most closely related to the Habitats Directive is the **Birds Directive** of 1979, which shares not only common objectives (for birds in this case) and a similar conceptual structure, but also common provisions in relation to the network of protected sites (Natura 2000). Furthermore, Articles 5 to 9 of the Birds Directive contain similar provisions regarding species protection. In addition, the ECJ case law on these provisions is already quite extensive. The reasoning behind the judgments arising from the implementation of the Birds Directive is thus of great importance and can often be applied as well to Articles 12 and 16 of the Habitats Directive[6].

(7) Seen in an international context, the species protection provisions of the Habitats Directive help achieve the aims of relevant international nature conservation conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora[7], the Bern Convention[8], the Bonn Convention[9] and the Convention on Biological Diversity[10].

(8) Of particular relevance here is the **Bern Convention**. The Bern Convention (signed in 1979) pre-dates the Habitats Directive and had an important influence on both its conception and drafting. The parallels between Article 6 of the Convention[11] and Article 12 of Directive 92/43/EEC are obvious. However, despite the equivalence of objectives and the similarities in wording, Directive 92/43/EEC creates a more detailed framework for site

---

6 For example, in its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017), the Court used the case law for the Birds Directive.

7 Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

8 Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ L 38, 10.2.1982, p. 1).

9 82/461/EEC, Council Decision of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (OJ L 210, 19/07/1982, p. 10).

10 93/626/EEC, Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13/12/1993 p. 1).

11 Article 6 of the Convention provides that *"each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:*

*(a) all forms of deliberate capture and keeping and deliberate killing;*

*(b) the deliberate damage to or destruction of breeding or resting sites;*

*(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;*

*(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;*

*(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article."*

conservation and protection than does the Convention[12]. The differences between the two texts were confirmed by the Court in case C-75/01, relating to the transposition of Directive 92/43/EEC in Luxembourg. The Court considered that the national measures for transposing Article 12(1)(c) of the Directive, including a law approving the Bern Convention, were insufficient to ensure complete transposition due to the disparities between Annex II of the Bern convention and Annex IV(a) of Directive 92/43/EEC[13]. It follows that even if the Bern Convention and Directive 92/43/EEC have substantially similar objectives, this does not affect the autonomous character of the obligations under the Habitats Directive.

*Summary: The species protection provisions of the Habitats Directive have to be seen in the context of international conventions and other EC legal instruments, the most closely related being the Bern Convention and the Birds Directive.*

### *I.2 Species conservation within the overall scheme of Directive 92/43/EEC*

(9) The maintenance or restoration, at favourable conservation status, of the natural habitats and species of wild fauna and flora of Community interest is the primary objective of Directive 92/43/EEC. In order to attain this objective the Directive establishes different conservation instruments. Articles 12-16 thus form part of a general framework that aims to meet, along with other provisions, the broad objective of the Directive as set out in Article 2.

#### I.2.1. Primary aim of the Directive: the role of Article 2

(10) The aim of the Directive is laid down in Article 2. This provision does not in itself create obligations for the Member States, but it is relevant when considering the interpretation of other provisions of the Directive.

*Article 2 (Directive 92/43/EEC)*

*1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.*

*2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.*

*3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.*

(11) It should be noted that the Court has recognised the need for any interpretation of Community legislation to take into account the aims of that legislation. According to Article 2(1) of Directive 92/43/EEC, the main aim of the Directive is to contribute towards ensuring biodiversity conservation through the conservation[14] of natural habitats and of wild fauna

[12] Two important differences should be stressed. Firstly, the Convention has a greater species coverage, since its Appendix II contains a larger number of species than Annex IV(a) of the Directive (partly due to the larger geographic area covered by the Convention). Secondly, the word "deliberate" figures in Article 6(b) but is absent from Article 12(1) (d).

[13] See the judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 55-58.

[14] According to Article 1(a) of the Directive, "conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."

and flora in the European territory of the Member States. Following Article 2(2), measures taken by Member States must aim to maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest[15]. Consequently, the strict protection obligations set out in Article 12 are important instruments for the achievement and effective implementation of the main aim of the Directive.

(12) In parallel, the economic, social and cultural requirements and regional and local characteristics referred to in Article 2(3) of the Directive should not be neglected when interpreting the species protection provisions. As set out further below, Article 2(3) is applicable to various implementation aspects of Article 12 and 16 (e.g. when defining the requisite measures, especially in the case of ongoing activities, when drafting codes of conduct, when producing species conservation plans, and of course when making use of the derogations system).

(13) Since Article 2(3) requires the protection of natural habitats and species to be balanced against other requirements, one may ask if this provision comprises an independent derogation from the general requirements of the Directive. For Directive 79/409/EEC, the Court has clearly confirmed that it does not[16]. *Mutatis mutandis*, it follows that Article 2(3) of Directive 92/43/EEC does not provide an independent derogation from the obligations and requirements of the Directive. Nonetheless, the Court's pronouncements show that Article 2 is not without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, the provisions of Article 2 have value as a general orientation guide as to what the Directive requires and allows.

*Summary: The strict protection obligations under Article 12 must be interpreted in terms of the overall aim of the Directive described in Article 2, to which they contribute. Article 2(3) cannot be regarded here as providing an independent derogation from the general requirements of the Directive.*

### I.2.2. Favourable conservation status

(14) The maintenance or restoration of "favourable conservation status" (FCS) is the overall objective for all habitat types and species of Community interest. Such species are listed in Annexes II, IV and V to the Directive. In simple terms, FCS could be described as a situation where a habitat type or species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in future. The fact that a habitat or species is not threatened (i.e. not faced by any direct extinction risk) does not necessarily mean that it has favourable conservation status. The target of the Directive is defined in a positive way, as a 'favourable' situation to be reached and maintained, which needs to be defined based on the best available knowledge. Therefore, the obligation of a Member State

[15] Such species are listed or may be listed in Annex II, IV and V of the Habitats Directive.

[16] See judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 8. The Court noted: "In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation." In Case C-262/85 (judgment of 8 July 1987, Commission v Italy, ECR p.3073) the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2.

is more than just avoiding extinction. All measures taken under the Directive must aim to reach or maintain a favourable conservation status.

(15) FCS for species is defined in general terms in Article 1(i) of the Habitats Directive.

*"conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2. The conservation status will be taken as 'favourable' when:*

*- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and*

*- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and*

*- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis."*

(16) This definition contains the main parameters (population[17] dynamics, range, sufficient habitat, prospects of long-term viability) for defining and assessing both the current and target conservation status. It also provides a framework for more specific definitions on a species-by-species basis. All these parameters therefore need to be considered thoroughly when designing measures for a certain species. It is important to note that the assessment of conservation status not only includes an element of 'diagnosis' based on current conditions, but also an important element of 'prognosis' (foreseeable future) based on influences. Such foreseeable future influences could be specific or general threats, positive or negative, medium- to long-term impacts, etc.

(17) The concept of FCS is not limited to the Natura 2000 network or to the species protected by this network (i.e. Annex II species). It applies to the *overall situation* of all species of Community interest (Annexes II, IV and V), which needs to be assessed and surveyed[18] in order to judge whether it is favourable or not. Assessing and evaluating the conservation status of habitats and species *within* the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent.

(18) In April 2005 the Habitats Committee agreed on a harmonised framework for evaluating the conservation status of habitats and species (see document DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive"[19]). Member States agreed to assess conservation status according to a common 3-grade assessment matrix within each of the biogeographic regions in their territory. The three grades are favourable = green, unfavourable/inadequate = amber and unfavourable/bad = red *("traffic light system")*.

(19) For assessing favourable conservation status, the meaning of the term "natural range" as used in the Habitats Directive was defined as follows:

[17] "Population" is defined here as a group of individuals of the same species living in a geographic area at the same time that are (potentially) interbreeding (i.e. sharing a common gene pool).

[18] Article 11 of the Directive requires surveillance of the conservation status of the natural habitats and species referred to in Article 2, with particular regard to priority natural habitat types and priority species.

[19] See http://forum.europa.eu.int/Public/irc/env/monnat/home (public site, no "sign in" needed) for all relevant documents

**The natural range of species and habitats — a dynamic concept**

The natural range describes roughly the spatial limits within which the habitat or species occurs. It is not identical to the precise localities (the area actually occupied) or territory where a habitat, species or sub-species permanently occurs. Such actual localities or territories might be patchy or disjointed for many habitats and species (i.e. habitats and species might not be evenly spread) within their natural range. If the reason for disjunction proves to be natural, i.e. caused by ecological factors, the isolated localities should not be interpreted as a continuous natural range. For example, for an alpine species the range may be the Alps and the Pyrenees, but not the lowlands between them. However, the natural range includes areas that are not permanently used: for example for migratory species, their "range" includes all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time during its normal migration[20].

A natural range as defined here is not static but dynamic: it can decrease and expand. A natural range can constitute one aspect for the assessment of (un)favourable conditions for a habitat or species. If the natural range is insufficient in size to allow for the long-term existence of that habitat or species, Member States are asked to define a reference value for a range that would allow for favourable conditions and work towards this, for instance by fostering expansion of the current range.

When a species or habitat spreads on its own to a new area/territory or when a species has been re-introduced into its former natural range (in accordance with the rules in Article 22 of the Habitats Directive), this territory has to be considered part of the natural range. Similarly, the restoration/re-creation or management of habitat areas, as well as certain agricultural and forestry practices, can contribute to the expansion of a habitat or a species and hence its range. However, individuals or feral populations of an animal species introduced deliberately or accidentally by man to locations where they have never occurred naturally, or where they would not have spread to naturally in the foreseeable future, should be considered to be outside their natural range and consequently not covered by the Directive. Vagrant or occasional occurrences would also not be considered as part of the natural range.

*Summary: The main parameters for defining the favourable conservation status of a species are given in Article 1(i) of the Habitats Directive. Roughly speaking, this status is a situation where species populations are doing well with good prospects for the future. Member States have agreed on a harmonised framework for* evaluating *conservation status in the report required by Article 17 under the Directive.*

### I.2.3. Species conservation instruments

(20) The Directive lays down a set of obligations and procedures that aim to meet the broad objective set out in Article 2. Two main concepts or “pillars” can be distinguished: the conservation of natural habitats and the habitats of species through the establishment of the Natura 2000 network (Articles 3 to 10) and the protection of animal and plant species (Articles 12 to 16).

[20] See also Article 1 of the Bonn Convention.

(21) The **1st pillar,** in relation to species[21], targets the conservation of the habitats of species[22], focusing on the maintenance (including positive management measures) and restoration of these habitats by establishing protected sites. The species for which this network of protected sites (Natura 2000) is established are listed in Annex II to the Directive.

(22) Article 6 is the central provision covering positive management (Article 6(1)) and avoidance of negative influences to the network (Article 6(2)); it also deals with plans or projects likely to have a significant negative impact on certain sites (Article 6(3)-(4)). The Commission services have produced two guidance documents explaining in detail the provisions of this Article:

1. "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1

2. "Assessment of Plans and Projects Significantly Affecting Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC", European Commission, 2002, ISBN 92-828-1818-7

(23) While the first document deals with the management of Natura 2000 sites in general, the second document focuses on the procedures for the nature impact assessment and its consequences under Article 6(3) and 6(4). Both documents are available at http://www.europa.eu.int/comm/environment/nature/home.htm.

(24) To enhance the effectiveness of the network, the provisions of Article 10 target the ecological coherence of the network by suggesting integrated land-use planning and the management of certain landscape features.

(25) The **2nd pillar** deals with direct influences on the species themselves as well as (in the case of animal species) their eggs, breeding sites and resting places. Provisions under this section are not restricted in geographical terms. They apply to the whole of the territory to which the Directive applies, albeit subject to very few specific geographical restrictions indicated in the annexes[23]. In contrast, the protection afforded by Article 6 is limited to the Natura 2000 network.

(26) A distinction can be made under this pillar between those provisions calling for a "system of strict protection" for Annex IV species (Articles 12 & 13) and measures to control the exploitation of species listed in Annex V (Articles 14 & 15[24]). While the "system of strict protection", as the name suggests, provides a stringent protection regime, species covered by Annex V can be exploited, although such exploitation should not jeopardise the objective of maintaining their favourable conservation status in any way.

(27) Both pillars allow for exceptions from the protection regimes. The system of protection envisaged under Articles 12-15 is qualified by the possibility of derogations under Article 16 of the Directive. Article 6(4) of the Directive addresses specific exceptions (i.e. from the protection granted by the Natura 2000 network) to the general rule of Article 6(3) that authorisation can only be granted to plans or projects not adversely affecting the

---

[21] The 1st pillar also deals with habitats and their typical species as listed in Annex I to the Directive.

[22] Article 1(f) states that the "*habitat of a species means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle*".

[23] For example for *Vipera seoanni*, there is a geographical restriction which excludes the Spanish population from Annex IV and consequently from the provisions of Article 12.

[24] Article 15 contains elements that also relate to Annex IV(a) species in cases when derogations are applied.

integrity of the sites concerned. The application of Article 6(4) has to respect the various steps and the sequential order established in the Directive.

(28) So while there are certain similarities between both pillars, it should be stressed that the 1st pillar requires not only active maintenance but also restoration and improvement actions on sites, while the 2nd pillar has a more preventive character, requiring Member States to avoid and prevent a number of situations that could negatively impact a species.

(29) In consequence, it can be said that the two pillars are closely interlinked and are complementary in their approach, as their joint aim is the favourable conservation status of all habitats and species of Community interest[25].

*Summary: In order to achieve its objectives, the Habitats Directive provides for two main instruments: the Natura 2000 network of protected sites and the species protection provisions. The provisions for species protection apply to the whole of a Member State's territory and concern the physical protection of specimens as well as their breeding sites and resting places. Both regimes allow for exceptions under certain conditions. Both instruments are complementary and jointly aim to ensure a favourable conservation status for all species of Community interest.*

### I.2.3.a) The Annexes

(30) Which "pillar" applies to which species is specified by the annexes to the Directive. The fact that a species is frequently listed in more than one annex demonstrates the close interaction between the two pillars, which share the same objective.

***Purpose of Annex and number of references[26] listed (EU25)***

| | |
|---|---|
| **Annex II** | Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation ("Natura 2000" sites"). Annex II lists a total of 869 references, of which 297 are animal and 572 plant species. |
| **Annex IV** | Animal and plant species of Community interest in need of strict protection. Annex IV lists a total of 922 references, of which 323 are animal and 599 plant species. |
| **Annex V** | Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures. Annex V lists a total of 77 references, of which 45 are animal and 32 plant species. |

(31) In total, the Directive lists 447 animal and 695 plant species. Although different species are listed in different annexes and therefore fall under different kinds of protection measures, many species are actually listed in more than one annex. For example, plant species listed in Annex II (except bryophytes) are automatically listed in Annex IV(b) as

[25] It should be noted that Articles 12 and 16 are applicable from the date on which Directive 92/43/EEC came into force, i.e. 10 June 1994. The Member States that joined the EU after 1994 were to comply with these provisions from the date of accession.

[26] "References" mostly refers to species but also includes some grouped taxa (e.g. *Alosa spp.*) and sub-species. Refers to annexes valid for the EU-25.

well, so are covered by the habitat protection provisions *and* the strict protection system of Article 13. On the other hand, a group of other plants is listed only in Annex IV. For animal species, such an 'automatic' parallel listing does not exist. The situation with animal species is therefore more complex:

***Overlap between Annexes – Animal species (EU25)***

| Annex | II & IV | II & V | only II | only IV | only V |
|---|---|---|---|---|---|
| % of the 447 animal references | 45% | 5% | 17% | 28% | 5% |

(32) How can this situation be explained? At the time of adoption, the legislator considered the level and type of threats to species as well as the best way to counteract threats based on the scientific information available at the time. While site designation and habitat management would be the appropriate approach for certain species, others might need a different regime of protection going beyond protected sites. The development of the annexes to the Habitats Directive follows the logic described below.

(33) A listing in Annex II was chosen for species for which the conservation of their (often quite specific) habitat is the principal factor determining their survival and well-being. The protection and management of sites were selected here as the appropriate instrument, which includes not only the maintenance of species habitats but also, where appropriate, their restoration. The group of species listed in Annex IV may be less suited to conservation by establishing protected areas, but instead needs "physical" protection of the actual species as well as protection of the most important parts of their habitat (i.e. their breeding sites and resting places) throughout the territory of a Member State. This is because of the specific threats they face, the measures needed to counteract them, the species' pattern of occurrence (e.g. scattered) or the type or specific character of their habitat. For the third group of species listed in Annex V, which may be exploited by human beings, this exploitation must be managed — if necessary — in order to ensure a favourable conservation status. Under Article 14 of the Directive, if Member States deem it necessary in the light of the surveillance provided for in Article 11, they have to take measures to ensure that the exploitation or taking in the wild of specimens of the species listed in Annex V is compatible with maintaining their favourable conservation status.

(34) Quite often, however, animal species do not perfectly fit into one of these groups. Usually species are subject to a combination of threats and should consequently be the target of a range of measures. This explains why most species of Community interest are actually listed in more than one annex. The most frequent combination is a listing in both Annex II and IV (see also the next chapter), which maximises the conservation effort by requiring management (maintenance and restoration) of the general habitats in protected sites (which should cover the most important populations) and the protection of the breeding sites and resting places as well as the species itself over the whole territory of a Member State.

(35) Since the development of these annexes, however, research and monitoring have developed further and the conservation status of a number of species may have changed, so that the picture today might be different from the one in the late 1980s/early 1990s when the Directive was prepared. As explained in chapter *I.2.4.b) "Appropriate and effective*

*character of measures taken"*, several reactions are possible. If it is found, for example, that a species in need of habitat restoration or active habitat management is listed only in Annex IV but would effectively need to be listed under Annex II, Member States may voluntarily take additional measures. Alternatively, based on good scientific evidence, the annexes could be amended to include the species in Annex II. On the other hand, the surveillance under Article 11, once collated and analysed at European level, might show that a species should be deleted from one or all the annexes it is listed in because it no longer fulfils the criteria for Community interest (as defined in Article 1(g) of the Directive).

(36) The efficient use of the different species conservation instruments requires **a species-by-species approach**[27]. Such an approach looks at the conservation needs of each species as well as the instruments available for its conservation and formulates on this basis the adequate measures to be implemented. Such an approach ensures flexible implementation of the Directive while at the same time optimum achievement of its objectives. The target of favourable conservation status should always be the guiding principle for all conservation efforts by the Member States and should be addressed by all appropriate means available (see also chapter I.2.4.b).

*Summary: The different annexes determine which instruments are available for which species. Most species are covered by more than one annex and therefore are subject to a combination of instruments, i.e. a combination of conservation approaches and measures. How these instruments are finally implemented should be considered on a species-by-species basis, taking account of the specific needs of each species.*

### I.2.3.b) The protection of animal species listed under both Annexes II and IV in Natura 2000 sites

(37) Since a large proportion (45%) of the animal taxa are listed in both Annex II and Annex IV, it is worth looking at which regime and which procedures apply to an Annex IV species within a Natura 2000 site. The Commission services consider that, within Natura 2000 sites, **a twofold regime applies** to Annex II/IV species. These species should benefit from both approaches: protection under the section on "Conservation of natural habitats and habitats of species", in particular the measures envisaged under Article 6, and the strict protection system envisaged under Article 12.

(38) This view is first of all justified by the different — and complementary — approaches followed by the two systems. Article 6 is concerned with site and habitat conservation and protection, whereas Article 12 is concerned with protecting the individuals of the listed species and their breeding sites and resting places. Furthermore, such an approach is in line with the general objective of the Habitats Directive, i.e. to contribute towards ensuring biodiversity through the maintenance or restoration, at favourable conservation status, of natural habitats and species of Community interest.

(39) It should be observed in this regard that for all Annex II species a coherent and complete network, based on an exhaustive list of sites, has to be established in accordance with the procedure and criteria set out in Annex III of the Directive. Based on a biogeographic approach, the network is established taking into account the threat status, ecology and distribution of a species. Depending on these and other scientific factors, a

[27] There might of course be cases where a whole group of species faces similar situations and has similar needs and can be treated together.

more or less complete coverage of habitats is agreed for inclusion in the network[28]. It therefore is all the more important that for species (listed in Annexes II and IV) not largely covered by the network, measures are also taken outside the network to maintain or restore their favourable conservation status. However, the fact that an Annex IV species is well covered in the Natura 2000 network does not replace the obligation to establish and effectively implement a strict protection system. It follows that, for animal species listed in Annex II and IV(a), within a site belonging to the Natura 2000 network, the simultaneous application of Articles 6 and 12 to 16 needs to be ensured.

(40) Given that these provisions contain similar elements, their simultaneous application may lead to situations where overlaps occur. This is for example the case with the protection of Natura 2000 sites under Article 6(1) and (2) and the protection of breeding sites and resting places under Article 12(1)(d). Both provisions deal with the protection of habitats of species. Breeding sites and resting places are central parts of the total habitat of a species, which has to be protected (maintained and restored) in its entirety in the Natura 2000 site. Natura 2000 therefore has a much more intensive and broader task, namely to maintain (and where needed restore) the entire habitat of a species at certain sites, while the provisions of Article 12 concentrate on preventing negative effects on the most central parts of such habitats, namely those that are essential in order to guarantee successful breeding and resting.

(41) It would be logical for measures taken under Article 6(1) (e.g. management plans) to make special reference to the protection requirements of Annex II & IV species occurring at the site. Also, where, for example, special measures are taken to avoid the deterioration of habitats or disturbance of species (Article 6(2)), these should logically respond to the requirements spelled out under Article 12(1)(a)-(d).

(42) With regard to the **simultaneous application of derogations** under Articles 6(3)-(4) and 16 to animal species listed in both Annexes II and IV, the Commission services consider that their simultaneous or parallel application is feasible in practical terms and meaningful in conservation terms.

(43) Without envisaging all possible scenarios, the Commission services consider that, if for example a project would be likely to destroy or damage the central parts of habitats within a Natura 2000 site, it can be assumed that both Article 6(3) and Article 16 come into play at the same time. It can be further assumed that the impact assessment thus triggered will cover both provisions — as they simultaneously have the same objective (although Article 12(1)(d) is more limited), i.e. the assessment under Article 16 will form part of the presumably broader (because covering the entire habitat) assessment undertaken under Article 6(3). Such a procedure should avoid any double assessment or incoherence in applying the provisions. It has to be ensured in such cases that the outcome of the impact assessment does not go against the species protection provisions. Of course, the decisions taken after the assessment will then have to take into account the requirements under both articles. Should, for example, a harmful project be allowed due to overriding public interest, compensation measures will have to be taken and reported under Article 6(4) and the project also has to be included in the Article 16 (derogation) reports.

(44) On the other hand, it may well be possible that a derogation is required under Article 16 for an activity in a Natura 2000 site even where no impact assessment under Article 6(3) is needed. This might for example be the case when a few specimens or eggs of an Annex

[28] Even where Community lists have been approved, the network still needs improvement for certain habitat types and species: so-called 'reserves' had to be included in the first Community lists of sites of Community interest to allow for completion later on.

II/IV species are to be taken for research purposes although this is unlikely to have any negative effect on the site and its population, or on the contrary will have a positive effect.

*Summary: Species listed in Annex II and IV benefit from complementary, twofold protection within Natura 2000 sites. Certain overlaps in the protection of habitats (entire habitat in the Natura 2000 site, including breeding and resting sites under Article 12) exist but can and should be dealt with in a coherent manner.*

### I.2.4 Basic principles of species conservation

#### I.2.4.a) Good knowledge and surveillance of conservation status

(45) Recital 19 of the Directive states that "the improvement of scientific and technical knowledge is essential for the implementation of this Directive", while Article 18 of the Directive stresses the necessity for research. Indeed, in order to implement meaningful species conservation measures under the Directive, a good knowledge of each species (range, occurrences, biology, ecology, threats & sensitivity, conservation needs, etc.) is a *conditio sine qua non*. Member States therefore need to collect and use the best available information from all reliable sources (e.g. conservation agencies, universities, conservation NGOs, etc.) when designing their conservation strategies. In addition, as the Directive's aims are framed in an EU and not a national context, it may often be important to look for information beyond regional and national borders in order to cooperate and coordinate with other regions/Member States (this may — among other things — take place in committees and working groups at EU level or through EC co-funded projects). Harmonised, transboundary approaches are valuable for the implementation of the Directive when for example two Member States share one population of a certain species and can only assess the full situation (and consequently define effective measures) when taking the situation 'on the other side of the border' into account.

(46) Besides the factual knowledge on a species, surveillance (or monitoring[29]), meaning long-term systematic observation, is required by the Directive to track trends in conservation status. The establishment of an appropriate surveillance system to monitor the conservation status of a species of Community interest (as listed in Annex II, IV and V) is an obligation arising from Article 11 of the Directive. According to the Court, *"the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner"*[30]. Thus, domestic law should set out the statutory duties of the national authorities to undertake surveillance of the conservation status of natural habitats and species, in order to guarantee that this surveillance is undertaken systematically and on a permanent basis[31].

[29] Article 11 of the Directive refers to the surveillance of the conservation status of natural habitats and species. The Commission services consider that the interpretation of the term "surveillance" and its scope should take into account the relevant definitions of Article 1(e) and (i).

[30] See the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 26 and 65.

[31] In its judgment of 20 October 2005, the Court found that *"inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis"* (Case C-6/04, paragraph 68).

*Article 11 (Directive 92/43/EEC)*

*Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.*

(47) The scope of Article 11 is not restricted to Natura 2000 sites, but requires monitoring of the conservation status of habitats and species of Community interest, as defined in Article 1 of the Directive, throughout the territories of all Member States.

(48) The position of Article 11, which comes at the end of the section on "conservation of habitats and habitats of species", could give rise to some ambiguity. However, the Commission services consider that this provision applies to the species covered by the 2nd pillar as well. This conclusion is based on several grounds. First of all, the text of Article 11 expressly refers to the surveillance of "the conservation status of the natural habitats and species referred to in Article 2", i.e. the natural habitats and species of wild fauna and flora of Community interest. Additionally, Article 14 of the Directive, which is in the 'protection of species' section, includes a reference to the "surveillance provided for in Article 11". This clearly illustrates that the compartmentalisation between these two sections of the Directive is not absolute. Furthermore, the recitals of the Directive refer to the need to set up a system "for surveillance of the conservation status of the natural habitats and species covered by this Directive" for the implementation of the Directive.

(49) A common framework for evaluating conservation status (in three grades) and reporting on this under Article 17 of the Directive was approved by the Habitats Committee in April 2005[32]. This framework defines what information is to be reported (and consequently collected) and gives rough guidelines on how to assess conservation status, so that conclusions at European level can be drawn from the national reports. Important elements of the agreement are that the 2007 report should include a first assessment of conservation status for each species and habitat of Community interest, based on the best available information. Reports thereafter (every 6 years) should be based on the surveillance systems put in place[33]. In order to know when a species or habitat has a favourable status, this favourable situation first needs to be defined. Member States are therefore encouraged to define "favourable reference values", to be used as benchmarks in the assessment process.

(50) The status of species should be determined at biogeographical level in Member States (for overviews, national/regional strategies, targets and reporting purposes) and at population level[34] where appropriate (for defining requisite measures, management and derogations). In the case of transboundary populations and species that migrate across the frontiers of the EU, their overall natural range, including migration zones outside the EU, should be considered as well where this is feasible. Repeated or regular monitoring will give an indication as to the appropriateness and effectiveness of the conservation measures chosen.

---

[32] DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive".

[33] Member States are free to choose their means and methods of gathering data and to adapt monitoring methods to regional differences; however, a certain – voluntary – harmonisation over the medium to long term should be sought.

[34] Regarding the definition of 'population', a group of spatially separated populations of the same species which interact at some level (meta-populations) might be used as a biologically meaningful reference unit. This approach needs to be adapted to the species in question, taking account of its biology/ecology.

(51) Surveillance of the conservation status of animal species should provide valuable information and contribute to effective implementation of the Directive. Such information is also necessary for appropriately applying derogations under Article 16: in order to determine whether any actions would be detrimental to maintaining that species at a favourable conservation status, national authorities must have sufficient information available to assess the conservation status of the species, and to predict the likely effects of any proposed derogation.

(52) In addition to the surveillance of conservation status, there is an explicit obligation under Article 12(4) to establish a system to monitor the incidental capture and killing of Annex IV(a) species and, in the light of the information gathered, to take further research or conservation measures if required. Findings under this system should be incorporated in the overall lessons drawn from the surveillance of conservation status.

*Summary: Good knowledge of a species (range/distribution, occurrence, biology, ecology, threats & sensitivity, conservation needs, etc.) and regular surveillance of its conservation status over time (as required in Article 11) are essential preconditions for any meaningful conservation strategy. Cooperation at EU level and transboundary cooperation might be essential for certain species. An EU framework for assessing conservation status was agreed by Member States in April 2005.*

### I.2.4.b) Appropriate and effective character of measures taken

(53) The Directive does not define in detail the concrete measures needed to fulfil the obligations arising from its various provisions and allows the Member States a certain margin of manoeuvre, or flexibility. The definition, adoption and implementation of such measures fall within the competence of national authorities. The Habitats Directive thus enables the Member States to implement its provisions in a **proportionate and appropriate** manner, an approach that underlies all the provisions of the Habitats Directive, including Articles 12 and 16. However, the discretionary power of Member States should respect some basic requirements.

(54) When it comes to interpreting provisions of a Directive, special attention must be given to the guiding principle laid down in Article 10 of the EC Treaty, which states that *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

(55) Consequently, the maintenance or restoration of favourable conservation status has to be taken into consideration when establishing adequate measures for species protection and habitat conservation. Good scientific knowledge and surveillance of a species are preconditions for doing so. The circle is closed when the results of the surveillance of conservation status show that the measures chosen are actually appropriate and **effective** in the field.

(56) The measures taken by the Member States should adequately address the objective pursued, i.e. maintaining and restoring favourable conservation status, while also taking account of economic, social and cultural requirements and regional and local characteristics (Article 2(3)). Such measures will be proportionate where they enable the desired aim to be attained, are necessary for attainment of that aim and are appropriate in terms of the means used.

(57) In addition, it should be underlined that **a species-by-species approach** also needs to be adopted. The concrete targets to be achieved may differ significantly for each species, and can also evolve (e.g. due to better scientific knowledge). Member States should therefore always consider their implementation actions in the light of the intended objective, the species concerned and the circumstances of each case. Thus, a proportionate approach is not a static concept and becomes an important factor for the flexible implementation of species conservation. However, taking no measures at all on account of a species being in a good conservation status is not an option (see also chapter II.2.3).

(58) Flexibility and proportionality should thus not be misunderstood as concepts that reduce the obligations on Member States to act in an effective way, but need to be seen as providing room for authorities to adapt their way of implementation to the specific circumstances of each case (in conservation status terms, but also in social, economic and cultural terms). The implementation of a flexible and proportionate approach calls for the Member States to act within a clear framework of coordinated and effective measures, applied in a coherent[35] way with sufficient safeguards. According to the Court, *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned"*[36]. Thus, such approaches need to respect the overall objective of the Directive, namely to ensure biodiversity and to maintain or restore, at a favourable status, natural habitats and species of Community interest[37].

(59) The following paragraphs are intended to explain the link between conservation status, the use of different instruments and their appropriateness and effectiveness.

(60) In general terms, surveillance or an initial assessment of conservation status can conclude that the status of a species is either favourable or unfavourable (classified in different grades). Based on the best available information, the Member States should then define — in accordance with the provisions of the Directive — the specific conservation measures needed to maintain (a favourable) or restore (an unfavourable) conservation status for each species.

(61) At this stage, the question as to **what types of measures are obligatory** under the Directive arises depending on the annex in which a species is listed. Chapter II will deal in more detail with the concept of 'requisite measures to establish a system of strict protection' under Article 12. At this point, it will only be noted that certain measures, though important or appropriate for a species, might not be required under the provisions of the Directive depending on the annex in which a species is listed in. In relation to the species protection section, it is important to recognise that proactive habitat management measures (such as restoration of habitats/populations, improvement of habitats) are not an obligation under Article 12, even though they might well be under Article 6. For example, if proactive biotope restoration is needed for a butterfly species listed only in Annex IV(a) because its habitat has nearly disappeared and only a larger habitat would ensure long-term survival, such a measure would not be covered by Article 12. Such situations could be avoided or corrected in the medium to long term by revision of the annexes or the Directive itself.

---

[35] Coherence in this context means that flexibility and proportionality cannot be applied only when this seems convenient (for example only when granting derogations) but must at the same time be applied to the requisite measures for the effective protection of species under the strict protection system, so that overall implementation is in line with the objectives of the Directive.

[36] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112, and judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 66.

[37] If the Commission considers that such an approach does not comply with the Directive, it needs to prove that this is the case (see, for example, the judgment of 6 November 2003, Commission v UK, Case C-434/01, ECR p.13239, paragraph 21).

(62) Overall, the following main scenarios can be distinguished:

1. If the measures required for a specific species are obligatory under the Directive, there are two possible scenarios:

   - The Member State implements sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

   - The Member State does not implement sufficient and verifiable measures to maintain or restore FCS. This means that it is not complying with its obligations, which normally constitutes an infringement of the Directive.

2. If the measures required for a species (or parts of it) are not obligatory under the Directive (e.g. active biotope restoration or reintroduction for a species exclusively listed in Annex IV), there are two possibilities:

   - The Member State implements voluntarily sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

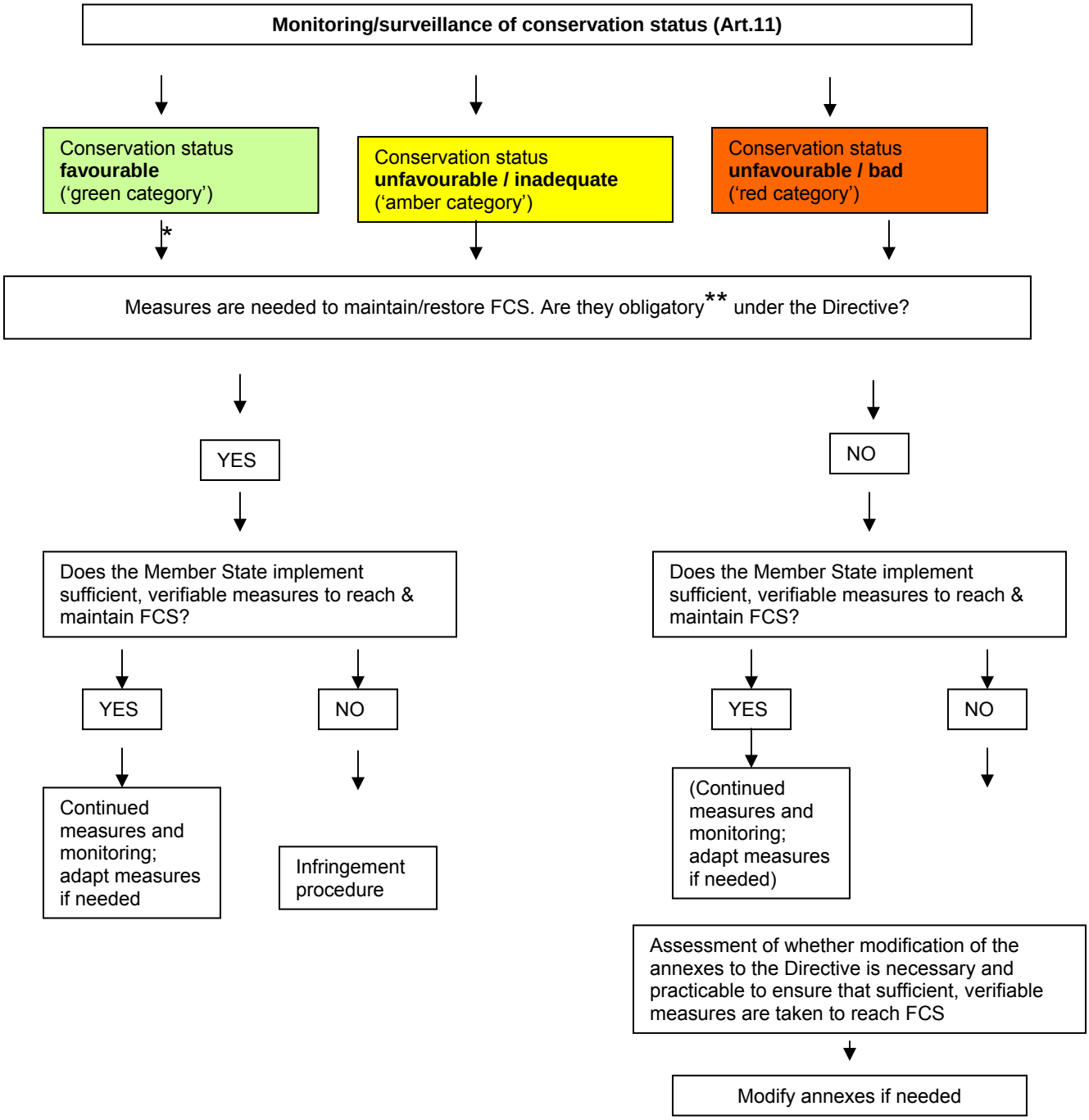
   - The Member State does not implement sufficient and verifiable measures to maintain or reach FCS. In such a case, the need for further action needs to be assessed, which might include modification of the annexes to the Directive if this is the appropriate way of ensuring FCS for a species. Modification of the annexes could involve adding a species listed only in Annex IV to Annex II or upgrading a species to priority status. If modification of the annexes is not likely to bring results, more far-reaching adaptations or additional instruments might be considered[38].

(63) This demonstrates the importance of designing appropriate and effective measures in combination with a surveillance system to monitor the conservation status of species.

*Summary: Measures taken by the Member States when implementing the provisions under the Directive should always be proportionate and appropriate to the objective pursued, i.e. maintaining and restoring favourable conservation status. The measures must be appropriate and effective on the ground. There might be some cases where appropriate measures are not obligatory under the Directive. Voluntary measures or adaptation of the Directive and its annexes may be envisaged in such cases.*

[38] Annexes could also be modified to remove a species as well, since surveillance could reveal a species to be widely abundant.

## APPROPRIATENESS AND EFFECTIVENESS OF MEASURES TAKEN




* Where monitoring shows that a species is in a favourable status with no need for measures to maintain this situation, and consequently no longer fulfils the criteria for Community interest, modification of the annexes (in this case, removal of the species) should be envisaged.

** This refers to the situation described in chapter 1.2.4.b.

## II. ARTICLE 12

| **Text of Article 12** |
| --- |
| *1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:*<br><br>*(a) all forms of deliberate capture or killing of specimens of these species in the wild;*<br><br>*(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;*<br><br>*(c) deliberate destruction or taking of eggs from the wild;*<br><br>*(d) deterioration or destruction of breeding sites or resting places.*<br><br>*2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.*<br><br>*3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.*<br><br>*4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.* |

(1) As a part of the second pillar of Directive 92/43/EEC, Article 12 tackles the more specific question of the protection of Annex IV(a) species. Consequently, Article 12 places the emphasis on the direct threats faced by animal species listed in Annex IV(a) rather than the broader question of the conservation of their habitats — with the exception of 12(1)(d).

(2) Annex IV(a) encompasses a wide variety of species, from large, wide-ranging vertebrates to small invertebrates with very small home ranges. Some of these animal species benefit from the provisions of the section on 'habitat conservation' but others do not. In the case of species listed only in Annex IV, Article 12 is the main provision for achieving the conservation aim in Article 2.

(3) Before addressing the provisions of Article 12 in detail, it is worth recalling some general legal considerations that have previously been developed by the ECJ.

### II.1. General legal considerations

(4) Effective implementation of Article 12 of Directive 92/43/EEC requires full, clear and precise transposition by Member States. According to established case law, "*the provisions of Directives must be implemented with unquestionable binding force and with the*

*specificity, precision and clarity necessary to satisfy the requirements of legal certainty*"[39]. For instance, a prohibition on using pesticides where this is likely to have seriously harmful effects on the balance of nature is not as clear, precise and strict as the prohibition of the deterioration of the breeding sites or resting places of protected animals as laid down in Article 12(1)(d)[40].

(5) According to the Court, the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive with sufficient clarity and precision[41]. Any provisions setting up a strict protection framework should specifically address the issue of Annex IV(a) species protection and meet the requirements laid down by Article 12. It should be observed that the Court[42] emphasised the importance of this question in the *Caretta caretta* case. When asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system which it believed met the requirements laid down by Article 12, "*the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements.*" In consequence, given the specific character of Article 12, legislative or administrative provisions of a general character, e.g. a mere repetition of the wording of Article 12 in national legislation, may not always satisfy the requirements of species protection and guarantee the effective implementation of Article 12. The formal transposition of Article 12 into national legislation may not always guarantee its effectiveness and may need to be complemented by further implementing provisions to ensure strict protection based on the particularities, specific problems and threats faced by species or groups of species.

(6) When transposing the Directive, Member States must respect the meaning of terms and concepts used by the Directive so as to ensure uniformity in its interpretation and application[43]. This also implies that national transposition measures should guarantee the full application of the Directive without modifying its terms, selectively applying its provisions or adding supplementary conditions or derogations not provided for in the Directive[44]. As the Court has observed, "*faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories… It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise*"[45].

(7) For instance, the transposition of Article 12(1)(d) prohibiting the deterioration or destruction of breeding sites and resting places that are "*clearly perceptible*" or "perfectly *known and identified as such*" or prohibiting only the deliberate deterioration or destruction

---

[39] See in particular the judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 27), but also the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32.

[40] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 67-68.

[41] For instance: judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 21.

[42] See paragraph 29 of the judgment in Case C-103/00.

[43] For instance: judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

[44] Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

[45] See for instance the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26 and the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 59-60.

of breeding sites or resting places[46] modifies the substance of Article 12(1)(d) and limits its scope of application. The same goes for the exemption of lawful acts from the application of Article 12(1)(d). This kind of transposition is therefore incompatible with Article 12(1)(d).

(8) In addition, "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty*"[47]. It has to be stressed that the existence of national case law alone, with no specific legal provision, cannot be considered as properly complying with the obligation to fully transpose a Directive.

*Summary: Effective implementation of Article 12 requires full, clear and precise transposition by Member States. The provisions in their laws must be specific enough to be capable of meeting the requirements of the Directive.*

**The *Caretta caretta* Judgment**

The judgment of 30 January 2002 in the *Caretta caretta* case (Commission versus Greece, Case C-103/00) was the first judgment on the application of Article 12 of the Habitats Directive (Directive 92/43/EEC) for a specific species. The Court had never given an interpretation on its application and scope prior to this judgment.

The loggerhead sea turtle (*Caretta caretta*) is listed in Annexes II and IV to Directive 92/43/EEC as a species of Community interest in need of strict protection. Laganas Bay on the island of Zakynthos is the most important breeding site for this turtle in the Mediterranean and has also been proposed as a Site of Community Importance for the Natura 2000 network.

In 1998, a number of non-governmental organisations exposed the deterioration in the conditions for this species of sea turtle on Zakynthos. The main problems were uncontrolled use of the island's beaches and the surrounding sea for tourism-related activities, including, among other things, the erection of illegal buildings, the use of mopeds on beaches and other activities with potential negative impacts on these turtles. The Commission called on the Greek authorities to provide information on the measures taken to protect the species on this island. Based on this information and the findings of Commission officials on missions, an infringement procedure under Article 226 of the Treaty was initiated on the grounds that Greece had failed to fulfil its obligations under Article 12(1)(b) and (d) of the Habitats Directive. In the course of the pre-litigation procedure, the Greek authorities maintained that all the appropriate measures to ensure the protection of the turtle had been taken or were in the process of being adopted and implemented.

After an updated assessment of the situation by the Commission services in 1999, it was still found to be inadequate and the case was referred to the Court of Justice. More specifically, the Commission alleged that Greece had contravened this Article, firstly by not adopting a legal framework designed to ensure the strict protection of *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration in, or destruction of, its breeding sites and secondly by not taking any concrete, effective measures on the ground to avoid such problems.

[46] See also the Court judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 79.

[47] For example: judgment of 23 February 1988, Commission v Italy, Case 429/85, ECR p.843, paragraph 12; judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10; judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

On 30 January 2002, the Court accepted the Commission's arguments and condemned Greece for its failure to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakynthos. In particular, the Greek authorities had not taken the requisite measures to avoid disturbance of the species during its breeding period and activities that may bring about deterioration or destruction of its breeding sites.

## II.2. Requisite measures for a system of strict protection

(9) Article 12 of Directive 92/43/EEC obliges Member States to take requisite measures to "establish and implement an effective system of strict protection"[48] for the animal species listed in Annex IV(a) in their natural range. This wording leads to several questions as regards the definition of certain terms.

(10) The Directive, while clearly setting out the prohibitions, does not define in detail the "requisite" measures for their implementation and for the establishment of a "system" of strict protection for each of the species concerned. The interpretation and implementation of Article 12(1)(a) to (d) should take into account the aim of the Directive as laid down in Article 2. Article 12 should not be interpreted as requiring the adoption of pro-active habitat management measures, such as for example the restoration or improvement of habitats for certain species. Thus, the Directive gives a certain margin of manoeuvre to the Member States, which are responsible for defining, adopting and implementing the requisite measures establishing a "system" of strict protection for each of the animal species listed in Annex IV(a). However, the discretionary power of Member States is subject to some limitations and should respect some basic requirements.

### II.2.1. Measures to establish and effectively implement a system of strict protection

(11) The Commission considers that the full and effective application of Article 12 requires, on the one hand, the establishment of a coherent legal framework, i.e. the adoption of specific laws, regulations or administrative measures to effectively prohibit the activities indicated in Article 12(1), and, on the other hand, the application of concrete measures to enforce these provisions on the ground for the protection of Annex IV(a) species.

(12) The Court also adopted this approach in Cases C-103/00 (concerning the protection of *Caretta caretta* in Zakynthos[49]), C-518/04 (concerning the protection of *Vipera schweizeri* in Milos[50]) and C-183/05 (concerning the protection of several Annex IV species in Ireland[51]). In particular, in Case C-103/00, the Advocate General provided a detailed analysis of the significance and scope of the concept of "system of strict protection".

(13) This concept is fundamental for the application of Article 12. In the *Caretta caretta* case, the Court declared that Greece had failed to fulfil its obligations under 12(1) of Directive 92/43/EEC, since it had failed to take "*the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakynthos to avoid disturbing the species during its breeding period and to avoid activities which may deteriorate or destroy its breeding sites*." Thus, full application of Article 12

[48] See the judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147.

[49] Judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147. See also the judgment of 17 January 1991, Commission v Italy, C-157/89, ECR p.57 (in particular paragraph 14), which concerns Article 7 of Directive 79/409/EEC.

[50] Judgment of 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42.

[51] Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR.

requires the establishment and implementation of a system of strict protection which effectively prohibits the activities indicated in Article 12(1).

(14) To summarise the above, an adequate system of strict protection for Annex IV(a) species consists in **a set of coherent and coordinated measures of a preventive nature**. This results directly from the term "system" and also takes account of the need to establish a link between the adopted measures and the objectives of Article 12 and the Directive in general. These measures must contribute to the aim of maintaining the species in the long term or restoring its population in its habitat and must be **effectively enforced**.

(15) Moreover, this interpretation is borne out by recitals 3[52] and 15[53] of the Directive, which refer to the encouragement of human activities and to management measures with a view to maintaining or restoring species at a favourable conservation status. Of course, the recitals themselves do not have any binding legal effect and can never override the substantive provisions of the Directive. The Court does not use the preamble to directly ground a judgment. However, the preamble is often used as an aid in interpreting the substantive provisions of secondary legislation[54].

(16) The need for coherent and coordinated measures of a preventive nature in order to implement the requirement for the strict protection of Annex IV(a) species does not necessarily imply the establishment of new structures or authorisation procedures at national level. Regarding projects that may affect an Annex IV species, **Member States can adapt existing planning procedures to meet the requirements of Article 12.** This means that assessment of the impact on species can be built into the appraisals that form part of existing decision-making processes at various levels in a Member State, including e.g. land-use planning decisions. With regard to ongoing activities, all Member States will most likely employ planning procedures, regulations or best practice codes, which could then be used as tools to implement Article 12 provisions.

*Summary: The full and effective application of Article 12 requires, on the one hand, the establishment of a legal framework of coherent and coordinated measures and, on the other, the application of concrete, coherent and coordinated measures to enforce these provisions on the ground effectively.*

### II.2.2. Measures to ensure favourable conservation status

(17) The interpretation of Article 12 has to take into consideration the objective of Directive 92/43/EEC[55] set out in Article 2, which applies, without distinction, to all Annexes. Consequently, strict protection measures adopted under Article 12 should aim to fulfil the main objective of the Directive by contributing to the maintenance or restoration, at favourable conservation status, of Annex IV(a) species of Community interest, while taking into account economic, social and cultural requirements and regional and local characteristics.

---

52 "Whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities."

53 "Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions".

54 For example, judgment 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883.

55 See chapter I.2.1.

(18) Furthermore, Article 12 has to be interpreted in the light of Article 1(i), which defines the favourable conservation status of a species. In addition, the measures taken by the Member States should be appropriate with a view to attaining the objective of maintaining or restoring the conservation status of a species. This implies that the measures to be taken must be decided depending on the particular circumstances of each situation and taking into account the specificity of each species. For instance, the characteristics of a species, such as its conservation status, may justify more specific or intense protection measures.

*Summary: Strict protection measures adopted under Article 12 must contribute to fulfilling the main objective of the Directive, namely maintaining or restoring a favourable conservation status.*

### II.2.3. Measures regarding the situations described in Article 12

(19) The scope and type of measures taken to establish a system of strict protection are circumscribed by the content of the prohibitions and other obligations in Article 12 (see also chapter II.3). Consequently, the measures taken must relate to actions that threaten the species (12(1)(a)-(c), 12(2), 12(4)) or defined elements of their habitats (Article 12(1)(d)). Article 12 does not, in itself or in conjunction with Article 2, oblige Member States to take proactive habitat management measures. What is required are measures to effectively implement the prohibitions of Article 12.

(20) It is obvious that different types of measures may be required to address each specific species listed in Annex IV and each specific situation. In addition, as already stated in chapter II.1, mere repetition of the wording of Article 12 in national legislation may not always satisfy the requirements of species protection. The transposition of Article 12 into national legislation should guarantee its effective implementation. Based on the particularities, specific problems and threats faced by species or groups of species, Member States should adopt provisions specifically for their protection. It is the responsibility of national authorities to define the measures necessary to implement the prohibitions of Article 12 and to ensure the strict protection of animal species. The nature of these measures will depend on each national system.

(21) However, for some species and in some situations, the adoption and implementation of purely prohibitive measures may not be sufficient, and may not guarantee effective implementation of Article 12. In such cases, Article 12 requires the adoption and implementation of preventive measures. It is also evident from the wording of Articles 12 and 1(i), and from the objective of "maintaining" a favourable conservation status, that Member States are bound by their obligations under Article 12 even before any reduction in numbers of the species has been confirmed or the risk of this protected species disappearing has become a reality[56]. Even if a species has a favourable conservation status and is likely to have this in the foreseeable future, Member States should take preventive measures to protect the species by effectively prohibiting the activities indicated in Article 12.

(22) This view was supported in Cases C-103/00, C-518/04 and C-183/05, where the Court stressed the importance of the preventive character of the measures taken[57]. The Court rejected the Greek Government's argument that a decrease in the number of nests needed to be proved in order to demonstrate the absence of strict protection for *Caretta*

[56] See in particular paragraph 43 of the Advocate General's opinion and paragraph 31 of the *Caretta caretta* judgment, as well as paragraph 21 of the *Vipera schweizeri* judgment.

[57] This solution had already been applied in the Santoña case (judgment of 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221, paragraph 15).

*caretta*. According to the Court *"the fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question"*, i.e. the absence of a system of strict protection for *Caretta caretta*. The same goes for arguments such as the good state of the environment or the stability of a species population. It clearly follows that the measures to be taken under Article 12 should not be purely prohibitive but should also be of a preventive nature.

(23) Such an approach is also founded on Article 174 of the EC Treaty, according to which "*Community policy on the environment shall aim at a high level of protection*", and is based on the precautionary principle and on the principle that preventive action should be taken. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of breeding sites or resting places of Annex IV(a) species (Article 12(1)(d)). Preventive measures that at the same time ensure effective implementation of the prohibitions in Article 12 "on the ground" could include for example:

- information campaigns to raise awareness among a general or targeted public (e.g. landowners, etc.) of the protection requirements for certain species;
- action to have species protection considerations taken into account by relevant economic sectors interfering with Annex IV species (e.g. agriculture, forestry) to avoid the negative impacts of certain land-use practices. This could include training, codes of conduct, guidance documents, or the adaptation of forestry or agricultural plans and best practice or administrative procedures.
- active prevention of likely disturbances (e.g. restricting access to bat caves during sensitive periods to avoid disturbance or vandalism)
- inspections
- preparation of national conservation plans, which could set out in detail the measures mentioned above and provide practical guidance to local/regional authorities, affected interest groups, etc. in effectively implementing provisions for specific species

**National Species Action Plans in Sweden**

Sweden has put forward about 120 National Action Plans for threatened species that will be developed and initiated in the period 2003 – 2006. A National Action Plan (NAP) is not a legal document, but serves as guidance for authorities, organisations and landowners on important actions needed to conserve species and to review their ecology and present-day status. The NAP normally sets out the division of responsibility among relevant bodies.

The establishment of an NAP is coordinated by one of the 21 County Administration Boards. They normally do not write the plan themselves, but contract an expert (there is a guidance document on how to write NAPs and on the adoption procedure). When the Administration Board and the Swedish Environmental Protection Agency (SEPA) agree that there is a good draft available, the plan is circulated for consideration by relevant bodies and experts. Based on comments received, the plan is modified and finally adopted by the SEPA. The NAP normally includes a draft budget, provided by the SEPA and other bodies. SEPA's present annual budget (2005) for producing and implementing plans is about 6.5 million euros.

Main elements of a Swedish NAP:

- Formal decision by the Swedish EPA to adopt the NAP
- Time period, follow-up and review of the Plan
- Brief description of the species, their ecology and biology, and genetic aspects (if relevant)

- Distribution and conservation status
- Status in relation to national and international legislation and commitments
- Reasons for decline and identified threats
- Experiences from previous actions (if any)
- Vision for the future and gap analyses
- Short-term and long-term NAP objectives
- Priority measures to be taken
- Recommendations targeting municipalities, landowners and others
- Description of consequences to other species/habitats and conflicts of interests
- References
- Appendices (maps, diagrams, and a table with an overview of all agreed actions, actors, priorities, costs and finance)
- Summaries in Swedish and English

The plans, which usually cover a period of several years, are supported by yearly plans dealing with the concrete action to be undertaken. Approximately 40 NAPs have so far been established, e.g. for *Hyla arborea, Bombina bombina, Osmoderma eremita, Margaritifera margaritifera, Ursus arctos* and many others. The programme is ongoing, will probably gain a larger budget in the coming years, and is coupled with environmental objectives approved by the Swedish parliament.

Consequently, for some species, preventive measures would also form part of the "requisite measures" for the system of strict protection. They are not the same as proactive biotope management measures such as restoration or habitat improvement.

*Summary: Measures to be taken under Article 12 are circumscribed by the content of the prohibitions and other obligations in Article 12. However, as national legislation should guarantee the effectiveness of Article 12, the formal transposition of Article 12 prohibitions may not be sufficient and Member States should define the measures necessary to implement the prohibitions of Article 12 and ensure the strict protection of species. In addition, for some species and in some situations, the adoption and implementation of preventive measures may be required. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of the breeding sites or resting places of Annex IV(a) species.*

### II.2.4. Provisions of Article 12(1) (a)-(d) in relation to ongoing activities

(24) While the application of protection provisions can be clearly linked to development permitting procedures, for e.g. construction projects and infrastructure, ongoing activities such as **agriculture and forestry**[58], for example, pose a more complex set of issues. The majority of activities and practices in these sectors are not subject to prior approval or consent and it would be disproportionate to impose a comprehensive set of controls along these lines. It is also important to recognise the positive contribution that many traditional farming and forestry practices make to the creation and maintenance of some of Europe's most valued habitats (e.g. semi-natural grasslands such as hay meadows or species-rich *Nardus* grassland). The Directive does nevertheless apply to these sectors and Member States do therefore have to meet their obligations to protect the species concerned. This

[58] As very widespread activities, agriculture and forestry are looked at in detail in this chapter. However, while the level of statutory control over ongoing activities may vary, the principles set out in this chapter should be seen as generally applying to other ongoing activities as well (e.g. fisheries, tourism, maintenance activities, etc.)

does not necessarily mean that new structures or authorisation procedures should be introduced at national level. All Member States will most likely have planning procedures, regulations or best practice codes in place, and these tools could be adapted in order to apply Article 12 to ongoing activities. **Independently of the option chosen to apply Article 12 to ongoing activities (creation of a new mechanism or adaptation of existing mechanisms), Member States have to ensure that the strict protection requirements are adequately met.** As agriculture and forestry differ significantly on this point, they are discussed separately.

(25) As regards **agriculture**[59], a number of Member States opt for preventive measures to ensure Article 12 compliance, in part by developing **guidance and codes of conduct**. It is important to note that basic farming practice rules will include the protection of features — such as hedges, ponds, etc. — which are most likely to be the habitat of the species concerned. This approach is seen to be appropriate and effective in contributing to the protection of these species, providing a high chance of success. The range of species concerned is very wide, however, and in some cases Member States have thought it appropriate to produce more detailed species-specific guidance. The Directive nevertheless requires that such approaches and tools complement rather than replace formal legal protection, i.e. if these tools (e.g. codes of conduct, best practices) are ignored, there must be legal procedures in place in order to ensure an effective system of strict protection for animal species.

(26) In this context, it should be stressed that the occurrence of protected species in e.g. agricultural land is often the result of traditional land-use and farming practices, usually of an extensive nature. Where land-use practices are clearly supportive of the conservation status of a species under consideration, it is obvious that the continuation of such practices should be encouraged. Accidental disturbance or killing of individuals of the species concerned by such practices needs to be accepted in the interest of the population as a whole (applying proportionality to achieve the overall objective). Where however an ongoing land use (due to changes of practices, intensification, etc.) is clearly damaging to a species, leading to decreases in its population in the area, a Member State is required to find ways to avoid this.

**The UK approach of integrating species protection in ongoing activities**

In the UK, there are two "layers" for protecting species during ongoing activities: the first is legislative, the second comprises a range of good practice guidance available to farmers, foresters, building professionals, etc. By following good practice guidance, land managers should be able to continue their normal activities and at the same time avoid the deterioration or destruction of the breeding sites / resting places of Annex IV species. Maintaining or restoring optimum habitats for populations is seen as more important than the unintentional loss or disturbance of individuals that might occur as result of ongoing activities. By raising awareness of the possible presence of such species and by giving advice on action that land managers can take, the chances of offences against species are minimised.

[59] With respect to the relationship between agriculture and environment protection, the 2003 reform of the Common Agricultural Policy is significant in two key respects. Firstly, it has broken the link between Community subsidies and the productivity of farmland. The majority of farmers will now receive a Single Farm Payment no longer related to their productivity. The incentive for farmers to increase productivity will in future be solely determined by economic considerations set by market prices. Secondly, a condition for receiving Single Farm Payments and any other support from the CAP will be compliance with a number of environmental standards established in Community environment legislation (known as cross-compliance) and thus observance of a set of basic farming practice rules.

Government agencies in the UK consequently provide a range of practical guidance on protected species aimed at informing property managers. This ranges from simple general guidance (e.g. on newts on farmland) to comprehensive conservation handbooks (e.g. for the dormouse *Muscardinus avellarnarius*). It is disseminated via the internet or as leaflets to people managing farms, forests or even buildings that host protected species, for example information brochures such as 'Great crested newts on your farm', 'Woodland management for bats' and 'Bats in buildings'.

The guidance provides land-owners with

1. information on how to know if a listed species inhabits the property
2. a simple description of the species concerned, supported by illustrations
3. information on the biology and ecological requirements of the species
4. a simple description of the annual life cycle and relationship with the annual management practices of interest to land managers
5. advice on how to prevent damage to species and their habitats and how ongoing activities might be adjusted to favour species protection
6. information on the need for some management operations to have a licence and where to apply for it
7. examples of concrete activities that are damaging to species
8. information on the legal protection status and possible legal consequences in cases where the law might be breached
9. essential contact information on who can help and give advice
10. information on grant schemes available (Environmental Stewardship)

(27) Applying Article 12 to **forestry** is, in some respects, more complex in that it is more likely that the trees to be harvested are themselves the habitat (breeding site/resting place) of some of the species concerned. The specific characteristics of the sector, i.e. the long production cycles and consequently the need for long-term planning add to the special challenges of species conservation. In the search for sustainable forest-management practices, which are consistent with conservation requirements, a variety of approaches have been developed in different Member States to address the issue. Existing approaches vary from detailed forestry planning and prior approval of forest management plans, or general codes of practice, to the pre-notification (see Finnish example below) of felling proposals to permit environmental authorities to intervene where known populations of protected species may be involved. As in the case of agricultural practices, these preventive approaches can ensure the protection of the species concerned, provided that they are communicated effectively and are implemented with good will and sufficient resources. A particular economic incentive to follow such approaches is in fact provided by the growing prevalence of forest certification schemes, which require compliance with environmental protection requirements including biodiversity and species protection (the approaches may of course need to be adapted to conform to the protection requirements of Annex IV species). However, such approaches do not provide an absolute guarantee, except where full prior approval of forest management plans is required, and must (as indicated above) be supported by a legal protection regime as required by the Directive.

**Species protection in ongoing forestry management in France**

In France, ongoing forestry practices are regulated in both public and private forests. A law adopted in 2001 provides that the management of forests must be sustainable and must guarantee the preservation of biodiversity. The implementation of this law is supported by different types of management plans and codes of good practice depending on whether a

forest is private or public and depending on its size. These documents are approved by the administrative authorities and take full account of protected habitats and species. However, these documents do not stand alone: they are accompanied by awareness-raising, information and training of forest owners and managers so that they can make an active contribution to the implementation of Article 12. Coherent cooperation between the different levels (national, regional, local) is also ensured by planning, information and guidance instruments.

The French forestry plans go beyond the protection of current species occurrences and habitats: they also target the long-term viability of species populations, taking into account their conservation needs over time as well as space. Two examples illustrate this:

Certain bat species need large areas of forest to survive in the long term. A bat-sensitive forest management therefore needs to provide — over a longer-term perspective — the structures needed and other requirements for a sufficiently large habitat, while at the same time allowing for the use and renewal of the forest. Consequently, local, mostly unavoidable deterioration or destruction of bat habitats during the exploitation of single parcels of forests will — due to the overall planning, codes of good practice and safeguards applying on a broader scale to the woodland as a whole — not have any influence on the conservation status of the species in the woodland as such. This situation was confirmed in a special study carried out in the “Rambouillet” forest near Paris.

Another example is the wood-boring beetle *Rosalia alpina*, which inhabits mature broadleaf trees in mountainous forests. During its larval development, it is virtually impossible to detect the presence of the insect in a tree. It is therefore more or less unavoidable that breeding sites and resting places of the beetle will be destroyed during forest exploitation. The management of this species, as laid down in the management plan, therefore targets the long-term preservation of a network of islands with trees likely to be used by the beetle in order to guarantee the conservation status of the species.

(28) The conclusion that can be drawn is that ongoing activities should best be guided so as to avoid conflicts with the species protection provisions in the first place. Tools such as planning instruments, systems of prior consent, codes of conduct and concrete information or guidance are options here. Such measures should:

a) form part of the “requisite measures” needed under Article 12 to “establish and implement an effective system of strict protection”,
b) incorporate the strict protection requirements,
c) offer flexibility, i.e. while recognising that absolute protection for all individuals of a species cannot be guaranteed, ensure that any harmful action takes full account of the conservation needs of the species/population concerned,
d) have the advantage that they potentially protect the person engaging in an activity (i.e. from prosecution) as long as the person adheres to these measures.
e) be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in the case of non-compliance (legal certainty aspects are met)
f) help define appropriate levels of surveillance (required under Article 11 of the Directive) and determine how these should be funded,
g) be in line with Article 2(3) by taking account of economic, social and cultural requirements.

**Integrating flying squirrel protection in Finnish forestry**

In June 2004 a new legislative protection system was established in Finland to enhance the protection of the breeding sites and resting places of the flying squirrel *(Pteromys volans)*. Under the Forestry Act, a forest owner must notify the regional forest authorities before cuttings take place. The notification must include a map and a short description of planned cuttings. All known breeding and resting places of the squirrel are stored in a database. If a planned cutting site matches information in the database, a formal decision is taken by the environmental authorities. The landowner, the forest company concerned and the regional forest authority are informed. The decision includes a detailed description of the site and a map indicating the location of the breeding sites and resting places. It also lays down what measures, if any, are allowed.

The experience so far shows that there are some problems, such as time-consuming procedures, diverse technical problems, and scientific problems especially in identifying the breeding and resting places, and that the system needs to be improved. On the other hand, it is already evident that the system has improved cooperation and the exchange of information and data between the forest authorities and environment authorities and that it provides landowners with more accurate and updated information on the species they have an obligation to protect. The ecological and economic effects of the system need to be assessed in the near future.

A lot of Member States have used voluntary measures, such as agro/forestry environmental measures under rural development regulation, to support the implementation of Article 12. Such measures have the potential to successfully combine the preventive approach with (voluntary) proactive habitat management.

**Developing measures for species protection under rural development regulation & LIFE-nature**

The occurrence of large predators protected by the Habitats Directive can sometimes lead to conflicts with farmers and foresters. A characteristic of these large predators is their mobility within very large territories, usually beyond specific Natura 2000 sites designated for them. Large predators may have an impact on ongoing activities, mainly livestock farming (e.g. sheep herding), due to predation. These protected species are widely known by farmers and the need to protect them due to their continuously decreasing numbers is also well communicated and documented. Actions to mitigate the impacts of these species on ongoing activities have been examined for many years. Several measures have been tested with support from the LIFE-nature programme[60] and put in place with support from agri-environmental projects to prevent damage, such as the installation of electric fences, the provision of sheepdogs to watch over herds, the provision of natural prey, improvement of the habitat and feeding possibilities within this habitat, etc., and/or to provide compensation for damage encountered.

Measures of this type have been included in the rural development plans of some Member States. For example, Greece's rural development plan includes the following measures:
1. acquiring and using sheep dogs in areas where wolf and bear are present;
2. installing and maintaining electric fences to protect crops and hives in areas with bears;

[60] For details on LIFE-nature and the projects funded by this programme, please go to http://ec.europa.eu/environment/life/life/nature.htm

3. cultivation of special plots of cereals or fruit trees by farmers to provide food resources for (among others) bears.
These voluntary measures aim at preventing damage from large carnivores, complementing national legislation that prohibits all kinds of actions that have a negative effect on the species, like killing, trapping, baits, etc. Similar measures are included in the rural development programmes of various French regions with populations of large predators.

These positive examples of practices that contribute to species management and protection can in some cases also entail some negative impacts for other protected species in Annex IV, which might be locally disturbed. However, looking at the overall picture, such measures contribute to the protection of Annex IV species and also to good pastoral management.

*Summary: For ongoing activities, such as agriculture or forestry, the challenge is to apply the species protection provisions of Article 12 using appropriate means in order to avoid conflicts in first place. The use of tools such as planning instruments, codes of conduct and concrete information/guidance are options here and potentially can satisfy the specific conservation needs while taking into account economic, social and cultural requirements. However, these tools need to be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in cases of non-compliance.*

## II.3. The specific protection provisions under Article 12

### II.3.1. Deliberate capture or killing of specimens of Annex IV(a) species

(29) Article 12(1)(a) prohibits all forms of deliberate capture or killing[61] of specimens of these species in the wild. In accordance with Article 12(3), this prohibition applies to all stages of life of the animals. According to Article 1(m), *"specimen means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species."*

(30) This prohibition is important as it is linked with the population of a species (its size, dynamics, etc.), which constitutes one of the criteria under Article 1(i) for assessing the conservation status of a species. Killing or capture may lead to an immediate, direct (quantitative) decline in a population, or could have other more indirect (qualitative) negative effects. The prohibition covers deliberate capture or killing, not incidental capture or killing, which falls under Article 12(4).

(31) In Case C-103/00, the Court referred to the element of "intent", observing that: "*the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.*" Despite the information available to the public on the need to protect these

[61] In its judgment of 18 May 2006 (Commission v Spain, case C-221/04, ECR p.4515, paragraph 69) the Court clarified that it is clear from a reading of the different language versions that "deliberate" refers to both the capture and killing of protected animal species.

areas, the persons on the beach committed the infringements[62]. This constituted a failure of enforcement. Thus, the Court "*seems to interpret the term 'deliberate' in the sense of conscious acceptance of consequences*"[63].

(32) In Case C-221/04[64], the reasoning of the Court was more specific. In that case, the Commission brought an action before the Court because, due to the authorisation by the authorities in Castilla y León of snares in several private hunting areas, Spain had failed to comply with Article 12(1)(a) as regards the protection of the otter (*Lutra lutra*). The Court recalled the findings of the *Caretta caretta* case and stated that ***"for the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing"***[65]. This is used as a "requisite criterion" by the Court, which in the present case found that the contested permit related to fox hunting and accordingly was not in itself intended to allow the capture of otters. In addition, the Court stressed that the presence of otters in the area concerned had not been formally proven, so that it had also not been established that the Spanish authorities knew that they risked endangering otters by issuing the contested permit for fox hunting. Thus, the Court concluded that the requisite criteria for determining that the capture or killing of a specimen belonging to a protected animal species was deliberate had not been met[66].

(33) On the basis of the approach taken by the Court in cases C-103/00 and C-221/04, the following definition could be proposed: **"Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.** In other words, not only a person who fully intends to capture or kill a specimen of an animal commits an offence: an offence is also committed by a person who might not intend to capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (e.g. as an unwanted but accepted side-effect), with reckless disregard of the known prohibitions (conditional intent). It goes without saying that negligence is not included in the meaning of "deliberate".

(34) Therefore, it would seem appropriate to alert the public, or other more limited categories of people (e.g. certain categories of land users) who are likely to interfere with a species in Annex IV(a), to the prohibitions that apply to listed species using appropriate means. The public relations work of the Scottish Natural Heritage in relation to bats is an example of this (see http://www.snh.org.uk, publications on bats). The beach notices in the *Caretta caretta* case constitute another.

---

[62] In Case C-103/00, the Court emphasised the fact that both the driving of mopeds and the presence of small craft were not isolated occurrences. In practical terms, it seems that, in the case of *Caretta caretta*, the repeated character of the violations was decisive in proving the existence of deliberate disturbance.

[63] See paragraph 118 of the Advocate General's Opinion in Case C-6/04.

[64] Judgment of the Court of 18 May 2006, Commission v Spain, Case C-221/04, ECR p.4515.

[65] See paragraph 71 of the judgment.

[66] See paragraphs 72-74 of the judgment.

*Summary: Article 12(1)(a) prohibits all forms of deliberate capture or killing of specimens of Annex IV(a) species in the wild. The term "deliberate" has to be interpreted as going beyond "direct intention". A person who is reasonably expected to know that his action will most likely lead to an offence against a species, but intends the offence or, if not, at least accepts the results of his action, commits an offence. Good information and guidance by the competent authorities seem an appropriate way of implementing these provisions.*

### II.3.2. Deliberate disturbance of Annex IV(a) species, particularly during periods of breeding, rearing, hibernation and migration

(35) Article 12(1)(b) prohibits the deliberate disturbance of Annex IV species especially during periods of breeding, rearing, hibernation and migration, where the species are more vulnerable[67]. Under Article 12(3), moreover, this prohibition applies to all stages of life of the animal species concerned.

#### II.3.2.a) Disturbance

(36) Neither Article 12 nor Article 1 of Directive 92/43/EEC contains a definition of the term "disturbance". Article 6 guidelines[68] contain some useful information on the term in relation to habitats. If we apply the Commission services' guidelines to Article 12, we may observe the following:

(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e.g. by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods in its life cycle (e.g. breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of "disturbance".

(38) The disturbance under Article 12(1)(b) must be deliberate (see chapter II.3.1) and not accidental. On the other hand, while "disturbance" under Article 6(2) must be significant, this is not the case in Article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.

---

[67] In Case C-75/01 (judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 53-54), the Court declared that Luxembourg had failed to ensure the full and complete transposition of Article 12(1)(b), since deliberate disturbance of species was not prohibited during the period of migration.

[68] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC"; see, in particular, points 3.4, 3.5 and 3.6.2.

(39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a Member State (see also chapter III.2.3.a on "Scale of assessment"). For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a "disturbance" in terms of Article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12. Once again, it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above.

(40) On the question of deliberate disturbance of a species during the breeding period, concerning *Caretta caretta* in Zakynthos, the Court analysed, on a case-by-case basis, the various activities on the breeding beaches with a view to establishing the causal link between these activities and the disturbance of the species. It found, first of all, that driving mopeds on a breeding beach of *Caretta caretta* was likely to disturb this species, mainly because of the noise nuisance, particularly during the egg-laying, incubation and hatching period and when the young turtles were making their way out to sea. Lastly, according to the judges, it was clear that the presence of small craft close to the breeding beaches constituted a threat to their lives and well-being.

*Summary: Disturbance need not directly affect the physical integrity of a species but can nevertheless have a direct negative effect. Disturbance is detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.*

### II.3.2.b) Periods of breeding, rearing, hibernation and migration

(41) The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. There is, however, no definition of these terms in the Habitats Directive. Nevertheless, similar terms (e.g. "period of reproduction", "return to the breeding areas"[69]) are used in the Birds Directive, where they are defined in the context of birds. As Annex IV(a) includes a much wider range of species, which are very different ecologically, biologically and behaviourally, it is necessary to use, once more, a "species-by-species" approach when defining periods of breeding, rearing, hibernation and migration (where those periods apply at all).

(42) Period of breeding and rearing:

This period may include (where applicable) the period of courtship, mating, nest construction or selection of egg-laying or parturition[70] site, parturition or egg laying, or production of offspring where reproduction is asexual, egg development and egg hatching, and rearing of young.

(43) Period of hibernation:

[69] 'Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds' (to be found under http://www.europa.eu.int/comm/environment/nature/home.htm).

[70] Parturition – act of giving birth.

Hibernation is a period of time when an animal becomes inactive and remains in a state of sleep, a torpid or resting state, usually during winter. Usually such a state is accompanied by a lowered body temperature and slowed heartbeat and breathing. Hibernation allows an animal to survive harsh conditions by using less energy than if it were active (for example some bats, rodents, amphibians or reptiles)

(44) Period of migration:

Migration is the periodic movement of animals from one area to another as a natural part of their life cycle, usually in response to seasonal changes or changes in the food supply.

*Summary: The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. These periods can be defined only using a species-by-species approach, due to ecological, biological and behavioural differences between species.*

### II.3.3. Deliberate destruction or taking of eggs from the wild

(45) Under Article 12(1)(c), deliberate destruction or taking of eggs from the wild is proscribed. As it protects the eggs of species, this provision protects the species population and its viability in the long-term.

### II.3.4. Deterioration or destruction of breeding sites or resting places

(46) Article 12(1)(d) is a stand-alone provision. Contrary to the other prohibitions of Article 12, it does not concern directly the species but protects important parts of their habitats, as it prohibits deterioration or destruction of breeding sites or resting places. In addition, while points (a), (b) and (c) of Article 12(1) use the term "deliberate", this is not the case as far as point (d) is concerned. This prohibition presents a number of issues that need further clarification.

#### II.3.4.a) Consequences of the word "deliberate" not being included in Article 12(1)(d)

(47) Under points (a), (b) and (c) of Article 12(1) only deliberate acts are prohibited and have to be avoided, whereas under point (d) a deliberate act is not required as a necessary precondition[71]. Article 12(1)(d) requires all acts resulting in deterioration or destruction of breeding sites or resting places to be prohibited irrespective of whether they are deliberate or not[72]. Apparently, the Community legislator has focused on the two important areas of breeding sites and resting places and decided that stricter measures are needed. The Court confirmed that "*by not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding sites or resting*

[71] It is worth mentioning that this point constitutes one of the differences between Directive 92/43/EEC and the Bern Convention. While this specific part of Article 12 lacks the word "deliberate", the term appears in the comparable wording of Article 6 of the Bern Convention.

[72] In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 79), the Court observed that *"by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d)".* The Court followed the same approach in its judgement of 11 January 2007 (Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraph 47): *"by providing that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence, section 23(7)(b) of the Wildlife Act does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not"*.

*places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts*"[73].

(48) In criminal law, a distinction is made between intentional/deliberate and unintentional acts. "Deliberate" also covers situations where the result is not directly intended but the person ought to have taken into account the consequences that could follow from his action. This clearly indicates that, when leaving out the word "deliberate" from subparagraph (d), the intention was to include non-deliberate acts leading to deterioration or destruction in the provision as well. This introduces a special quality to this provision: all deterioration or destruction of breeding sites or resting places is to be effectively prohibited, i.e. avoided.

(49) However, this does not mean that proactive habitat management measures are required under Article 12(1)(d) of the Directive (e.g. to actively manage a meadow for butterflies). Nonetheless, in order to protect breeding sites or resting places from deterioration, a simple prohibition in a legal text is not sufficient and must be supported by an adequate enforcement mechanism, including preventive measures. The lack of the word 'deliberate' underlines the importance of preventive action. Under a strict protection system, Member States should anticipate the threats sites may face from human action and take measures to ensure that those likely to commit an offence (intentionally or not) are aware of the prohibition in force and act accordingly.

(50) However, the deterioration of natural habitats may take place naturally (including through natural succession after cessation of a certain land use like agriculture) or be caused by unforeseeable events, so that the habitat is no longer a suitable breeding site or resting place for certain species. In this case, where no act has been committed to provoke deterioration/destruction of breeding sites or resting places but, where this has arisen through natural causes, Article 12(1)(d) cannot be applied[74].

(51) It should be stressed that, in the *Caretta caretta* case, the Court declared that the presence of buildings on a beach used by the species for breeding was liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive[75]. Significantly, the Court did not use the Commission's wording, which referred to "illegal" buildings. The mere fact that buildings had been built there and were liable to cause deterioration and destruction was the overriding argument for the Court. Therefore, the construction of buildings on a beach classified as "an absolute protection area" and where "special notices had been erected" is sufficient to constitute an infringement of Article 12(1)(d).

---

[73] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 55.

[74] The appropriate instrument for dealing with deterioration due to natural causes or unforeseeable events is Article 6(2) of the Habitats Directive. In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 34), the Court stated that "*in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.*"

[75] According to paragraph 38 of the judgment, "there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive".

*Summary: The word "deliberate" covers not only situations where a certain result is directly intended but also situations were the person committing an offence knows the consequences of his action but accepts them, even if not directly intended. The fact that the word "deliberate" is not used in Article 12(1)(d) underlines the importance of preventive action by Member States to avoid all likely deterioration or destruction caused by humans. Cases of deterioration or destruction resulting from natural causes (i.e. not directly the consequence of human activities, e.g. natural disasters) or caused by unforeseeable events, do not fall within the scope of Article 12(1)(d).*

### II.3.4.b) Identification of "breeding sites and resting places"

(52) Although Article 12(1)(d) explicitly refers to the protection of "breeding sites" and "resting places" of species listed in Annex IV(a), neither Article 12(1)(d) nor Article 1 of the Directive provide any specific definitions.

(53) In the light of the objectives of the Directive, however, breeding sites and resting places may be considered to require strict protection because they are crucial to the life cycle of animals and are very important parts of a species' entire habitat[76], needed to ensure its survival. Their protection is directly connected with the conservation status of a species. The provision in Article 12(1)(d) should therefore be understood as **aiming to safeguard the ecological functionality** of breeding sites and resting places. Thus, Article 12(1)(d) ensures that such sites and places are not damaged or destroyed by human activities so that they can continue to provide all that is required for a specific animal to rest or to breed successfully.

(54) It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.

(55) The identification of general criteria for breeding sites and resting places is difficult, because Annex IV(a) lists species from many taxa with many different life history strategies. It is not possible to provide a rigid definition of "breeding site" and "resting places" that will apply to all taxa. Any interpretation of the terms "breeding sites" and "resting places" must therefore take into account this variety and reflect different prevailing conditions. The following general definitions aim to provide guidance that will allow species-specific definitions to be prepared in the form of individual dossiers for each of the species listed under Annex IV(a) of the Directive. The definitions are based on the assumption that the sites in question can be identified and reasonably delimited. They are intended to be used as a checklist of elements to be considered when preparing individual species dossiers; meaning that not all these elements will be applicable to all species (e.g. *Canis lupus* has no clearly definable mating site). Knowledge gaps for species can be identified here. For example, the current information on *Caretta caretta* permits only breeding sites (i.e. the beaches) to be well defined, with resting places (in marine areas) not yet determined.

[76] Article 1(f) defines the "habitat of a species" only as "an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle".

However, with improved knowledge and increased research, resting sites may be delimited in future.

(56) The two definitions below are detailed in separate sections, though in practice they will often interlink and overlap and so could be considered together.

(57) ***Breeding sites: a definition***

Breeding is defined here as: mating, giving birth to young (including egg laying) or production of offspring where reproduction is asexual. A breeding site is defined here as the areas needed to mate and to give birth in and covers also the vicinity of the nest or parturition site, where offspring are dependent on such sites. For some species, a breeding site will also include associated structures needed for territorial definition and defence. For species that reproduce asexually, a breeding site is defined as the area needed to produce offspring. Breeding sites that are used regularly, either within or between years, must be protected even when not occupied.

(58) The breeding site may thus include areas required for:

1. courtship;
2. mating;
3. nest construction or selection of egg-laying or parturition[77] site;
4. place used for the purpose of parturition or egg laying or production of offspring where reproduction is asexual;
5. place of egg development and egg hatching;
6. nest or parturition site when occupied by young dependent on that site;

(59) ***Resting places: a definition***

Resting places are defined here as the areas essential to sustain an animal or group of animals when they are not active. For species that have a sessile stage, a resting place is defined as the site of attachment. Resting places will include structures created by animals to function as resting places. Resting places that are used regularly, either within or between years, must be protected even when not occupied.

(60) Resting places essential for survival may include one or more structures and habitat features required for:

1. thermoregulatory behaviour, e.g. *Lacerta agilis*;
2. resting, sleeping or recuperation, e.g. *Nyctalus leisleri* roosts;
3. hiding, protection or refuge e.g. *Macrothele calpeiana* burrows;
4. hibernation, e.g. bat dormitories; *Muscardinus avellanarius* hides.

**Examples of breeding sites and resting places**

| | **Breeding site** | **Resting place** |
|---|---|---|
| ***Triturus cristatus*** *(see also* | All points of the definition apply to *T. cristatus*.<br><br>The pond used for mating has individual male territories within which | During the terrestrial phase of its life, *T. cristatus* makes use of refuges such as stones and logs to hide under during the day. Similar refuges are used for periods of hibernation (in cold regions) or |

[77] parturition – act of giving birth

| | | |
|---|---|---|
| *dossier in Annex III)* | courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely.<br><br>The pond is therefore the breeding site. | summer dormancy (in hot regions). During the aquatic phase of their life, adults and larvae make use of submerged and emergent vegetation as a place of refuge.<br><br>*T. cristatus* does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them, dispersing over a suitable interconnecting terrestrial habitat. Individuals may move approx. 1 km from their natal pool.<br><br>The resting places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle. |
| ***Nyctalus Leisleri*** | Males establish mating territories in tree holes in the autumn. Mating takes place in late autumn and females delay fertilisation until the spring. Young are born in a maternity roost and are dependent on their mother until they are weaned in the summer.<br><br>Male territories and maternity roosts are therefore breeding sites. This strict application of the definition omits winter hibernation roosts, which are covered by "resting places" in Article 12(1)(d) | Hibernation<br>*N. leisleri* is principally a tree-dwelling bat that hibernates over winter. In the winter they roost in tree-holes, buildings and occasionally caves and tunnels that provide a suitable microclimate. They will also utilise artificial roost boxes. Tree roosts have been found in parkland and urban areas as well as deciduous and coniferous woodland. These roosts must be in a relatively undisturbed position as bats roused from their torpor expend valuable energy reserves that cannot be replaced in winter.<br><br>Day roosts during their active period (in spring) are also essential to all bat species, requiring a relatively undisturbed site during daylight hours, again in the cracks and crevasses of old trees and buildings. Depending on their location, a colony may use several summer roosts in turn, the larger of which may be used as maternity roosts, while males will become solitary or live in small groups.<br><br>Migration<br>*N. leisleri* is known to migrate in some parts of its European range: individuals ringed in Germany have been found to winter in France and Switzerland (National report 2003). Exact migration patterns are not known. However, other populations appear more sedentary with both maternity and winter roosts located in the same location.<br><br>Roosts used by *N. leisleri* to rest during the day and to hibernate in are resting |

| | | |
|---|---|---|
| | | places. |
| ***Osmoderma eremita*** | All points of the definition apply to *O. eremita*<br><br>This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer.<br><br>A series of mature and substantially hollow deciduous trees, usually *Quercus* sp. with heart rot, being used by the species is the breeding site for *O. eremita*. | Resting place and breeding site are in effect synonymous for *O. eremita*.<br><br>This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer.<br><br>A series of mature and substantially hollow deciduous trees, usually *Quercus sp*. with heart rot, being used by the species is the resting place for *O. eremita*. |
| ***Maculinia arion*** | Points 1 to 5 of the definition apply to *M. arion*.<br><br>*M. arion* requires a site with its larval food plant (*Thymus* species) and larval host and food source, *Myrmica* ant nests, to complete its development. Eggs are laid in the bud of a *Thymus* flower where they feed and develop. At a certain stage, the larva drops from the plant and attracts an ant to pick it up and take it into the ants nest. The larva continues its development within the nest, predating ant larvae. Pupation occurs within the nest and the adults emerge in early summer.<br><br>The breeding sites for *M. arion* will be a site with *Thymus* sp. plants close to the site of adult emergence and the *Myrmica* ant nest where the larvae and pupae develop. | This species has no clearly defined resting places other than those needed for larval development and pupation. These life stages are covered by the definition of breeding site on the left. |

(61) The prohibition of Article 12(1)(d) can consequently be seen as an aspect of habitat conservation, albeit covering only specific parts of the biological cycle. Other parts of the habitat, e.g. feeding areas, are not covered unless they coincide with breeding sites or resting places. An example of this is the butterfly species, *Parnassius apollo*, whose breeding sites coincide with locations where adults lay eggs and caterpillars live and feed (in Finland, stands of the plant species *Sedum telephium*). Consequently, a proper implementation of Article 12(1)(d) requires a good knowledge of the ecology (biology, habitats, population size, distribution and dynamics) and behaviour of the species (life cycle, organisation, interaction within and between species).

(62) **'Narrower' or 'wider' definition of breeding sites and resting places?** Discussions in the Article 12 working group and elsewhere have shown that the "framework" definition given above provides room for different interpretations. This is also because of the great variety of species listed in Annex IV. One frequent debate concerns whether breeding sites and resting places should be delimited in a narrower or a wider sense. For example, the wood-boring beetle *Osmoderma eremita* lives for the majority of its life within the rot-filled cavity of mature deciduous trees, usually of the *Quercus* species, and a high proportion of individuals do not leave the natal tree: so what is its breeding site and resting place? Is it the single tree or is it maybe that part of the woodland with trees inhabited by *O. eremita*? There are arguments for both views. From the Commission services' point of view the 'wider' definition seems to be more meaningful here in conservation terms, as it allows the woodland as a whole to be taken into account, linking both the protection measures under Article 12 and any derogations under Article 16 to the wider unit of the woodland and focusing on the continued functionality of that site as a whole for the species under consideration. Besides the advantage of a more holistic approach to species protection, this also allows more flexibility when considering impacts on such sites. In the Commission services' view, however, this approach seems more feasible for species with relatively **small home ranges**.

(63) The species dossier on *Triturus cristatus* (see box above) assumes overlapping breeding sites and resting places, stating that "*The functional unit needed to maintain a viable T. cristatus population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be breeding sites, as well as a proportion of other areas which will be resting places set within a suitable terrestrial habitat*." This view of an ecological / functional unit suits a species with a small home range. The 'local' population of such a species could play a role in such a definition.

(64) The situation is different for **wide-ranging species**. The particular problem posed by wide-ranging species is already recognised in Article 4(1) of the Directive. Here, it may be advisable to restrict the definition of a breeding and resting site to a locality that can be clearly delimited: e.g. the roosts for bats or the holt of an otter.

(65) In the *Caretta caretta* case, the Court did not give any definition of breeding sites and resting places for species and followed a case-by-case/species-by-species approach. In the case in question, the Court emphasised the importance of Laganas Bay, which was (easily) identified as a "*vital breeding region for the protected species Caretta caretta*"[78]. This clearly identifiable area has the physical and biological factors essential for the reproduction of the species (marine area and nesting beaches). This prudent approach of the Court seems due to the fact that it is difficult to establish a general definition of "breeding sites" and "resting places" because of the wide range of differences in the ecological characteristics of species.

*Summary: Breeding sites and resting places are to be strictly protected, because they are crucial to the life cycle of animals and are vital parts of a species' entire habitat. Article 12(1)(d) should therefore be understood as aiming to safeguard the continued ecological functionality of such sites and places, ensuring that they continue to provide all the elements needed by a specific animal to rest or to breed successfully. The protection applies all year round if these sites are used on a regular basis.*

[78] Paragraph 27 of the judgment.

### II.3.4.c) Concept of "deterioration"

(66) Neither Article 12(1)(d) nor Article 1 of Directive 92/43/EEC contains a definition of the concept of "deterioration", although this term is also present in other provisions of the Directive (e.g. Article 6).

(67) In general, deterioration can be defined as physical degradation affecting a habitat, or a breeding site or resting place. In contrast to destruction, such degradation may occur slowly and **gradually reduce the functionality** of the site or place. Deterioration may therefore not immediately lead to a loss of functionality of a site/place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss. Because of the wide variety of species listed in Annex IV(a), the assessment of deterioration of a particular breeding site or resting place must be carried out on a case-by-case basis. Again, deterioration or destruction that is the result of natural causes (not human-caused) or unforeseeable events does not fall under the scope of Article 12(1)(d). Neither does the deterioration of a site due to natural succession as a consequence of the abandonment of certain human land-uses or the abandonment of a building.

(68) When trying to identify and avoid the causes that lead to the deterioration or even loss of breeding/resting functionality, it is important to establish a clear **cause-effect relationship** between one or more human-induced activities and the deterioration/destruction of a breeding site or resting place. Obviously, the causes for deterioration can be located inside or outside, or possibly even at some distance from, the breeding site or resting place under consideration. Such causes/activities then need to be controlled in such a way that deterioration and destruction can be avoided. Only a clear view of the causes will enable the authorities to act accordingly and avoid further or future deterioration or destruction.

(68a) In cases where the deterioration/destruction of a breeding site or resting place is due to diffuse causes, it will probably be difficult to establish a clear cause-effect relationship with a human-induced activity. For instance, where there is a gradual deterioration (eutrophication) of water bodies due to a complexity of sources in terms of time and origin, it will be difficult to establish a clear cause-effect relationship with agricultural activities. In these situations, it is very unlikely that an infringement of Article 12 can be proven, in particular if the activity complies with obligations arising from other relevant EC environmental legislation, e.g. the Nitrates Directive.

(69) Focusing on the functionality of breeding sites and resting places and the establishment of a cause-effect relationship also gives guidance on the matter of divergences between **different linguistic versions** regarding the term "deterioration". The terms used in the German, Danish, Dutch and Swedish versions of Article 12(1)(d)[79] correspond rather more to the word "damage" than "deterioration". Nonetheless, in Article 6(2) of the Directive, the German version uses a word which corresponds slightly better to "*deterioration*". Given this discrepancy between different language versions, it should be recalled that the Court has on earlier occasions stressed the necessity for uniform application and ruled out the possibility of considering one single version of a text in isolation. Hence, the Court holds that such provisions must be interpreted on the basis of the actual intention of the author and the aim pursued in the light of all language versions[80].

---

[79] The German, Danish, Dutch and Swedish versions of Article 12.1(d) employ the terms *"Beschädigung", "beskadigelse", "beschadiging"* and *"skada"* (damage), respectively.

[80] See the following judgments: 12 November 1969, Stauder, case 29/69, ECR 1969 p.419, paragraph 3; judgment of 27 October 1977, Bouchereau, case 30/77, ECR 1977 p.1999, paragraph 14; judgment of 12 July

(70) In order to define the limits of what one can regard as "deterioration", a scrupulous analysis of Article 12(1)(d) as a whole is indispensable. The purpose of Article 12 is to introduce a system of strict protection for Annex IV(a) species. The explicit protection of breeding sites and resting places in addition to the protection of the species as such, without the qualification "deliberate", demonstrates the importance granted to these sites by the Directive. This specific protection against the deterioration or destruction of breeding sites and resting places is self-evidently linked with the essential function of these sites, which must continue to provide all the elements required by a specific animal (or group of animals) to breed or to rest.

(71) Examples of deterioration under Article 12(1)(d):

- (Repeated) filling in of parts of spawning grounds for the crested newt (*Triturus cristatus*), thereby reducing (in sum) its function as a breeding site.
- Deterioration in the function of parts of a hamster burrow as a breeding and resting place as a result of deep ploughing.
- Hydraulic engineering step by step in a river that is a resting and breeding site for *Acipenser sturio*, so as to gradually reduce the functionality of the site.
- Gradual negative impact on a water soldier (*Stratiotes aloides*) population, which is an egg-laying site for the green hawker (*Aeshna viridis*), due to a point-source discharge into the water body.

*Summary: Deterioration can be defined as physical degradation affecting a breeding site or resting place. In contrast to destruction, such degradation might also occur slowly and gradually reduce the functionality of the site or place. If it is possible to establish a clear cause-effect relationship between one or more human-induced activities and the deterioration of a breeding site or resting place, Article 12(1)(d) applies.*

### II.3.4.d) Measures to ensure the continued ecological functionality of breeding sites or resting places

(72) For cases where projects or activities may have an impact on breeding sites / resting places the distinction between measures under Article 12(1)(d) and those that come under Article 16 needs to be examined. In particular, to what extent are measures that ensure the continued ecological functionality of a concrete breeding site/resting place possible, thereby ensuring compliance with Article 12 (and not requiring derogations under Article 16). The decisive question when drawing the line is: "Does or will a breeding site / resting place suffer from deterioration or destruction (even if only temporarily) due to a certain project/activity?" If the answer is "yes", Article 16 needs to be applied; if the answer is "no", it is reasonable to assume that Article 12 is complied with.

(73) What are "measures that ensure the continued ecological functionality of a breeding site/resting place" (in the following "CEF measures")?

(74) First of all, they must have the character of mitigation measures. Mitigation measures aim at minimising or even cancelling out the negative impact of an activity through a range of preventive actions. However, they may also go beyond this and include actions that actively improve or manage a certain breeding site / resting place so that it does not — at any time — suffer from reduced or lost ecological functionality. This could include e.g. enlarging the site or creating new habitats in, or in direct functional relation to, a breeding

1979, Wörsdorfer, case 9/79, ECR 1979 p.2717, paragraph 6; judgment of 7 July 1988, Moksel, Case 55/87, ECR 1988, p.3845, paragraph 15.

site or resting place, as a counterweight to the potential loss of parts or functions of the site. The ecological functionality of such measures for the species in question would of course have to be clearly demonstrated.

(75) CEF measures may be an option when an activity can affect parts of a breeding site or resting place. If the breeding site or resting place, as a result of such measures, will still remain at least the same size (or greater) and retain the same quality (or better) for the species in question, there will be no deterioration in the function, quality or integrity of the site and the activity can be undertaken with no need for a derogation under Article 16. It is crucial that the continued ecological functionality of the site is maintained or improved. Therefore, the monitoring of CEF measures is important. An interesting approach in this regard is outlined in a Dutch publication entitled "Effective protection of Annex IV species of the EU Habitats Directive: The landscape approach"[81].

(76) In accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Article 12(1)(d). There must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction. The assessment of the probability of success must be made on the basis of objective information and in the light of the characteristics and specific environmental conditions of the site concerned. In addition, the use of CEF measures has to take into account the conservation status of the species concerned. For example, in the case of rare species with an unfavourable conservation status, there must be a higher degree of certainty that the measures will work as intended than in the case of more common species with a favourable conservation status.

(77) CEF measures could be an integral part of the specifications of an activity or project; they could also form part of preventive measures under a strict protection system to comply with Article 12(1)(d). Such measures can be used only in situations where an authorisation or planning regime with formal procedures is in place, and where the competent authorities are able to assess whether the measures taken to preserve the "breeding" or "resting" functionality of a site are sufficient.

(78) Based on the definition of breeding sites and resting places (see chapter II.3.4.b), the approach outlined above seems especially relevant when dealing with animals with small home ranges, where breeding sites / resting places are delimited as "functional units" (i.e. the wider approach is used). Here, it should be stressed that a Member State must be **consistent in its definition** of breeding sites and resting places for a given species and consequently in providing for their protection across its territory.

(79) CEF measures are different from compensatory measures in the strict sense. Compensation measures are independent of an activity/project and aim to compensate for or offset specific negative effects on a species. By definition, **compensatory measures thus imply the deterioration or destruction of a breeding site or resting place** (the effect compensated for). This is not the case with CEF measures, which ensure that the continued ecological functionality of the breeding site/resting place remains fully intact (in quantitative and qualitative terms). Consequently, where there is deterioration or destruction of a breeding site or resting place, a derogation under Article 16 is always necessary. Chapter III.2.3.b deals with the use of compensation measures under Article 16.

[81] Alterra report n° 590, Wageningen, September 2002 (available in English)

*Summary: Measures that ensure the continued ecological functionality of a breeding site/resting place in the case of projects/activities with a possible impact on such sites/places must have the character of mitigation measures (i.e. measures minimising or even cancelling out the negative impact), but may also include measures that actively improve or manage a certain breeding site / resting place in such a way that it does not — at any time — suffer from a reduction or loss of ecological functionality. As long as this precondition is fulfilled and such processes are controlled and monitored by the competent authorities, there is no need for recourse to Article 16.*

### II.3.5. Keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild

(80) For Annex IV(a) species, Article 12(2) states that: "Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented." Article 12(3) stipulates that the prohibitions in Article 12(1)(a) and (b) and Article 12(2) apply to all life stages of Annex IV(a) species.

### II.3.6. Incidental capture and killing of Annex IV(a) species

(81) Article 12(4) requires the establishment of a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States have to undertake further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

(82) It should be stressed that Article 12(4) could be of relevance in defining the requirements of both a "strict protection system" and an "appropriate surveillance system". A system of strict protection can also make provision for recording the incidental capture and killing of species (for Article 12(4)). In this context, the strict protection measures may ultimately need to include conservation measures required to offset the negative impact of incidental capture and killing.

(83) An example for the application of this provision is the monitoring of the by-catch of Cetaceans in the fisheries sector and the technical measures taken to avoid such incidents (e.g. attachment of pingers to fishing nets). Another example is the monitoring of bat deaths in wind turbines or roadkills.

## III. ARTICLE 16

| **Text of Article 16** |
| --- |
| *1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):*<br><br>*(a) in the interest of protecting wild fauna and flora and conserving natural habitats;*<br><br>*(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;*<br><br>*(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;*<br><br>*(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;*<br><br>*(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.*<br><br>*2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.*<br><br>*3. The reports shall specify: (a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used; (b) the means, devices or methods authorised for the capture or killing of animal species and the reasons for their use; (c) the circumstances of when and where such derogations are granted; (d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task; (e) the supervisory measures used and the results obtained.* |

(1) The system of strict protection under Article 12 may be bypassed through derogations under Article 16 of the Directive. A number of activities that would normally be prohibited under Article 12 can be permitted by means of Article 16. In practice, consideration of the application of Article 12 will often arise in conjunction with a derogation argued for under Article 16.

(2) The possibilities in Article 16 for derogating from the restrictions and prohibitions in Articles 12, 13, 14 and 15(a) and (b) are limited. Derogations not only must be justified in relation to the overall aim of the Directive, but are subject to three specific conditions.

(3) The failure to respect any one of these conditions may render a derogation invalid. The competent national and other authorities or conservation bodies must therefore carefully examine all those general and specific requirements before granting a derogation.

(4) Before addressing the provisions of Article 16 in detail, it is worth underlining that the ECJ has already developed a quite extensive case law on derogations under Article 9 of Directive 79/409/EEC on the conservation of wild birds. Given the similarity between the derogation systems established by the two Directives, the reasoning of those judgments is of great importance and can be applied to Article 16[82].

## III.1. General legal considerations

### III.1.1 Obligation to ensure full, clear and precise transposition of Article 16

(5) The transposition into national law of Article 16 should guarantee the implementation of the derogations by the competent national authorities in an appropriate manner. It should be recalled that a Directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. However, the Court has set limits to this margin of manoeuvre for Member States when they transpose a Directive. Hence, the national transposition of the derogation system under Article 16 has to comply with some basic legal principles of EC law and must meet a number of requirements.

(6) According to ECJ case law[83], "*the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. A general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner.*" Mere administrative practices, which, by their nature, are alterable at will by the authorities and which are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty and the Directive[84]. Accordingly, the application of the requirements of Article 16 in practice is not a substitute for proper formal transposition.

(7) Moreover, the provisions of the Directives must be implemented with unquestionable binding force, and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty[85]. The Court was more explicit in Case C-339/87[86], which relates to derogations under Article 9 of Directive 79/409/EEC. The Court stated that "*the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories.*" In its judgment of 20 October 2005, the Court applied this case law to the Habitats Directive and observed that "*in the context of the Habitats Directive, which lays down complex and*

---

[82] The third chapter of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds", which examines the derogation system under Article 9 of the Birds Directive, is a useful reference for the understanding of Article 16. The document is available on the website http://www.europa.eu.int/comm/environment/nature/home.htm.

[83] See the judgment of 28 February 1991, Commission v Germany, Case 131/88, ECR p.825.

[84] For example, see the judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10.

[85] See in particular the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32; 13 February 2003, Commission v Luxembourg, Case C-75/01, paragraph 28, ECR p.1585, paragraphs 87-88; 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 27.

[86] Judgment of 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851, paragraph 28.

*technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise"*[87].

(8) Finally, when transposing Article 16, Member States must respect the meaning of terms and concepts used by the Directive with the aim of ensuring uniformity in its interpretation and application[88]. This also implies that national transposition measures should guarantee the full application of the Directive, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive[89]. For instance, in Case C-6/04[90], the Court found that a derogation authorising acts that lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, provided such acts are lawful and cannot be reasonably avoided, *"is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof"*. In Case C-98/03[91], the Court found that German law (paragraph 43(4) of the BNatSchG 2002) was not compatible with Article 16. The German provision provided as the sole condition for derogation that animals, including their nesting or incubation sites, habitat or resting places, and plant species under particular protection must not be subject to deliberate harm. According to the Court, "*even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive*". In case C-183/05[92], the Court considered that the regime of derogations under Irish legislation (Section 23(7)(b) of the Wildlife Act) was inconsistent with Articles 12 and 16 of Directive 92/43/CEE. The Irish provision provided that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence. According to the Court, not only this provisions does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not, but it goes beyond what is provided for in Article 16 of Directive 92/43, since the latter determines, in an exhaustive manner, the conditions under which derogations may be granted.

*Summary: Article 16 must be fully and formally transposed with unquestionable binding force. The criteria to be met before granting a derogation must be reproduced in specific national provisions. National transposition measures should guarantee the full application of Article 16, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive. Mere administrative practices are not sufficient.*

87 Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26.

88 For instance see the judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

89 Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

90 Judgment of 20 October 2005, Commission v UK, Case C-6/04, paragraphs 109-113.

91 Judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 57-62.

92 Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraphs 47-49.

### III.1.2. Appropriate overall application of derogations

(9) Primarily, the national authorities responsible for applying derogations need to take into consideration that, under the case law of the Court of Justice[93], derogations must be interpreted and implemented restrictively to avoid undermining the main provisions of a Directive. This has been also confirmed for the Habitats Directive[94]. In the case of Directive 79/409/EEC, the Court has on several occasions underlined the need for strictness when implementing Article 9 derogations. Given that Article 9 has close parallels with Article 16 in terms of content, it can be reasonably assumed that the Court would take a similarly strict approach regarding the interpretation and implementation of Article 16.

(10) For derogations under Article 9 of Directive 79/409/EEC, the Court[95] has already noted that although Article 9 authorises wide derogations from the general system of protection, its application must deal with precise requirements and specific situations.

(11) As regards measures to be taken under Article 12, the need to implement appropriate and effective measures in a sufficient and verifiable manner has been underlined. The same approach can be followed for the derogations scheme. If used correctly, this ensures that granting derogations does not go against the objective of the Directive[96]. **Applying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can <u>adapt</u> their application in the light of the overall objective of the Directive. As a general rule, the severity of any of the conditions or "tests" will increase with the severity of the impact of a derogation on a species/population**.

(12) Allowing a valid derogation presupposes that the competent national authorities have ensured that all the conditions applying to all the derogations granted have been met and also that the derogations in their totality do not produce effects that go against the objectives of Article 12 and the Directive as a whole. Consequently, applying a proportional approach to the use of derogations needs careful consideration and framing at national and/or biogeographic level within a Member State. The authority with the greatest territorial overview in a Member State (and, if necessary, also a view extending beyond borders in the case of transboundary populations) thus needs to guide this proportional approach, even though it may then be applied in practice at regional or local level[97].

---

[93] See the following judgments of the ECJ: judgment of 8 July 1987, Commission v Italian Republic, Case 262/85, ECR p.3073; judgment 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223; judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775.

[94] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 111 ("*Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively*").

[95] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

[96] It should be recalled that the Court observed that *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16"* (judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112).

[97] This of course does not exclude the possibility that, depending on the organisational structure in a Member State, regional or local authorities will also be in a position to consider the effects of derogations beyond their own territories.

*Summary: Derogation provisions need to be interpreted narrowly: they must deal with precise requirements and specific situations. It is up to the competent authority with the greatest territorial overview to ensure that the totality of derogations in a Member State does not lead to effects that go against the objectives of the Directive.*

## III.2. A carefully controlled system for granting derogations: the 3 tests

(13) Article 16 sets three preconditions, all of which must be complied with before granting a derogation: 1) the demonstration of one or more of the reasons listed in Article 16(1) (a)-(e), 2) the absence of a satisfactory alternative and 3) the assurance that a derogation is not detrimental to the maintenance of populations at a favourable conservation status. Before the second and third preconditions can be examined, precondition 1 must be met: in practical terms, there is little point examining the issue of satisfactory alternatives and impact on conservation status if the actions concerned by the derogation do not come under Article 16(1) (a)-(e).

### III.2.1. Demonstration of one of the reasons under Article 16(1)(a) to (e) (Test 1)

(14) Derogations are granted because there is a specific problem or situation which needs to be tackled. Derogations must be based on at least one of the reasons listed in Article 16(1)(a), (b), (c), (d) and (e). Specific derogations not justified by any of these reasons (e.g. a provision exempting acts that lead to the killing of protected species or to the deterioration or destruction of their breeding and resting places, provided they are the result of a lawful operation that cannot be reasonably avoided) are contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16[98]. When the competent national authorities are called upon to grant a derogation, they need to explain the particular circumstances justifying the choice of a reason under Article 16(1)(a) to (e) and verify that the specific conditions are met[99].

#### *(a) In the interest of protecting wild fauna and flora and conserving natural habitats*

(15) The first reason for granting a derogation is the protection of wild flora and fauna and the conservation of natural habitats. Article 16(1)(a) specifies neither the types of fauna, flora or natural habitats covered nor the types of threats. In the light of the general objective of the Directive, vulnerable, rare, endangered or endemic species and natural habitats (as for example listed in the annexes to the Habitats Directive) are more likely to be concerned by this reason, which would effectively aim to reduce the negative impact of a given species on them. It would be unusual to prioritise the interests of a common and thriving species over the interests of a species meeting the criteria of Article 1(c) and (g) of the Directive. However, one may not exclude other species and habitats completely from consideration.

#### *(b) To prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property*

[98] See also the Court judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraphs 109-113).

[99] See also the Order of 19 December 2006 (Commission v Italy, Case C-503/06 R).

(16) The second reason for granting a derogation is to prevent serious damage in particular to crops, livestock, forests, fisheries, water, and other types of property. This derogation takes into account economic interests, and, as noted, the damage to be prevented has to be serious.

(17) It is worth noting that the list is not exhaustive and other damaging situations may be covered. Moreover, property interests are also covered, which is not the case in Directive 79/409/EEC (the Birds Directive)[100].

(18) With regard to Article 9 of Directive 79/409/EEC, the Court noted that: "The aim of this provision of the Directive is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive."[101] It follows that mere nuisance and normal business risk are not covered."

(19) As this provision is intended to *prevent* serious damage, it is not necessary that the serious damage itself has already occurred; it is sufficient that such serious damage is likely to occur.

### *(c) In the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment*

(20) The third reason for granting a derogation covers "imperative reasons of overriding public interest." This concept is not defined in the Directive but the paragraph mentions public interest reasons such as public health, public safety, reasons of social or economic nature, reasons with beneficial consequences of primary importance for the environment, and also covers other reasons not mentioned, as the list is not exhaustive.

(21) In other fields of Community law where similar concepts appear, for instance the free movement of goods, the European Court of Justice has held that overriding requirements or public interest reasons can justify national measures restricting the principle of freedom of movement: it has recognised public health, environmental protection, and the pursuit of legitimate goals of economic and social policy as such imperative requirements.

(22) The same concept also appears in Article 6(4) of the Directive. So far, the Court has not given clear indications for the interpretation of this specific concept. The Commission's analysis in the Article 6 guidance document[102] is pertinent for a better understanding of the concept and may be recalled here.

(23) Firstly, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects that are entirely in the interest of companies or individuals would generally not be considered as covered.

---

[100] According to Article 9(1)(a), "Member states may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution,… to prevent serious damage to crops, livestock, forests , fisheries and water."

[101] Judgment of 8 July 1987, Commission v Belgium, Case C-247/85, ECR p.3029, paragraph 56.

[102] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1, also available on the website http://www.europa.eu.int. See, in particular, section 5.3.2.

(24) Secondly, the "overriding" character of this public interest must be underlined. This qualification implies that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive. Careful balancing of interests is needed here. In this context, it also seems reasonable to assume that a public interest is in most cases likely to be overriding only if it is a long-term interest: short-term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation.

***(d) For the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants***

(25) Such derogations could for example concern the marking of certain individuals of a species for research purposes (e.g. radio collars) in order to understand their behaviour better, or for conservation projects aiming at the reintroduction of species. Research projects must obviously also be subject to consideration of alternative methods if they are likely to have a negative impact on the population concerned.

***(e) To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities***

(26) The fifth and last reason for derogation concerns the taking or keeping of certain specimens of the species listed in Annex IV. This reason is subject to several conditions that must be respected[103]. This is why its application in practice seems exceptional:

- "*limited numbers*"

(27) This criterion is not an absolute criterion, but has to be compared to the population level of a species and is directly linked with its conservation status[104]. Therefore it is essential to determine a threshold or quantity below which the derogation can be granted. This threshold/quantity must be fixed taking into account the conservation objectives of the Directive and the need to ensure a system of strict protection for the species concerned.

(28) Derogations should not be granted where there is a risk that the derogation might have a significant negative effect on the population concerned in quantitative or in qualitative (e.g. a negative impact on population structure) terms. In Case C-182/02 (which concerned derogations authorised under Article 9 of Directive 79/409/EEC)[105], the Court confirmed that the condition specifying small numbers "*cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level.*" In Case C-344/03, which concerns the derogations granted in Finland for the hunting of bird species, the Court used the criteria of the ORNIS Committee (1% of the

[103] Paragraphs 3.5.20-3.5.48 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds" contains useful information especially as regards the concept of limited/small numbers.

[104] In a case regarding Article 9 of Directive 79/409/EEC (judgment of 27 April 1988, Commission v France, Case C-252/85, ECR p.2243), the Court stated that: "It is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned."

[105] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.

total annual mortality rate of the populations in question) in order to assess whether the limited numbers requirement was complied with[106].

(29) Obviously, if it can be clearly demonstrated that such derogations will be beneficial to the conservation status of the species or population concerned, there is no obstacle to granting them. However, the Commission services consider that an appropriate plan for the conservation of the species, aiming at restoring favourable conservation status, should be the recommended way of demonstrating compliance with this criterion.

- "*under strictly supervised conditions, on a selective basis and to a limited extent*"

(30) This qualification clearly demonstrates that the EC legislator intended significant constraints.

(31) The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that can be related to particular individuals or groups of individuals, places, times and quantities. The term "to a limited extent" supports this interpretation. It also implies the need for efficient enforcement of such derogations to ensure compliance.

(32) The principle of selectivity in turn means that the activity in question must be highly specific in its effect, targeting one species (or group of closely related species), to the exclusion of all others. It also implies that certain technical aspects of the method used should verifiably demonstrate selectivity. There is a need to come to a view on methods that are themselves not entirely selective unless combined with the skills and/or experience of the operator.

(33) From the above, it follows that the implementation of this provision would involve some management, and one way of delivering this would be through a species management/conservation plan. Such plans aim at the long-term conservation of a species and contain measures mainly concerning the viability of the population and the natural range and habitats of the species. Derogations could be provided for in the plan and be part of the regulation of the species population, without this affecting favourable conservation status. Thus, a species management/conservation plan could be an appropriate tool for the use of derogations under Article 16(1)(e), as it is the best way of demonstrating compliance with the strict requirements of Article 16.

**Example: Latvian Lynx management plan**

The plan was prepared by national experts and confirmed by order of the Minister of Environment and Regional Development in 2002. The entire text is available at www.dap.gov.lv/public/files_uploaded/sugu_plani/lynx_lynx_mp.pdf.

The plan forms the basis for a long-term strategy for the conservation and management of the lynx in Latvia, including strictly limited harvesting of the population by hunting. It takes a long-term view, where the lynx in Latvia currently has its best distribution status within the last 150 years and is considered to have a favourable conservation status. Limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception. The practice thus fully complies with Article 16(1)(e) of the Habitats Directive.

[106] See paragraphs 47-59 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033.

The following main requirements are imposed to prevent hunting from affecting favourable conservation status:

- The goal is not only to preserve the size and range of population but also to maintain the environmental capacity for and the natural ecological functions of the species in its ecosystem. This allows applications for scientific research providing important data for conservation.
- The season for lynx hunting is adapted to the species' biological requirements.
- Samples for scientific research have to be taken from the harvested animals to monitor the sex-age structure, reproduction rate, diet and health of the population in order to avoid any negative impact on the population structure.
- The annual assessment of population size and distribution range must be continued.
- Annual hunting quotas have to be set considering the monitoring data.
- Public education and involvement must be promoted. Hunters are to be involved in collecting research samples and subsequently informed of the results obtained.

The management plan has been implemented and the national legislation amended accordingly. The authority responsible for supervising management is the State Forest Service (www.vmd.gov.lv).

*Summary: the first consideration when envisaging a derogation should be whether it is justified by one of the reasons given under 16(1) (a) to (e). The type and weight of the reason must also be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation.*

### III.2.2. Absence of a satisfactory alternative (Test 2)

(34) Under Article 16(1), Member States must be certain that "there is no satisfactory alternative" before allowing a derogation. As with Article 6(4) of Directive 92/43/EEC and Article 9(1) of Directive 79/409/EEC[107], this is an overarching condition that all derogations must satisfy.

(35) In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons and evaluate those alternative solutions. Nevertheless, this discretionary power is subject to several constraints.

(36) Based on the case law of the Court on derogations under Article 9 of Directive 79/409/EEC[108], especially in Case C-10/96, an analysis of whether there is "no other satisfactory alternative" can be considered as having three parts: What is the problem or specific situation that needs to be addressed? Are there any other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? The following remarks are based on the case law of the Court on Article 9 of the Birds Directive and apply the approach adopted by the Court to Article 16.

[107] For this condition, see also section 3.4 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds".

[108] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, ECR p.6775; judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

(37) The analysis of whether "there is no other satisfactory alternative" presumes that a specific problem or situation exists and needs to be tackled. The competent national authorities are called upon to solve this problem or situation by choosing, among the possible alternatives, the most appropriate that will ensure the best protection of the species while solving the problem/situation. To ensure the strict protection of species, these alternatives must be assessed with regard to the prohibitions listed in Article 12. They could involve alternative locations (or routes), different development scales or designs, or alternative activities, processes or methods.

(38) In any case, recourse to Article 16 derogations must be a **last resort**[109]**.** The essential common characteristic of any derogation system is that it has to yield to other requirements laid down in the Directive in the interest of conservation.

(39) The same strict approach applies to the interpretation of the term "satisfactory". Given the exceptional nature of the derogation regime and the duty of Member States under Article 10 of the EC Treaty to facilitate the achievement of the tasks of the Community, a derogation would only be justified on the basis of an objective demonstration that there is no other satisfactory solution. According to the Advocate General in case C-10/96, this term "*may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted.*"

(40) As regards the factors for evaluating the existence of another satisfactory solution, it is recognised that this is a matter for the national courts. The appraisal of whether an alternative is satisfactory or not, in a given situation, must be founded on objectively verifiable factors, such as scientific and technical considerations[110]. In addition, the solution finally selected, even if it involves a derogation, must be objectively limited to the extent necessary to resolve the specific problem or situation[111].

(41) Evidently, the requirement to consider seriously other alternatives is of primary importance. The discretionary power of Member States is limited, and where another solution exists, any arguments that it is not "satisfactory" will need to be convincing. Moreover, it should be stressed that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation.

(42) The judgment in Case C-182/02 illustrates the strict approach adopted by the Court for derogations under the Birds Directive. In order to determine whether or not a satisfactory solution existed, the Court assessed the "need" and "purpose" of the

[109] See paragraph 33 of the Advocate General's Opinion in Case C-10/96.
[110] See also paragraph 39 of the Advocate General's Opinion in Case C-10/96.
[111] See paragraphs 21-22 and 26-27 of the judgment.

derogation[112]. This judgment confirms the importance of demonstrating that there are compelling reasons to justify a derogation[113].

**Managing otter in the fish pond area "Oberes Waldviertel", Austria**

While the otter was historically very widespread in Austria, including the Alps, it became rare and nearly extinct during the 19th and early 20th century, most probably due to direct persecution and habitat loss. Since 1980, there has been a slow but steady recovery with the species spreading from its core (relict) populations in the region of Waldviertel (near the border to the Czech Republic) and the Pannonian basin in Burgenland/Styria. The Waldviertel region is known for its fish ponds, mostly for breeding carp. As otters cause damage to these ponds, especially in winter, the need for counter-measures became obvious early on, in the 1980s/90s. The killing or relocation of animals was not an option, however. As the area was (and still is) a core centre of the fragmented Austrian population, an alternative was envisaged: the regional government established a damage compensation scheme for fish pond owners and also financed measures to avoid damage (e.g. electric fences). With these measures, damage to the ponds could be kept down to a certain level and the compensation made the remaining damage acceptable to fish pond owners.

*Summary: The second consideration is whether there is a satisfactory alternative to the derogation sought, i.e. whether the problem the authority is faced with can be solved in a way that does not involve a derogation.*

### III.2.3 Impact of a derogation on conservation status (Test 3)

(43) According to Article 16(1), derogations must not be "*detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*". The implementation of this provision should include a two-step assessment: firstly, determination of the conservation status of the populations of a species in its natural range within the Member State concerned (and possibly beyond national boundaries if the populations are shared with neighbouring countries) and, secondly, evaluation of the impact of the derogation on the population or populations concerned. The assessment is thus at two levels: the level of "natural range" and the level of "population". For the sake of clarity, "population" is defined here as a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding (i.e. sharing a common gene pool). As for the definition of "natural range" and for background on the concept of "favourable conservation status", please see chapter I.2.2.

[112] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02. According to paragraph 16, the condition requiring the absence of a satisfactory alternative "cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, Commission v Italy, paragraph 39). There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

[113] See also paragraphs 18-46 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, not yet published.

### III.2.3.a) Scale of assessment

(44) One may ask what level is best considered for evaluating whether the impact of a derogation is detrimental, neutral or even positive for the conservation status of a species.

(45) The conservation status of a species must ultimately be considered across its natural range, according to Article 1(i). In discussions with the Habitats Committee, it was therefore agreed that, for the purpose of reporting under Article 17 (in connection with Article 11), conservation status should be assessed at biogeographic level in each Member State. This would ultimately allow information to be aggregated for complete biogeographic regions across the EU. The conservation status of a species within the relevant biogeographic region within a Member State should be important information to be used when considering a derogation.

(46) However, an appropriate **assessment of the impact** of a specific derogation will in many cases, if not most, have to be at a lower level than the biogeographic region in order be meaningful in ecological terms. A useful level in this regard could be the (local) population. The wording of Article 16, which points to *"populations of the species concerned"*, confirms this interpretation. The approach of course needs to be adapted to the species in question: the killing of individuals of a wide-ranging large carnivore will need to be evaluated at population level (transboundary where applicable[114]), while the impact of the destruction of a breeding site in a rather fragmented amphibian habitat may be better evaluated on site or at meta-population level[115]. It should be kept in mind that, according to established case law, derogations must be applied appropriately in order to deal with precise requirements and specific situations[116]. It follows that assessments at lower levels are normally essential, since the derogations have to deal with specific problems and provide suitable solutions. Such an assessment at a lower level would then have to be seen in relation to the situation on a larger scale (e.g. biogeographic or national), for a complete picture of the situation.

*Summary: The overall conservation status of a species in a Member State should, in line with the harmonised reporting framework agreed for Article 17 (in relation to Article 11) of the Directive, be evaluated at biogeographic level in each Member State. An appropriate assessment of the impact of a specific derogation will normally have to be at a lower level (e.g. site, population level) in order to be meaningful in the specific context of the derogation.*

### III.2.3.b) Derogations and conservation status

(47) To begin with, it must be acknowledged that neither the granting of derogations for species in an unfavourable conservation status nor the use of compensation measures is explicitly provided for in the Directive. However, by interpreting and implementing the provision in 16(1) in a way that puts the focus on reaching the overall objective of favourable conservation status, we believe that both concepts may be incorporated in the

[114] Regarding species with transboundary populations or species that migrate across the frontiers of the EU, the overall natural range of these species, including the migration zones outside the EU, should be considered where possible or feasible.

[115] A metapopulation consists of a group of spatially separated populations of the same species which interact at some level. The term metapopulation was coined by Richard Levins in 1969 to describe a model of population dynamics of insect pests in agricultural fields, but the idea has been most broadly applied to species in naturally or artificially fragmented habitats.

[116] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

interpretation under the condition that reaching this objective is not compromised in any way.

(48) Obviously, the less favourable the conservation status and trends, the less likely that the granting of derogations would be justified apart from under the most exceptional circumstances. It is also clear that the **application of a proportional approach** to derogations is **only possible within a clear and well-developed framework of species conservation measures**. Again (as with protection measures), the conservation status of a species (at biogeographic and population level) is the core concept for a flexible and proportional approach to the use of derogations. It is therefore important not only to consider the present conservation status, but also to examine how it is developing.

(49) Two things have to be distinguished in applying "Test 3":

1. What is the actual conservation status of the affected species — at biogeographic level and at (local) population level?

2. What is the impact of the derogation as such?

(50) Considering the **first question,** it should be recognised that the conservation status of the (local) population of a species in a certain geographical area might well be different from the overall conservation status of populations in the biogeographic region in the Member State (or even the range). Both situations should be considered and taken into account in any decision.

(51) As for the **second question**, it is generally the rule that no derogation can be granted if it has a **detrimental** effect on the conservation status or the attainment of favourable conservation status for a species at all levels. In other words, if a derogation is likely to have a significantly negative effect on the population concerned (or the prospects of this population) or at biogeographical level within a Member State, the competent authority should not allow it. The net result of a derogation should be neutral or positive for a species[117].

(52) Where the population concerned within a biogeographic region in a Member State is healthy and unlikely to suffer detrimental effects from a derogation, even if the picture at biogeographic level is less good, the derogation would naturally be easier to justify than when the population concerned is already in a bad state and declining. In such cases where the conservation status is different at the different levels assessed, the situation at population level should be considered first, and the impact of the derogation on the population should then be examined in the context of the biogeographic region. In this way, a variety of situations and conservation interests can be taken into account.

(53) In line with the proportionate approach, derogations can be more easily justified if

a) requisite (appropriate, effective and verifiable) measures are established and implemented effectively in a Member State for a species to ensure strict protection and to aim for favourable conservation status

b) the derogation does not work against, render ineffective or neutralise the requisite measures

[117] In responses to human health disasters, however, the net result of a derogation may be negative for the species.

c) in the case of the deterioration or destruction of breeding sites and resting places: sufficient compensatory measures (see below) are taken to offset the impact at population and biogeographic levels

d) the impact of the derogation and the effectiveness of compensation measures are closely monitored and lessons are drawn for the future

(54) One recommended way of implementing a flexible and proportional derogation system as part of a strict protection system is the preparation of **species conservation plans** (even though not required under the Directive). Such plans could, besides informing and guiding the requisite measures under Article 12, also give guidance on the implementation of derogation schemes on a species-by-species basis or at transboundary population level, where applicable (guidance on assessing and monitoring the impact of derogations, possible compensation measures, etc.). Such plans would naturally have to be adapted regularly in the light of improved knowledge and monitoring results. These plans could be considered as a tool for demonstrating that the derogation system is in line with the objectives of the Directive.

**The role of compensation measures** *(derogations from Article 12(1)(d))*

(55) Compensation measures are independent of the activity causing deterioration or destruction of a breeding site or resting place. Such measures are intended to compensate for or offset specific negative effects on a species. Compensation measures should target precisely the negative effects on the species concerned and it is recommended that they are in place and effective before the negative effect occurs[118].

(56) Even though compensation measures are not mentioned in Article 16, and are as such not obligatory, they may be considered to provide better justification of a derogation if there is a risk that the derogation might have a detrimental effect. Compensation measures may be envisaged for derogations from Article 12(1)(d), i.e. in the case of the deterioration or destruction of breeding sites and resting places. Depending on the biology, ecology and behaviour of species, such measures may work well for some species but not for others. In general, compensation would have to:

i) offset the negative impact of the activity under the specific circumstances (at population level),
ii) have a good chance of success and be based on best practice,
iii) guarantee a species' prospects of achieving FCS,
iv) be effective before or at the latest when deterioration or destruction of a breeding site or resting place starts to take place.

(57) Compensation could thus guarantee that no detrimental effect is produced at either population or biogeographic level. ***However, it does not replace or marginalise any of the 3 tests.*** This means that the adoption of a compensation scheme cannot avoid the need for a derogation to pass all three tests described in chapter III.2.

[118] In some cases, compensation measures may not be fully functional by the time deterioration/destruction is taking place. Whether compensation has to be put in place without delay or whether some delay is acceptable depends on the type of species and the species' habitat. This should be taken into account in the decision authorising such compensation measures.

**Compensation under Article 16 — a case concerning *Triturus cristatus***

During the planning stage for a housing area, a small Swedish municipality discovered that a small pond within the area designated for exploitation harboured a population of great crested newts (*Triturus cristatus*).

The population and its breeding site were in a difficult situation, as in previous years the surrounding woodland, probably used by wintering newts, had been destroyed and the habitats adjacent to the pond had been degraded. The chances of long-term survival of the population under these circumstances were considered to be uncertain to low. Closer investigation showed that the population size was about 100 adult specimens.

The completion of the housing area was considered to be of public interest and important in the regional context. Alternatives that would have been less damaging to the newt population could not be found in the neighbourhood. The overall conservation status of the species was unclear, with trends not known, although its range in Southern Sweden was continuous and the total Swedish population was estimated at 100 000 reproductive animals. A new population assessment and a National Action Plan for the species were launched during 2005.

It was therefore decided to create new habitats for the newts as a compensatory measure and to move the whole population. If successful, this action would improve the situation of the population concerned. A suitable compensation site was found less than 10 km away, an area already holding newts and providing sufficient habitat (including terrestrial wintering areas) for the long-term survival of the population. Within this area, a new pond was dug. The newts were translocated using the latest “state of the art” techniques. Studies showed that the number of adult newts had increased to about 160 specimens and the number of young leaving the pond in the autumn amounted to about 1 300 specimens.

The derogation was subject to several preconditions: a survey of the breeding newt population was to be performed in the housing area and at potential new sites; the timing of the construction activities for the housing complex was brought into line with the compensation actions; the permit to catch and move newts was linked to monitoring of the effects on the newt population for the following 8-10 years. Through bottle traps, visual counting and the taking of pictures of individual belly patterns, the long-term development of the population was to be assessed. The project was also intended as a pilot study for tackling future situations and has provided valuable information on the translocation of newts.

**How can multi-species derogations be dealt with?**

(58) For some projects (e.g. large infrastructure projects of public interest, such as transport networks), a number of Annex IV species might be affected. In such cases, the impact on ***each*** of the affected species should be considered and, based on this information, a picture of the overall impact should be formed in order to determine the solution to be implemented. The solution must also meet all 3 “tests”. It is not enough to just list the number of species potentially affected without taking the further step of judging the extent of the problems and finding ways to avoid them.

*Summary: the less favourable the conservation status and trends, the less likely will the granting of derogations be justified apart from in the most exceptional circumstances. The net result of a derogation should be neutral or positive for a species; detrimental effects should not occur. Compensation measures may, under certain circumstances, be used to offset the impact of a derogation on breeding sites and resting places, but do not replace or marginalise any of the "3 tests". Species conservation plans are not obligatory but are recommended as tools to demonstrate — among other things — that derogations for a certain species are in line with the objectives of the Directive.*

### III.2.4 Monitoring the impacts of derogations / Reporting on derogations

(59) Competent national authorities not only have to ensure that all the conditions of the derogation scheme are met *before* derogations are granted, but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, *after* they are implemented. This should ensure that any risk for a species arising unintentionally through the derogations (possibly in combination with other negative factors) is detected. The Directive does not explicitly provide for such monitoring. However, when advocating a proportional and flexible use of the derogation system (as set out above), we consider that the framework conditions must be right to ensure that the flexible approach does not lead to undesired effects. Monitoring is a key element in this regard.

(60) Such monitoring could also be seen as a part of the general surveillance obligation under Article 11 of the Directive. It would be reasonable for such surveillance to be sensitive to the effects (including cumulative effects and the effects of compensation measures) of derogations implemented for species for which derogations are regularly granted or which are in an unfavourable conservation status (and are nevertheless the subject of derogations).

#### *Reporting obligation for derogations set out in Article 16(2) and 16(3)*

(61) Derogations must also satisfy the formal conditions set out in Article 16(2) and (3). In the words of the Court in Case C-118/94 (a Birds Directive case), these formal conditions "*are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them."*

(62) Member States do not need to consult the Commission before applying derogations but are obliged to submit a report every two years to the Commission on the implementation of Article 16. Article 16(2) does not define the precise content of these national reports. It is however clear that the information must be factual and cover the details set out in Article 16(3). On the basis of the information provided in the derogation reports, the Commission must be in a position to supervise the application of Article 16 within the Member States and its compatibility with the Directive. In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the Directive, it has the right to initiate an infringement procedure against the Member State concerned.

(63) Even though not mentioned explicitly in the Directive under Article 16(3), and therefore not obligatory, the Commission services consider that the two-yearly derogation reports might also include details that provide an understanding of the competent authorities' reasoning in applying a proportionate and flexible approach.

(64) Such additional information could include:

- Information on the conservation status of the derogated species (at biogeographic level in the Member State),

- Special justifications for derogations for species in a less than favourable status (e.g. references to conservation plans, conservation measures undertaken and their effects, summary of the impact assessment of the derogation on the species, alternatives assessed)

- Compensation measures taken

(65) Corresponding changes to the derogation reporting format have now been agreed. The new reporting format and a new IT tool, called the Habitats and Birds Directives Derogation System (HaBiDeS), is currently being tested and will be implemented by the Commission services and Member States.

*Summary: Competent national authorities not only have to ensure that all conditions of the derogation scheme are met before derogations are granted (i.e. the "3 tests" are met), but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, after they are implemented. Again, although not obligatory, the Commission services consider that future derogation reports should include information to allow the Commission to understand and evaluate the use of a proportionate and flexible approach by Member States as set out in this document.*

**Annex I: Court case references**

**Annex II: List of animal species covered by Annex II, IV and V**

**Annex III: Example of a species dossier for *Triturus cristatus***

**Annex I**

## Court case references

- 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029
- 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073
- 23 February 1988, Commission v Italy, Case 429/85, ECR p.843
- 27 April 1988, Commission v France, Case C-252/85, ECR p.2243
- 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851
- 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461
- 17 January 1991, Commission v Italy, C-157/89, ECR p.57
- 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883
- 28 February 1991, Commission v Germany, Case 131/88, ECR p.825
- 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607
- 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221
- 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223
- 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775
- 19 May 1999, Commission v France, Case C-225/97, ECR p.3011
- 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001
- 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007
- 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147
- 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585
- 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02
- 20 October 2005, Commission v the UK, Case C-6/04, ECR p.9017

- 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033
- 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53
- 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42
- 18 May 2006, Commission v Spain, case C-221/04, ECR p.4515
- 11 January 2007, Commission v Ireland, case C-183/05, not yet published in the ECR

# List of animal species covered by Annexes II, IV and V of the directive 92/43/EEC

*Disclaimer : The table enclosed is a consolidated table produced by DG Environment. It is meant purely as an overview tool but we do not assume any liability for its content. The legally binding versions of the annexes are those officially published in the relevant legal acts. The latest version of these annexes on which the table is based is published in the "Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania"*

The species listed in this Annex are indicated

- by the name of the species or subspecies (in bold and italics), or
- by all the species belonging to a higher taxon or to a designated part of that taxon. The abbreviation « spp. » after the name of a family or genus designates all the species belonging to that family or genus.

An asterisk (*) before the name of a species indicates that it is a priority species of Annex II (Annex VI and V do not distinguish between priority and non-priority species).

The annexes consolidated in this table are :

**ANNEX II** : SPECIES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

**ANNEX IV :** SPECIES OF COMMUNITY INTEREST IN NEED OF STRICT PROTECTION

**ANNEX V :** SPECIES OF COMMUNITY INTEREST WHOSE TAKING IN THE WILD AND EXPLOITATION MAY BE SUBJECT TO MANAGEMENT MEASURES

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| | | | | |
| *VERTEBRATES* | | | | |
| | | | | |
| **MAMMALS** | | | | |
| | | | | |
| INSECTIVORA | | | | |
| | | | | |
| Erinaceidae | | | | |
| ***Erinaceus algirus*** | | **X** | | |
| Soricidae | | | | |
| ***Crocidura canariensis*** | | **X** | | |
| ***Crocidura sicula*** | | **X** | | |
| Talpidae | | | | |
| ***Galemys pyrenaicus*** | **X** | **X** | | |
| | | | | |
| CHIROPTERA | | | | |
| | | | | |
| *MICROCHIROPTERA* | | | | |
| Rhinolophidae | | | | |
| ***Rhinolophus blasii*** | **X** | **X** | | |
| ***Rhinolophus euryale*** | **X** | **X** | | |
| ***Rhinolophus ferrumequinum*** | **X** | **X** | | |
| ***Rhinolophus hipposideros*** | **X** | **X** | | |
| ***Rhinolophus mehelyi*** | **X** | **X** | | |
| Vespertilionidae | | | | |
| ***Barbastella barbastellus*** | **X** | **X** | | |
| ***Miniopterus schreibersi*** | **X** | **X** | | |
| ***Myotis bechsteini*** | **X** | **X** | | |
| ***Myotis blythii*** | **X** | **X** | | |
| ***Myotis capaccinii*** | **X** | **X** | | |
| ***Myotis dasycneme*** | **X** | **X** | | |
| ***Myotis emarginatus*** | **X** | **X** | | |
| ***Myotis myotis*** | **X** | **X** | | |
| **All other Microchiroptera** | | **X** | | |
| | | | | |
| *MEGACHIROPTERA* | | | | |
| Pteropodidae | | | | |
| ***Rousettus aegiptiacus*** | **X** | **X** | | |
| | | | | |
| RODENTIA | | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| | | | | |
| Gliridae | | | | |
| **All species except *Glis glis* and *Eliomys quercinus*** | | **X** | | |
| ***Myomimus roachi*** | **X** | **X** | | |
| Sciuridae | | | | |
| **** Marmota marmota latirostris*** | **X** | **X** | | |
| **** Pteromys volans (Sciuropterus russicus)*** | **X** | **X** | | |
| ***Spermophilus citellus (Citellus citellus)*** | **X** | **X** | | |
| **** Spermophilus suslicus (Citellus suslicus)*** | **X** | **X** | | |
| ***Sciurus anomalus*** | | **X** | | |
| Castoridae | | | | |
| ***Castor fiber*** | **X** | **X** | **X** | **Annex II** : except the Estonian, Latvian, Lithuanian, Finnish and Swedish populations<br>**Annex IV** : except the Estonian, Latvian, Lithuanian, Polish, Finnish and Swedish, populations<br>**Annex V** : Finnish, Swedish, Latvian, Lithuanian, Estonian and Polish populations |
| Cricetidae | | | | |
| ***Cricetus cricetus*** | | **X** | **X** | **Annex IV** : except the Hungarian populations<br>**Annex V :** Hungarian populations |
| ***Mesocricetus newtoni*** | **X** | **X** | | |
| Microtidae | | | | |
| ***Microtus cabrerae*** | **X** | **X** | | |
| **** Microtus oeconomus arenicola*** | **X** | **X** | | |
| **** Microtus oeconomus mehelyi*** | **X** | **X** | | |
| ***Microtus tatricus*** | **X** | **X** | | |
| Zapodidae | | | | |
| ***Sicista betulina*** | | **X** | | |
| ***Sicista subtilis*** | **X** | **X** | | |
| Hystricidae | | | | |
| ***Hystrix cristata*** | | **X** | | |
| | | | | |
| CARNIVORA | | | | |
| | | | | |
| Canidae | | | | |
| **** Alopex lagopus*** | **X** | **X** | | |
| ***Canis aureus*** | | | **X** | |
| **** Canis lupus*** | **X** | **X** | **X** | **Annex II** : except the Estonian population ; Greek |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| | | | | populations : only south of the 39th parallel ; Spanish populations : only those south of the Duero ; Latvian, Lithuanian and Finnish populations<br>**Annex IV :** except the Greek populations north of the 39th parallel ; Estonian populations, Spanish populations north of the Duero ; Latvian, Lithuanian, Polish, Slovak, Bulgarian populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management<br>**Annex V** : Spanish populations north of the Duero, Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management, Latvian, Lithuanian, Estonian, Polish and Slovak populations |
| Ursidae | | | | |
| **** Ursus arctos*** | **X** | **X** | | **Annex II** : except the Estonian, Finnish, and Swedish populations |
| Mustelidae | | | | |
| **** Gulo gulo*** | **X** | | | |
| ***Lutra lutra*** | **X** | **X** | | |
| ***Martes martes*** | | | **X** | |
| ***Mustela eversmanii*** | **X** | **X** | | |
| ***Mustela putorius*** | | | **X** | |
| **** Mustela lutreola*** | **X** | **X** | | |
| ***Vormela peregusna*** | **X** | **X** | | |
| Felidae | | | | |
| ***Felis silvestris*** | | **X** | | |
| ***Lynx lynx*** | **X** | **X** | **X** | **Annex II** : except the Estonian, Latvian and Finnish populations<br>**Annex IV** : except the Estonian population<br>**Annex V** : Estonian population |
| **** Lynx pardinus*** | **X** | **X** | | |
| Phocidae | | | | |
| ***Halichoerus grypus*** | **X** | | **X** | |
| **** Monachus monachus*** | **X** | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Phoca hispida bottnica*** | **X** | | **X** | |
| **** Phoca hispida saimensis*** | **X** | **X** | | |
| ***Phoca vitulina*** | **X** | | **X** | |
| **All other Phocidae** | | | **X** | |
| Viverridae | | | | |
| ***Genetta genetta*** | | | **X** | |
| ***Herpestes ichneumon*** | | | **X** | |
| | | | | |
| DUPLICIDENTATA | | | | |
| | | | | |
| Leporidae | | | | |
| ***Lepus timidus*** | | | **X** | |
| | | | | |
| ARTIODACTYLA | | | | |
| | | | | |
| Cervidae | | | | |
| **** Cervus elaphus corsicanus*** | **X** | **X** | | |
| ***Rangifer tarandus fennicus*** | **X** | | | |
| Bovidae | | | | |
| **** Bison bonasus*** | **X** | **X** | | |
| ***Capra aegagrus*** (natural populations) | **X** | **X** | | |
| ***Capra ibex*** | | | **X** | |
| ***Capra pyrenaica*** **(except *Capra pyrenaica pyrenaica*)** | | | **X** | |
| **** Capra pyrenaica pyrenaica*** | **X** | **X** | | |
| ***Ovis gmelini musimon (Ovis ammon musimon)*** (natural populations – Corsica and Sardinia) | **X** | **X** | | |
| ***Ovis orientalis ophion*** **(*Ovis gmelini ophion*)** | **X** | **X** | | |
| **** Rupicapra pyrenaica ornata*** **(*Rupicapra rupicapra ornata*)** | **X** | **X** | | |
| ***Rupicapra rupicapra*** **(except *Rupicapra rupicapra balcanica*, *Rupicapra rupicapra ornata* and *Rupicapra rupicapra tatrica*)** | | | **X** | |
| ***Rupicapra rupicapra balcanica*** | **X** | **X** | | |
| **** Rupicapra rupicapra tatrica*** | **X** | **X** | | |
| | | | | |
| CETACEA | | | | |
| | | | | |
| ***Phocoena phocoena*** | **X** | **X** | | |
| ***Tursiops truncatus*** | **X** | **X** | | |
| **All other Cetacea** | | **X** | | |
| | | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| **REPTILES** | | | | |
| | | | | |
| CHELONIA (TESTUDINES) | | | | |
| | | | | |
| Testudinidae | | | | |
| ***Testudo graeca*** | **X** | **X** | | |
| ***Testudo hermanni*** | **X** | **X** | | |
| ***Testudo marginata*** | **X** | **X** | | |
| Cheloniidae | | | | |
| **** Caretta caretta*** | **X** | **X** | | |
| **** Chelonia mydas*** | **X** | **X** | | |
| ***Lepidochelys kempii*** | | **X** | | |
| ***Eretmochelys imbricata*** | | **X** | | |
| Dermochelyidae | | | | |
| ***Dermochelys coriacea*** | | **X** | | |
| Emydidae | | | | |
| ***Emys orbicularis*** | **X** | **X** | | |
| ***Mauremys caspica*** | **X** | **X** | | |
| ***Mauremys leprosa*** | **X** | **X** | | |
| | | | | |
| SAURIA | | | | |
| | | | | |
| Lacertidae | | | | |
| ***Algyroides fitzingeri*** | | **X** | | |
| ***Algyroides marchi*** | | **X** | | |
| ***Algyroides moreoticus*** | | **X** | | |
| ***Algyroides nigropunctatus*** | | **X** | | |
| ***Gallotia atlantica*** | | **X** | | |
| ***Gallotia galloti*** | | **X** | | |
| ***Gallotia galloti insulanagae*** | **X** | **X** | | |
| **** Gallotia simonyi*** | **X** | **X** | | |
| ***Gallotia stehlini*** | | **X** | | |
| ***Lacerta agilis*** | | **X** | | |
| ***Lacerta bedriagae*** | | **X** | | |
| ***Lacerta bonnali (Lacerta monticola)*** | **X** | **X** | | |
| ***Lacerta monticola*** | **X** | **X** | | |
| ***Lacerta danfordi*** | | **X** | | |
| ***Lacerta dugesi*** | | **X** | | |
| ***Lacerta graeca*** | | **X** | | |
| ***Lacerta horvathi*** | | **X** | | |
| ***Lacerta schreiberi*** | **X** | **X** | | |
| ***Lacerta trilineata*** | | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Lacerta viridis*** | | **X** | | |
| ***Lacerta vivipara pannonica*** | | **X** | | |
| ***Ophisops elegans*** | | **X** | | |
| ***Podarcis erhardii*** | | **X** | | |
| ***Podarcis filfolensis*** | | **X** | | |
| ***Podarcis hispanica atrata*** | | **X** | | |
| ***Podarcis lilfordi*** | **X** | **X** | | |
| ***Podarcis melisellensis*** | | **X** | | |
| ***Podarcis milensis*** | | **X** | | |
| ***Podarcis muralis*** | | **X** | | |
| ***Podarcis peloponnesiaca*** | | **X** | | |
| ***Podarcis pityusensis*** | **X** | **X** | | |
| ***Podarcis sicula*** | | **X** | | |
| ***Podarcis taurica*** | | **X** | | |
| ***Podarcis tiliguerta*** | | **X** | | |
| ***Podarcis wagleriana*** | | **X** | | |
| Scincidae | | | | |
| ***Ablepharus kitaibelli*** | | **X** | | |
| ***Chalcides bedriagai*** | | **X** | | |
| ***Chalcides ocellatus*** | | **X** | | |
| ***Chalcides sexlineatus*** | | **X** | | |
| ***Chalcides simonyi (Chalcides occidentalis)*** | **X** | **X** | | |
| ***Chalcides viridianus*** | | **X** | | |
| ***Ophiomorus punctatissimus*** | | **X** | | |
| Gekkonidae | | | | |
| ***Cyrtopodion kotschyi*** | | **X** | | |
| ***Phyllodactylus europaeus*** | **X** | **X** | | |
| ***Tarentola angustimentalis*** | | **X** | | |
| ***Tarentola boettgeri*** | | **X** | | |
| ***Tarentola delalandii*** | | **X** | | |
| ***Tarentola gomerensis*** | | **X** | | |
| Agamidae | | | | |
| ***Stellio stellio*** | | **X** | | |
| Chamaeleontidae | | | | |
| ***Chamaeleo chamaeleon*** | | **X** | | |
| Anguidae | | | | |
| ***Ophisaurus apodus*** | | **X** | | |
| | | | | |
| OPHIDIA (SERPENTES) | | | | |
| | | | | |
| Colubridae | | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Coluber caspius*** | | **X** | | |
| **** Coluber cypriensis*** | **X** | **X** | | |
| ***Coluber hippocrepis*** | | **X** | | |
| ***Coluber jugularis*** | | **X** | | |
| ***Coluber laurenti*** | | **X** | | |
| ***Coluber najadum*** | | **X** | | |
| ***Coluber nummifer*** | | **X** | | |
| ***Coluber viridiflavus*** | | **X** | | |
| ***Coronella austriaca*** | | **X** | | |
| ***Eirenis modesta*** | | **X** | | |
| ***Elaphe longissima*** | | **X** | | |
| ***Elaphe quatuorlineata*** | **X** | **X** | | |
| ***Elaphe situla*** | **X** | **X** | | |
| ***Natrix natrix cetti*** | | **X** | | |
| ***Natrix natrix corsa*** | | **X** | | |
| **** Natrix natrix cypriaca*** | **X** | **X** | | |
| ***Natrix tessellata*** | | **X** | | |
| ***Telescopus falax*** | | **X** | | |
| Viperidae | | | | |
| ***Vipera ammodytes*** | | **X** | | |
| **** Macrovipera schweizeri (Vipera lebetina schweizeri)*** | **X** | **X** | | |
| ***Vipera seoanni*** | | **X** | | **Annex IV** : except Spanish populations |
| ***Vipera ursinii*** **(except *Vipera ursinii rakosiensis*)** | **X** | **X** | | |
| **** Vipera ursinii rakosiensis*** | **X** | **X** | | |
| ***Vipera xanthina*** | | **X** | | |
| Boidae | | | | |
| ***Eryx jaculus*** | | **X** | | |
| | | | | |
| **AMPHIBIANS** | | | | |
| | | | | |
| CAUDATA | | | | |
| | | | | |
| Salamandridae | | | | |
| ***Chioglossa lusitanica*** | **X** | **X** | | |
| ***Euproctus asper*** | | **X** | | |
| ***Euproctus montanus*** | | **X** | | |
| ***Euproctus platycephalus*** | | **X** | | |
| ***Mertensiella luschani (Salamandra luschani)*** | **X** | **X** | | |
| ***Salamandra atra*** | | **X** | | |
| **** Salamandra aurorae (Salamandra atra*** | **X** | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***aurorae)*** | | | | |
| ***Salamandra lanzai*** | | **X** | | |
| ***Salamandrina terdigitata*** | **X** | **X** | | |
| ***Triturus carnifex (Triturus cristatus carnifex)*** | **X** | **X** | | |
| ***Triturus cristatus (Triturus cristatus cristatus)*** | **X** | **X** | | |
| ***Triturus dobrogicus (Triturus cristatus dobrogicus)*** | **X** | | | |
| ***Triturus italicus*** | | **X** | | |
| ***Triturus karelinii (Triturus cristatus karelinii)*** | **X** | **X** | | |
| ***Triturus marmoratus*** | | **X** | | |
| ***Triturus montandoni*** | **X** | **X** | | |
| ***Triturus vulgaris ampelensis*** | **X** | **X** | | |
| Proteidae | | | | |
| **** Proteus anguinus*** | **X** | **X** | | |
| Plethodontidae | | | | |
| ***Hydromantes (Speleomantes) ambrosii*** | **X** | **X** | | |
| ***Hydromantes (Speleomantes) flavus*** | **X** | **X** | | |
| ***Hydromantes (Speleomantes) genei*** | **X** | **X** | | |
| ***Hydromantes (Speleomantes) imperialis*** | **X** | **X** | | |
| ***Hydromantes (Speleomantes) strinatii*** | **X** | **X** | | |
| ***Hydromantes (Speleomantes) supramontes*** | **X** | **X** | | |
| | | | | |
| ANURA | | | | |
| | | | | |
| Discoglossidae | | | | |
| ***Alytes cisternasii*** | | **X** | | |
| **** Alytes muletensis*** | **X** | **X** | | |
| ***Alytes obstetricans*** | | **X** | | |
| ***Bombina bombina*** | **X** | **X** | | |
| ***Bombina variegata*** | **X** | **X** | | |
| ***Discoglossus galganoi*** **(including** ***Discoglossus « jeanneae »*****)** | **X** | **X** | | |
| ***Discoglossus montalentii*** | **X** | **X** | | |
| ***Discoglossus pictus*** | | **X** | | |
| ***Discoglossus sardus*** | **X** | **X** | | |
| Ranidae | | | | |
| ***Rana arvalis*** | | **X** | | |
| ***Rana dalmatina*** | | **X** | | |
| ***Rana esculenta*** | | | **X** | |
| ***Rana graeca*** | | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Rana iberica*** | | **X** | | |
| ***Rana italica*** | | **X** | | |
| ***Rana latastei*** | **X** | **X** | | |
| ***Rana lessonae*** | | **X** | | |
| ***Rana perezi*** | | | **X** | |
| ***Rana ridibunda*** | | | **X** | |
| ***Rana temporaria*** | | | **X** | |
| Pelobatidae | | | | |
| ***Pelobates cultripes*** | | **X** | | |
| ***Pelobates fuscus*** | | **X** | | |
| **** Pelobates fuscus insubricus*** | **X** | **X** | | |
| ***Pelobates syriacus*** | | **X** | | |
| Bufonidae | | | | |
| ***Bufo calamita*** | | **X** | | |
| ***Bufo viridis*** | | **X** | | |
| Hylidae | | | | |
| ***Hyla arborea*** | | **X** | | |
| ***Hyla meridionalis*** | | **X** | | |
| ***Hyla sarda*** | | **X** | | |
| | | | | |
| **FISH** | | | | |
| | | | | |
| PETROMYZONIFORMES | | | | |
| | | | | |
| Petromyzonidae | | | | |
| ***Eudontomyzon spp.*** | **X** | | | |
| ***Lampetra fluviatilis*** | **X** | | **X** | **Annex II** : except the Finnish and Swedish populations |
| ***Lampetra planeri*** | **X** | | | **Annex II** : except the Estonian, Finnish, and Swedish populations |
| ***Lethenteron zanandreai*** | **X** | | **X** | |
| ***Petromyzon marinus*** | **X** | | | **Annex II** : except the Swedish populations |
| | | | | |
| ACIPENSERIFORMES | | | | |
| | | | | |
| Acipenseridae | | | | |
| **** Acipenser naccarii*** | **X** | **X** | | |
| **** Acipenser sturio*** | **X** | **X** | | |
| **All other Acipenseridae species** | | | **X** | |
| | | | | |
| CLUPEIFORMES | | | | |
| | | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| Clupeidae | | | | |
| ***Alosa* spp.** | **X** | | **X** | |
| | | | | |
| SALMONIFORMES | | | | |
| | | | | |
| Salmonidae / Coregonidae | | | | |
| ***Coregonus spp. (except Coregonus oxyrhynchus* -anadromous populations in certain sectors of the North Sea)** | | | **X** | |
| **** Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea)** | **X** | **X** | | |
| ***Hucho hucho*** (natural populations) | **X** | | **X** | |
| ***Salmo macrostigma*** | **X** | | | |
| ***Salmo marmoratus*** | **X** | | | |
| ***Salmo salar* (only in fresh water)** | **X** | | **X** | **Annex II** : except the Finnish populations |
| ***Thymallus thymallus*** | | | **X** | |
| Umbridae | | | | |
| ***Umbra krameri*** | **X** | | | |
| | | | | |
| CYPRINIFORMES | | | | |
| | | | | |
| Cyprinidae | | | | |
| ***Alburnus albidus (Alburnus vulturius)*** | **X** | | | |
| ***Anaecypris hispanica*** | **X** | **X** | | |
| ***Aspius aspius*** | **X** | | **X** | **Annex II** : except the Finnish populations |
| ***Barbus spp.*** | | | **X** | |
| ***Barbus comiza*** | **X** | | **X** | |
| ***Barbus meridionalis*** | **X** | | **X** | |
| ***Barbus plebejus*** | **X** | | **X** | |
| ***Chalcalburnus chalcoides*** | **X** | | | |
| ***Chondrostoma genei*** | **X** | | | |
| ***Chondrostoma lusitanicum*** | **X** | | | |
| ***Chondrostoma polylepis* (including *C. willkommi*)** | **X** | | | |
| ***Chondrostoma soetta*** | **X** | | | |
| ***Chondrostoma toxostoma*** | **X** | | | |
| ***Gobio albipinnatus*** | **X** | | | |
| ***Gobio kessleri*** | **X** | | | |
| ***Gobio uranoscopus*** | **X** | | | |
| ***Iberocypris palaciosi*** | **X** | | | |
| **** Ladigesocypris ghigii*** | **X** | | | |
| ***Leuciscus lucumonis*** | **X** | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Leuciscus souffia*** | **X** | | | |
| ***Pelecus cultratus*** | **X** | | **X** | |
| ***Phoxinellus spp.*** | **X** | | | |
| **** Phoxinus percnurus*** | **X** | **X** | | |
| ***Rhodeus sericeus amarus*** | **X** | | | |
| ***Rutilus alburnoides*** | **X** | | | |
| ***Rutilus arcasii*** | **X** | | | |
| ***Rutilus frisii meidingeri*** | **X** | | **X** | |
| ***Rutilus lemmingii*** | **X** | | | |
| ***Rutilus pigus*** | **X** | | **X** | |
| ***Rutilus rubilio*** | **X** | | | |
| ***Rutilus macrolepidotus*** | **X** | | | |
| ***Scardinius graecus*** | **X** | | | |
| Cobitidae | | | | |
| ***Cobitis elongata*** | **X** | | | |
| ***Cobitis taenia*** | **X** | | | **Annex II** : except the Finnish populations |
| ***Cobitis trichonica*** | **X** | | | |
| ***Misgurnus fossilis*** | **X** | | | |
| ***Sabanejewia aurata*** | **X** | | | |
| ***Sabanejewia larvata* (*Cobitis larvata* and *Cobitis conspersa*)** | **X** | | | |
| | | | | |
| SILURIFORMES | | | | |
| | | | | |
| Siluridae | | | | |
| ***Silurus aristotelis*** | **X** | | **X** | |
| | | | | |
| ATHERINIFORMES | | | | |
| | | | | |
| Cyprinodontidae | | | | |
| ***Aphanius iberus*** | **X** | | | |
| ***Aphanius fasciatus*** | **X** | | | |
| **** Valencia hispanica (Valencia letourneuxi)*** | **X** | **X** | | |
| | | | | |
| PERCIFORMES | | | | |
| | | | | |
| Percidae | | | | |
| ***Gymnocephalus baloni*** | **X** | **X** | | |
| ***Gymnocephalus schraetzer*** | **X** | | **X** | |
| **** Romanichthys valsanicola*** | **X** | **X** | | |
| ***Zingel* spp. (except *Zingel asper* and *Zingel zingel*)** | **X** | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Zingel asper*** | **X** | **X** | | |
| ***Zingel zingel*** | **X** | | **X** | |
| Gobiidae | | | | |
| ***Knipowitschia (Padogobius) panizzae*** | **X** | | | |
| ***Padogobius nigricans*** | **X** | | | |
| ***Pomatoschistus canestrini*** | **X** | | | |
| | | | | |
| SCORPAENIFORMES | | | | |
| | | | | |
| Cottidae | | | | |
| ***Cottus gobio*** | **X** | | | **Annex II** : except the Finnish populations |
| ***Cottus petiti*** | **X** | | | |
| | | | | |
| *INVERTEBRATES* | | | | |
| | | | | |
| **ANNELIDA** | | | | |
| | | | | |
| HIRUDINOIDEA - ARHYNCHOBDELLAE | | | | |
| | | | | |
| Hirudinidae | | | | |
| ***Hirudo medicinalis*** | | | **X** | |
| | | | | |
| **ARTHROPODS** | | | | |
| | | | | |
| CRUSTACEA | | | | |
| | | | | |
| Decapoda | | | | |
| ***Astacus astacus*** | | | **X** | |
| ***Austropotamobius pallipes*** | **X** | | **X** | |
| **** Austropotamobius torrentium*** | **X** | | **X** | |
| ***Scyllarides latus*** | | | **X** | |
| Isopoda | | | | |
| **** Armadillidium ghardalamensis*** | **X** | **X** | | |
| | | | | |
| INSECTA | | | | |
| | | | | |
| Coleoptera | | | | |
| ***Agathidium pulchellum*** | **X** | | | |
| ***Bolbelasmus unicornis*** | **X** | **X** | | |
| ***Boros schneideri*** | **X** | | | |
| ***Buprestis splendens*** | **X** | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Carabus hampei*** | **X** | **X** | | |
| ***Carabus hungaricus*** | **X** | **X** | | |
| **** Carabus menetriesi pacholei*** | **X** | | | |
| **** Carabus olympiae*** | **X** | **X** | | |
| ***Carabus variolosus*** | **X** | **X** | | |
| ***Carabus zawadszkii*** | **X** | **X** | | |
| ***Cerambyx cerdo*** | **X** | **X** | | |
| ***Corticaria planula*** | **X** | | | |
| ***Cucujus cinnaberinus*** | **X** | **X** | | |
| ***Dorcadion fulvum cervae*** | **X** | **X** | | |
| ***Duvalius gebhardti*** | **X** | **X** | | |
| ***Duvalius hungaricus*** | **X** | **X** | | |
| ***Dytiscus latissimus*** | **X** | **X** | | |
| ***Graphoderus bilineatus*** | **X** | **X** | | |
| ***Leptodirus hochenwarti*** | **X** | **X** | | |
| ***Limoniscus violaceus*** | **X** | | | |
| ***Lucanus cervus*** | **X** | | | |
| ***Macroplea pubipennis*** | **X** | | | |
| ***Mesosa myops*** | **X** | | | |
| ***Morimus funereus*** | **X** | | | |
| **** Osmoderma eremita*** | **X** | **X** | | |
| ***Oxyporus mannerheimii*** | **X** | | | |
| ***Pilemia tigrina*** | **X** | **X** | | |
| **** Phryganophilus ruficollis*** | **X** | **X** | | |
| ***Probaticus subrugosus*** | **X** | **X** | | |
| ***Propomacrus cypriacus*** | **X** | **X** | | |
| **** Pseudogaurotina excellens*** | **X** | **X** | | |
| ***Pseudoseriscius cameroni*** | **X** | **X** | | |
| ***Pytho kolwensis*** | **X** | **X** | | |
| ***Rhysodes sulcatus*** | **X** | | | |
| **** Rosalia alpina*** | **X** | **X** | | |
| ***Stephanopachys linearis*** | **X** | | | |
| ***Stephanopachys substriatus*** | **X** | | | |
| ***Xyletinus tremulicola*** | **X** | | | |
| Hemiptera | | | | |
| ***Aradus angularis*** | **X** | | | |
| Lepidoptera | | | | |
| ***Agriades glandon aquilo*** | **X** | | | |
| ***Apatura metis*** | | **X** | | |
| ***Arytrura musculus*** | **X** | **X** | | |
| **** Callimorpha (Euplagia, Panaxia) quadripunctaria*** | **X** | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Catopta thrips*** | **X** | **X** | | |
| ***Chondrosoma fiduciarium*** | **X** | **X** | | |
| ***Clossiana improba*** | **X** | | | |
| ***Coenonympha hero*** | | **X** | | |
| ***Coenonympha oedippus*** | **X** | **X** | | |
| ***Colias myrmidone*** | **X** | **X** | | |
| ***Cucullia mixta*** | **X** | **X** | | |
| ***Dioszeghyana schmidtii*** | **X** | **X** | | |
| ***Erannis ankeraria*** | **X** | **X** | | |
| ***Erebia calcaria*** | **X** | **X** | | |
| ***Erebia christi*** | **X** | **X** | | |
| ***Erebia medusa polaris*** | **X** | | | |
| ***Erebia sudetica*** | | **X** | | |
| ***Eriogaster catax*** | **X** | **X** | | |
| ***Euphydryas (Eurodryas, Hypodryas) aurinia*** | **X** | | | |
| ***Fabriciana elisa*** | | **X** | | |
| ***Glyphipterix loricatella*** | **X** | **X** | | |
| ***Gortyna borelii lunata*** | **X** | **X** | | |
| ***Graellsia isabellae*** | **X** | | **X** | |
| ***Hesperia comma catena*** | **X** | | | |
| ***Hypodryas maturna*** | **X** | **X** | | |
| ***Hyles hippophaes*** | | **X** | | |
| ***Leptidea morsei*** | **X** | **X** | | |
| ***Lignyoptera fumidaria*** | **X** | **X** | | |
| ***Lopinga achine*** | | **X** | | |
| ***Lycaena dispar*** | **X** | **X** | | |
| ***Lycaena helle*** | **X** | **X** | | |
| ***Maculinea arion*** | | **X** | | |
| ***Maculinea nausithous*** | **X** | **X** | | |
| ***Maculinea teleius*** | **X** | **X** | | |
| ***Melanargia arge*** | **X** | **X** | | |
| **** Nymphalis vaualbum*** | **X** | **X** | | |
| ***Papilio alexanor*** | | **X** | | |
| ***Papilio hospiton*** | **X** | **X** | | |
| ***Parnassius apollo*** | | **X** | | |
| ***Parnassius mnemosyne*** | | **X** | | |
| ***Phyllometra culminaria*** | **X** | **X** | | |
| ***Plebicula golgus*** | **X** | **X** | | |
| ***Polymixis rufocincta isolata*** | **X** | **X** | | |
| ***Polyommatus eroides*** | **X** | **X** | | |
| ***Proserpinus proserpina*** | | **X** | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Pseudophilotes bavius*** | **X** | **X** | | |
| ***Xestia borealis*** | **X** | | | |
| ***Xestia brunneopicta*** | **X** | | | |
| **** Xylomoia strix*** | **X** | **X** | | |
| ***Zerynthia polyxena*** | | **X** | | |
| Mantodea | | | | |
| ***Apteromantis aptera*** | **X** | **X** | | |
| Odonata | | | | |
| ***Aeshna viridis*** | | **X** | | |
| ***Coenagrion hylas*** | **X** | | | |
| ***Coenagrion mercuriale*** | **X** | | | |
| ***Coenagrion ornatum*** | **X** | | | |
| ***Cordulegaster heros*** | **X** | **X** | | |
| ***Cordulegaster trinacriae*** | **X** | **X** | | |
| ***Gomphus graslinii*** | **X** | **X** | | |
| ***Leucorrhina albifrons*** | | **X** | | |
| ***Leucorrhina caudalis*** | | **X** | | |
| ***Leucorrhinia pectoralis*** | **X** | **X** | | |
| ***Lindenia tetraphylla*** | **X** | **X** | | |
| ***Macromia splendens*** | **X** | **X** | | |
| ***Ophiogomphus cecilia*** | **X** | **X** | | |
| ***Oxygastra curtisii*** | **X** | **X** | | |
| ***Stylurus flavipes*** | | **X** | | |
| ***Sympecma braueri*** | | **X** | | |
| Orthoptera | | | | |
| ***Baetica ustulata*** | **X** | **X** | | |
| ***Brachytrupes megacephalus*** | **X** | **X** | | |
| ***Isophya costata*** | **X** | **X** | | |
| ***Isophya harzi*** | **X** | **X** | | |
| ***Isophya stysi*** | **X** | **X** | | |
| ***Myrmecophilus baronii*** | **X** | **X** | | |
| ***Odontopodisma rubripes*** | **X** | **X** | | |
| ***Paracaloptenus caloptenoides*** | **X** | **X** | | |
| ***Pholidoptera transsylvanica*** | **X** | **X** | | |
| ***Saga pedo*** | | **X** | | |
| ***Stenobothrus (Stenobothrodes) eurasius*** | **X** | **X** | | |
| | | | | |
| ARACHNIDA | | | | |
| | | | | |
| Araneae | | | | |
| ***Macrothele calpeiana*** | | **X** | | |
| Pseudoscorpiones | | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Anthrenochernes stellae*** | **X** | | | |
| | | | | |
| **COELENTERATA** | | | | |
| | | | | |
| Cnidaria | | | | |
| ***Corallium rubrum*** | | | **X** | |
| | | | | |
| **MOLLUSCS** | | | | |
| | | | | |
| GASTROPODA | | | | |
| ***Anisus vorticulus*** | **X** | **X** | | |
| ***Caseolus calculus*** | **X** | **X** | | |
| ***Caseolus commixta*** | **X** | **X** | | |
| ***Caseolus sphaerula*** | **X** | **X** | | |
| ***Chilostoma banaticum*** | **X** | **X** | | |
| ***Discula leacockiana*** | **X** | **X** | | |
| ***Discula tabellata*** | **X** | **X** | | |
| ***Discula testudinalis*** | | **X** | | |
| ***Discula turricula*** | | **X** | | |
| ***Discus defloratus*** | | **X** | | |
| ***Discus guerinianus*** | **X** | **X** | | |
| ***Elona quimperiana*** | **X** | **X** | | |
| ***Geomalacus maculosus*** | **X** | **X** | | |
| ***Geomitra moniziana*** | **X** | **X** | | |
| ***Gibbula nivosa*** | **X** | **X** | | |
| **** Helicopsis striata austriaca*** | **X** | | | |
| ***Helix pomatia*** | | | **X** | |
| ***Hygromia kovacsi*** | **X** | **X** | | |
| ***Idiomela (Helix) subplicata*** | **X** | **X** | | |
| ***Lampedusa imitatrix*** | **X** | **X** | | |
| **** Lampedusa melitensis*** | **X** | **X** | | |
| ***Leiostyla abbreviata*** | **X** | **X** | | |
| ***Leiostyla cassida*** | **X** | **X** | | |
| ***Leiostyla corneocostata*** | **X** | **X** | | |
| ***Leiostyla gibba*** | **X** | **X** | | |
| ***Leiostyla lamellosa*** | **X** | **X** | | |
| **** Paladilhia hungarica*** | **X** | **X** | | |
| ***Patella feruginea*** | | **X** | | |
| ***Sadleriana pannonica*** | **X** | **X** | | |
| ***Theodoxus prevostianus*** | | | | |
| ***Theodoxus transversalis*** | **X** | **X** | | |
| ***Vertigo angustior*** | **X** | | | |

| ***Species name (in bold and italics)*** | ***Annex*** | | | ***Geographic restrictions*** |
|---|---|---|---|---|
| | **II** | **IV** | **V** | |
| ***Vertigo genesii*** | **X** | | | |
| ***Vertigo geyeri*** | **X** | | | |
| ***Vertigo moulinsiana*** | **X** | | | |
| | | | | |
| BIVALVIA | | | | |
| | | | | |
| Anisomyaria | | | | |
| ***Lithophaga lithophaga*** | | **X** | | |
| ***Pinna nobilis*** | | **X** | | |
| Unionoida | | | | |
| ***Margaritifera auricularia*** | | **X** | | |
| ***Margaritifera durrovensis (Margaritifera margaritifera)*** | **X** | | **X** | |
| ***Microcondylaea compressa*** | | | **X** | |
| ***Unio crassus*** | **X** | **X** | | |
| ***Unio elongatulus*** | | | **X** | |
| Dreissenidae | | | | |
| ***Congeria kusceri*** | **X** | **X** | | |
| | | | | |
| **ECHINODERMATA** | | | | |
| | | | | |
| Echinoidea | | | | |
| ***Centrostephanus longispinus*** | | **X** | | |

**Annex III**

# An example of a species dossier for *Triturus cristatus*

The crested newt, *Triturus cristatus* (senso lato), is a complex of closely related species occurring in Europe. In fact, *T. cristatus* is now considered to be a superspecies comprising 4 species: 1) Northern crested newt, *T. cristatus* (Laurenti, 1768) (sensu stricto): north and central Europe, to the Ural Mts., in the east; 2) Italian crested newt, *T. carnifex* (Laurenti, 1768): Italy and the Adriatic side of the Balkan peninsula; 3) Danube crested newt, *T. dobrogicus* (Kiritzescu, 1903): lowlands of the rivers Tisza and Danube; 4) Southern crested newt, *T. karelinii* (Strauch, 1870): SE Balkans, Crimea and Caucasus.

Even though these species are mostly allopatric, there is some complexity in transitional areas with morphological and genetic intergradation.

As with other members of the same family, the great crested newt shows an alternation between periods of aquatic and terrestrial activity. During the aquatic period it feeds on aquatic invertebrates, tadpoles and occasionally small fish. During the terrestrial periods it is active at night: searching for invertebrates. During the day it rests under stones, logs and other refuges. Breeding occurs during the aquatic period while summer dormancy and winter hibernation occur during the terrestrial one. Dispersion among ponds can be active, by nocturnal movements, or caused by seasonal floods.

The life cycle of newts shows great variation and is dependent upon several key factors, primarily water temperature and availability. The alternation between aquatic and terrestrial activity, and dormancy, shows considerable variation according to climatic conditions. In northern regions (and higher altitudes), there is a period of winter hibernation. In many southern areas, where water does not freeze, newts do not hibernate, and are found in water from autumn to late spring. Summer dormancy is common in areas of drought or where water temperature is raised.

Eggs are usually laid on the leaves of aquatic plants and larvae take refuge in amongst dense aquatic vegetation (plants and algae). Ponds with a large amount of aquatic vegetation and no fish represent the ideal environment for successful newt breeding, because of refuge availability and the lack of fish predation of both newt larvae and invertebrate prey. The occurrence of good structural variation such as dense terrestrial vegetation in or near the ponds, especially old growth forests, is also important because it offers diurnal refuges to adults during their terrestrial (nocturnal) life period.

Threats to the species include: (1) destruction of aquatic habitat; (2) cleaning of artificial springs, water reservoirs and ponds; (3) lowering of subterranean water table; (4) loss of connectivity including deforestation and consequent loss of small water basins; (5) use of pesticides that can accumulate in trophic webs which effect the invertebrate food of newts; (6) introduction of fish species in to ponds.

### *Interpretation of definitions for T. cristatus*

All points of the definition of breeding site apply to *T. cristatus.*

The pond used for mating has individual male territories within which courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely.

The pond is, therefore, the Breeding Site.

*T. cristatus* does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them dispersing over suitable interconnecting terrestrial habitat. ndividuals may move ca. 1 km from their natal pool.

The Resting Places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle as far as these terrestrial areas are essential and resting places can be identified.

The **functional unit** needed to maintain a viable *T. cristatus* population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be Breeding Sites, as well as a proportion of other areas which will be resting places set within suitable terrestrial habitat.

# JUDGMENT OF THE COURT (Sixth Chamber)
13 November 1990 *

In Case C-106/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Juzgado de Primera Instancia e Instrucción (Court of First Instance and Examining Magistrates' Court) No 1, Oviedo, Spain, for a preliminary ruling in the proceedings pending before that court between

**Marleasing SA**

and

**La Comercial Internacional de Alimentación SA**

on the interpretation of Article 11 of the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (Official Journal, English Special Edition 1968 (I), p. 41),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of Chamber, T. F. O'Higgins, M. Díez de Velasco, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: W. van Gerven
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of

Marleasing SA, by José Ramón Buzón Ferrero, of the Oviedo Bar,

* Language of the case: Spanish.

the Commission of the European Communities, by its Legal Adviser Antonio Caeiro and by Daniel Calleja, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 6 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 July 1990,

gives the following

## Judgment

1 By order of 13 March 1989, which was received at the Court on 3 April 1989, the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, referred a question to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 11 of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

2 Those questions arose in a dispute between Marleasing SA, the plaintiff in the main proceedings, and a number of defendants including La Comercial Internacional de Alimentación SA (hereinafter referred to as 'La Comercial'). The latter was established in the form of a public limited company by three persons, including Barviesa SA, which contributed its own assets.

3 It is apparent from the grounds set out in the order for reference that Marleasing's primary claim, based on Articles 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing La Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the

creditors of Barviesa SA, a co-founder of the defendant company. La Comercial contended that the action should be dismissed in its entirety on the ground, in particular, that Article 11 of Directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them.

4 The national court observed that in accordance with Article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities (Official Journal 1985 L 302, p. 23) the Kingdom of Spain was under an obligation to bring the directive into effect as from the date of accession, but that that had still not been done at the date of the order for reference. Taking the view, therefore, that the dispute raised a problem concerning the interpretation of Community law, the national court referred the following question to the Court:

'Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).

7 However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a

declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

8 In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

9 It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

10 With regard to the interpretation to be given to Article 11 of the directive, in particular Article 11(2)(b), it should be observed that that provision prohibits the laws of the Member States from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy.

11 According to the Commission, the expression 'objects of the company' must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association. It follows, in the Commission's view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founders' creditors.

12 That argument must be upheld. As is clear from the preamble to Directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure 'certainty in the law as regards relations between the company and third parties, and also between members' (sixth recital). Furthermore, the protection of third parties 'must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid'. It follows, therefore, that each ground of nullity provided for in Article 11 of the directive must be interpreted strictly. In those circumstances the words 'objects of the company' must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association.

13 The answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

## Costs

14 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, by order of 13 March 1989, hereby rules:

**A national court hearing a case which falls within the scope of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States**

of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

Mancini O'Higgins

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 13 November 1990.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber

# JUDGMENT OF THE COURT
19 November 1991 *

In Joined Cases C-6/90 and C-9/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Vicenza (Italy) (in Case C-6/90) and by the Pretura di Bassano del Grappa (Italy) (in Case C-9/90) for a preliminary ruling in the proceedings pending before those courts between

**Andrea Francovich**

and

**Italian Republic**

and between

**Danila Bonifaci and Others**

and

**Italian Republic**

on the interpretation of the third paragraph of Article 189 of the EEC Treaty and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (Official Journal 1980 L 283, p. 23),

* Language of the case: Italian.

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of

— Andrea Francovich and Danila Bonifaci and Others by Claudio Mondin, Aldo Campesan and Alberto dal Ferro, of the Vicenza Bar,

— the Italian Government by Oscar Fiumara, Avvocato dello Stato, acting as Agent,

— the Government of the Netherlands by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Richard Plender QC,

— the Commission of the European Communities by Giuliano Marenco and Karen Banks, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument on behalf of Andrea Francovich and Danila Bonifaci, the Italian Government, the United Kingdom, the German Government, represented by Jochim Sedemund, Rechtsanwalt, Cologne, acting as Agent, and the Commission at the hearing on 27 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 28 May 1991,

gives the following

## Judgment

1 By orders of 9 July and 30 December 1989, which were received at the Court on 8 January and 15 January 1990 respectively, the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the third paragraph of Article 189 of the EEC Treaty and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 L 283, p. 23).

2 Those questions were raised in the course of proceedings brought by Andrea Francovich and by Danila Bonifaci and Others (hereinafter referred to as 'the plaintiffs') against the Italian Republic.

3 Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. In particular it provides for specific guarantees of payment of unpaid wage claims.

4 Under Article 11 the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983. The Italian Republic failed to fulfil that obligation, and its default was recorded by the Court in its judgment in Case 22/87 *Commission* v *Italy* [(1989] ECR 143).

5 Mr Francovich, a party to the main proceedings in Case C-6/90, had worked for CDN Elettronica SnC in Vicenza but had received only sporadic payments on account of his wages. He therefore brought proceedings before the Pretura di Vicenza, which ordered the defendant to pay approximately LIT 6 million. In attempting to enforce that judgment the bailiff attached to the Tribunale di Vicenza was obliged to submit a negative return. Mr Francovich then claimed to be entitled to obtain from the Italian State the guarantees provided for in Directive 80/987 or, in the alternative, compensation.

6 In Case C-9/90 Danila Bonifaci and 33 other employees brought proceedings before the Pretura di Bassano del Grappa, stating that they had been employed by Gaia Confezioni Srl, which was declared insolvent on 5 April 1985. When the employment relationships were discontinued, the plaintiffs were owed more than LIT 253 million, which was proved as a debt in the company's insolvency. More than five years after the insolvency they had been paid nothing, and the receiver had told them that even a partial distribution in their favour was entirely improbable. Consequently, the plaintiffs brought proceedings against the Italian Republic in which they claimed that, in view of its obligation to implement Directive 80/987 with effect from 23 October 1983, it should be ordered to pay them their arrears of wages, at least for the last three months, or in the alternative to pay compensation.

7 It was in those circumstances that the national courts referred the following questions, which are identical in both cases, to the Court for a preliminary ruling:

'(1) Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/897 — a failure confirmed by a judgment of the Court of Justice — entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided and in any event to claim reparation of the loss and damage sustained in relation to provisions to which that right does not apply?

(2) Are the combined provisions of Articles 3 and 4 of Council Directive 80/987 to be interpreted as meaning that where the State has not availed itself of the option of laying down limits under Article 4, the State itself is obliged to pay the claims of employees in accordance with Article 3?

(3) If the answer to Question 2 is in the negative, the Court is asked to state what the minimum guarantee is that the State must provide pursuant to Directive 80/987 to an entitled employee so as to ensure that the share of pay payable to that employee may be regarded as giving effect to the directive.'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 The first question submitted by the national courts raises two issues, which should be considered separately. It concerns, first, the direct effect of the provisions of the directive which determine the rights of employees and, secondly, the existence and scope of State liability for damage resulting from breach of its obligations under Community law.

**The direct effect of the provisions of the directive which determine the rights of employees**

10 The first part of the first question submitted by the national courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the State in the national courts in the absence of implementing measures adopted within the prescribed period.

11 As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State (judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53).

12 It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a State can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period.

13 With regard first of all to the identity of the persons entitled to the guarantee, it is to be noted that, according to Article 1(1), the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1), the latter provision defining the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of 'employee' and 'employer'. Finally, Article 1(2) provides that the Member States may, by way of exception and under certain conditions, exclude claims by certain categories of employees listed in the annex to the directive.

14 Those provisions are sufficiently precise and unconditional to enable the national court to determine whether or not a person should be regarded as a person intended to benefit under the directive. A national court need only verify whether

the person concerned is an employed person under national law and whether he is excluded from the scope of the directive in accordance with Article 1(2) and Annex 1 (as to the necessary conditions for such exclusion, see the judgments in Case 22/87 *Commission* v *Italy*, cited above, paragraphs 18 to 23, and Case C-53/88 *Commission* v *Greece* [1990] ECR I-3917, paragraphs 11 to 26), and then ascertain whether one of the situations of insolvency provided for in Article 2 of the directive exists.

15 With regard to the content of the guarantee, Article 3 of the directive provides that measures must be taken to ensure the payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a date determined by the Member State, which may choose one of three possibilities: (a) the date of the onset of the employer's insolvency; (b) that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency; (c) that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.

16 Depending on the choice it makes, the Member State has the option, under Article 4(1) and (2), to restrict liability to periods of three months or eight weeks respectively, calculated in accordance with detailed rules laid down in that article. Finally, Article 4(3) provides that the Member States may set a ceiling on liability, in order to avoid the payment of sums going beyond the social objective of the directive. Where they exercise that option, the Member States must inform the Commission of the methods used to set the ceiling. In addition, Article 10 provides that the directive does not affect the option of Member States to take the measures necessary to avoid abuses and in particular to refuse or reduce liability in certain circumstances.

17 Article 3 of the directive thus leaves the Member State a discretion in determining the date from which payment of claims must be ensured. However, as is already implicit in the Court's case-law (see the judgments in Case 71/85 *Netherlands* v *FNV* [1986] ECR 3855 and Case 286/85 *McDermott and Cotter* v *Minister for*

*Social Welfare and Attorney General* [1987] ECR 1453, paragraph 15), the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.

18 In this case, the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the Member States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required.

19 As the Commission and the plaintiffs have pointed out, it is possible to determine the minimum guarantee provided for by the directive by taking the date whose choice entails the least liability for the guarantee institution. That date is that of the onset of the employer's insolvency, since the two other dates, that of the notice of dismissal issued to the employee and that on which the contract of employment or the employment relationship was discontinued, are, according to the conditions laid down in Article 3, necessarily subsequent to the onset of the insolvency and thus define a longer period in respect of which the payment of claims must be ensured.

20 The possibility under Article 4(2) of limiting the guarantee does not make it impossible to determine the minimum guarantee. It follows from the wording of that article that the Member States have the option of limiting the guarantees granted to employees to certain periods prior to the date referred to in Article 3. Those periods are fixed in relation to each of the three dates provided for in Article 3, so that it is always possible to determine to what extent the Member State could have reduced the guarantee provided for by the directive depending on the date which it would have chosen if it had transposed the directive.

21 As regards Article 4(3), according to which the Member States may set a ceiling on liability in order to avoid the payment of sums going beyond the social objective of the directive, and Article 10, which states that the directive does not affect the option of Member States to take the measures necessary to avoid abuses, it should be observed that a Member State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the directive (see, in relation to an analogous option concerning the prevention of abuse in fiscal matters, the judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 34).

22 It must therefore be held that the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee.

23 Finally, as regards the identity of the person liable to provide the guarantee, Article 5 of the directive provides that:

'Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

24 It has been submitted that since the directive provides for the possibility that the guarantee institutions may be financed entirely by the public authorities, it is unacceptable that a Member State may thwart the effects of the directive by asserting that it could have required other persons to bear part or all of the financial burden resting upon it.

25 That argument cannot be upheld. It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system. Under Article 5, the Member State has a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organize the guarantee system that the State may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the State takes on an obligation which in principle is not its own.

26 Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

27 The answer to the first part of the first question must therefore be that the provisions of Directive 80/987 which determine the rights of employees must be

interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.

**Liability of the State for loss and damage resulting from breach of its obligations under Community law**

28 In the second part of the first question the national court seeks to determine whether a Member State is obliged to make good loss and damage suffered by individuals as a result of the failure to transpose Directive 80/987.

29 The national court thus raises the issue of the existence and scope of a State's liability for loss and damage resulting from breach of its obligations under Community law.

30 That issue must be considered in the light of the general system of the Treaty and its fundamental principles.

(a) *The existence of State liability as a matter of principle*

31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa* v *ENEL* [1964] ECR 585).

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 *Humblet* v *Belgium* [1960] ECR 559).

37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) *The conditions for State liability*

38 Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42 Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage

caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 60/75 *Russo* v *AIMA* [1976] ECR 45, Case 33/76 *Rewe* v *Landwirstschaftskammer Saarland* [1976] ECR 1989 and Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805).

43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, *inter alia* the judgment in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595).

44 In this case, the breach of Community law by a Member State by virtue of its failure to transpose Directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45 Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.

46 The answer to be given to the national court must therefore be that a Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987.

## The second and third questions

47 In view of the reply to the first question referred by the national court, there is no need to rule on the second and third questions.

## Costs

48 The costs incurred by the Italian Government, the United Kingdom and the Netherlands and German Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90), by orders of 9 July 1989 and 30 December 1989 respectively, hereby rules:

1. **The provisions of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period;**

**2. A Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987/EEC.**

Due Slynn Joliet Schockweiler

Grévisse Kapteyn Mancini

Moitinho de Almeida Rodríguez Iglesias Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 19 November 1991.

J.-G. Giraud
Registrar

O. Due
President

# JUDGMENT OF THE COURT
5 March 1996 *

In Joined Cases C-46/93 and C-48/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Case C-46/93) and by the High Court of Justice, Queen's Bench Division, Divisional Court (Case C-48/93) for a preliminary ruling in the proceedings pending before those courts between

**Brasserie du Pêcheur SA**

and

**Federal Republic of Germany**

and between

**The Queen**

and

**Secretary of State for Transport**

* Languages of the cases: English and German.

**ex parte: Factortame Ltd and Others**

on the interpretation of the principle of the liability of the State for damage caused to individuals by breaches of Community law attributable to the State,

THE COURT,

composed of: G. C. Rodríguez Iglesias (Rapporteur), President, C. N. Kakouris, D. A. O. Edward and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, C. Gulmann and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrars: H. von Holstein, Deputy Registrar, and H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Brasserie du Pêcheur SA, by Hermann Büttner, Rechtsanwalt, Karlsruhe,

— claimants 1 to 36 and 38 to 84 in Case C-48/93, by David Vaughan QC, Gerald Barling QC and David Anderson, Barrister, instructed by Stephen Swabey, Solicitor,

— claimants 85 to 97 in Case C-48/93, by Nicholas Green, Barrister, instructed by Nicholas Horton, Solicitor,

— the 37th claimant in Case C-48/93, by Nicholas Forwood QC and Peter Duffy, Barrister, instructed by Holman Fenwick & Willan, Solicitors,

— the Government of the Federal Republic of Germany, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and Joachim Sedemund, Rechtsanwalt, Cologne,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards, Christopher Vajda and Rhodri Thompson, Barristers,

— the Danish Government, by J. Mølde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Spanish Government, by Alberto José Navarro González, Director-General for Community Legal and Institutional Affairs, and Rosario Silva de Lapuerta and Gloria Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents,

— the French Government, by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director of the Foreign Affairs Directorate in that Ministry, acting as Agents,

— Ireland, represented by M. A. Buckley, Chief State Solicitor, acting as Agent,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Christian Timmermans, Assistant Director-General of its Legal Service, Jörn Pipkorn, Legal Adviser, and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brasserie du Pêcheur SA, represented by H. Büttner and P. Soler-Couteaux, of the Strasbourg Bar; claimants 1 to 36 and 38 to 84 in Case C-48/93, represented by D. Vaughan, G. Barling, D. Anderson and S. Swabey; claimants 85 to 97 in Case C-48/93, represented by N. Green; the 37th claimant in Case C-48/93, represented by N. Forwood and P. Duffy; the German Government, represented by J. Sedemund; the United Kingdom, represented by Sir Nicholas Lyell QC, Attorney General, S. Richards, C. Vajda and J. E. Collins; the Danish Government, represented by P. Biering, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Greek Government, represented by F. Georgakopoulos, Assistant Legal Adviser to the State Legal Council, acting as Agent; the Spanish Government, represented by R. Silva de Lapuerta and G. Calvo Díaz; the French Government, represented by C. de Salins; the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by C. Timmermans, J. Pipkorn and C. Docksey, at the hearing on 25 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

## Judgment

1 By orders of 28 January 1993 and 18 November 1992, received at the Court on 17 February 1993 and 18 February 1993, respectively, the Bundesgerichtshof (Federal Court of Justice) (Case C-46/93) and the High Court of Justice, Queen's

Bench Division, Divisional Court (Case C-48/93) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions concerning the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

2 The questions were raised in two sets of proceedings between, on the one hand, Brasserie du Pêcheur SA and the Federal Republic of Germany and, on the other, Factortame Ltd and others (hereinafter 'Factortame') and the United Kingdom of Great Britain and Northern Ireland.

## Case C-46/93

3 Before the national court, Brasserie du Pêcheur, a French company based at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not comply with the Reinheitsgebot (purity requirement) laid down in Paragraphs 9 and 10 of the Biersteuergesetz of 14 March 1952 (Law on Beer Duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341, hereinafter 'the BStG').

4 The Commission took the view that those provisions were contrary to Article 30 of the EEC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation 'Bier' (beer) beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty.

5 Brasserie du Pêcheur consequently brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1 800 000, representing a fraction of the loss actually incurred.

6 The Bundesgerichtshof refers to Paragraph 839 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') and Article 34 of the Grundgesetz (Basic Law, 'the GG'). According to the first sentence of Paragraph 839 of the BGB, 'If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom.' Article 34 of the GG provides that 'If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged.'

7 If those provisions are read together, it appears that, in order for the State to be liable, the third party must be capable of being regarded as beneficiary of the obligation breached, which means that the State is liable for breach only of obligations conceived in favour of a third party. However, as the Bundesgerichtshof points out, in the case of the BStG the task assumed by the national legislature concerns only the public at large and is not directed towards any particular person or class of persons who could be regarded as 'third parties' within the meaning of the provisions mentioned above.

8 In this context, the Bundesgerichtshof has referred the following questions to the Court for a preliminary ruling:

'1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt

Paragraphs 9 and 10 of the German Biersteuergesetz to Article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If Question 1 is to be answered in the affirmative and Question 2 in the negative:

   (a) May liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

   (b) Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?'

Case C-48/93

9 On 16 December 1988 Factortame and others, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the High Court of Justice, Queen's Bench Division, Divisional Court (hereinafter 'the Divisional Court'), in which they challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 of the EEC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 March 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

10 In answer to questions referred by the Divisional Court, the Court held by judgment of 25 July 1991 in Case C-221/89 *Factortame II* [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom.

11 On 4 August 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to Articles 7, 52 and 221 of the EEC Treaty. By order of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect from 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, the Court confirmed that the reg-

istration conditions challenged in the infringement proceedings were contrary to Community law.

12 Meanwhile, on 2 October 1991, the Divisional Court made an order designed to give effect to this Court's judgment of 25 July 1991 in *Factortame II* and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national court with a detailed statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed.

13 Lastly, by order of 18 November 1992, the Divisional Court gave Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

14 In that context, the Divisional Court referred the following questions to the Court for a preliminary ruling:

'1. In all the circumstances of this case, where:

(a) a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty,

are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d) losses consequent on the inability of such persons to own and operate further vessels;

(e) loss of management fees;

(f) expenses incurred in an attempt to mitigate the above losses;

(g) exemplary damages as claimed?'

15 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**State liability for acts and omissions of the national legislature contrary to Community law (first question in both Case C-46/93 and Case C-48/93)**

16 By their first questions, each of the two national courts essentially seeks to establish whether the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the infringement in question.

17 In Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 37, the Court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

18 The German, Irish and Netherlands Governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not directly effective: in *Francovich and Others* the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law, it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19 That argument cannot be accepted.

20 The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11, Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 10, and C-119/89 *Commission* v *Spain* [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in *Francovich and Others*, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

21 This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of Article 189 of the Treaty. In such circumstances, which obtained in the case of *Francovich and Others*, the purpose of reparation is to redress the inju-

rious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22 It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

23 In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty in Case C-46/93 and Article 52 in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

24 The German Government further submits that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty.

25 It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.

26 In this case, as in *Francovich and Others*, those questions of interpretation have been referred to the Court by national courts pursuant to Article 177 of the Treaty.

27 Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

28 Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the Treaty refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29 The principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

30 In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.

31 In view of the foregoing considerations, the Court held in *Francovich and Others*, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32 It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

33 In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

34 As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

35 The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.

36 Consequently, the reply to the national courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

**Conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law (second question in Case C-46/93 and first question in Case C-48/93)**

37 By these questions, the national courts ask the Court to specify the conditions under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State is, in the particular circumstances, guaranteed by Community law.

38 Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (*Francovich and Others*, paragraph 38).

39 In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the Treaty (*Francovich and Others*, paragraphs 31 to 36).

40 In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court's case-law on non-contractual liability on the part of the Community.

41 First, the second paragraph of Article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the

laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42 Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43 The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44 Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45 The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized

by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 5 and 6).

46 That said, the national legislature — like the Community institutions — does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich and Others* relates, Article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47 In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48 In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49 As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50 Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51 In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

52 Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.

53 Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

54 The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and in the case of Article 52, the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi* v *Meroni* [1977] ECR 557, paragraph 13). Likewise, the essence of Article 52 is to confer rights on individuals (Case 2/74 *Reyners* [1974] ECR 631, paragraph 25).

55 As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

58 While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account.

59 In Case C-46/93 a distinction should be drawn between the question of the German legislature's having maintained in force provisions of the Biersteuergesetz concerning the purity of beer prohibiting the marketing under the designation 'Bier' of beers imported from other Member States which were lawfully produced in conformity with different rules, and the question of the retention of the provisions of that same law prohibiting the import of beers containing additives. As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of Article 30 by that legislation as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court, in particular Case 120/78 *Rewe-Zentral* [1979] ECR 649 ('Cassis de Dijon') and Case 193/80 *Commission* v *Italy* [1981] ECR 3019 ('vinegar'). In contrast, having regard to the relevant case-law, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive until the Court's judgment of 12 March 1987 in *Commission* v *Germany*, cited above, in which the Court held that prohibition to be incompatible with Article 30.

60 A number of observations may likewise be made about the national legislation at issue in Case C-48/93.

61 The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination

manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62 The latter conditions are prima facie incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in *Factortame II*, cited above, the Court rejected that justification.

63 In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, *inter alia*, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

64 Lastly, consideration should be given to the assertion made by Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, that the United Kingdom failed to adopt immediately the measures needed to comply with the Order of the President of the Court of 10 October 1989 in *Commission* v *United Kingdom*, cited above, and that this needlessly increased the loss it sustained. If this allegation — which was certainly contested by the United Kingdom at the hearing — should prove correct, it should be regarded by the national court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

65 As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.

66 The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

67 As appears from paragraphs 41, 42 and 43 of *Francovich and Others*, cited above, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595).

68 In that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss or damage resulting from the breach of Community law.

69 In Case C-46/93 the national court asks in particular whether national law may subject any right to compensation to the same restrictions as apply where a law is in breach of higher-ranking national provisions, for instance, where an ordinary Federal law infringes the Grundgesetz of the Federal Republic of Germany.

70 While the imposition of such restrictions may be consistent with the requirement that the conditions laid down should not be less favourable than those relating to

similar domestic claims, it is still to be considered whether such restrictions are not such as in practice to make it impossible or excessively difficult to obtain reparation.

71 The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of person.

72 Since such a condition stands in the way of the obligation on national courts to ensure the full effectiveness of Community law by guaranteeing effective protection for the rights of individuals, it must be set aside where an infringement of Community law is attributable to the national legislature.

73 Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature.

74 Accordingly, the reply to the questions from the national courts must be that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the

breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

**The possibility of making reparation conditional upon the existence of fault (third question in Case C-46/93)**

75 By its third question, the Bundesgerichtshof essentially seeks to establish whether, pursuant to the national legislation which it applies, the national court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the State to which the infringement is attributable.

76 As is clear from the case-file, the concept of fault does not have the same content in the various legal systems.

77 Next, it follows from the reply to the preceding question that, where a breach of Community law is attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices, a finding of a right to reparation on the basis of Community law will be conditional, *inter alia*, upon the breach having been sufficiently serious.

78 So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining

whether or not a given breach of Community law is serious (see the factors mentioned in paragraphs 56 and 57 above).

79 The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

80 Accordingly, the reply to the question from the national court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

**The actual extent of the reparation (question 4(a) in Case C-46/93 and the second question in Case C-48/93)**

81 By these questions, the national courts essentially ask the Court to identify the criteria for determination of the extent of the reparation due by the Member State responsible for the breach.

82 Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.

83 In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

84 In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

85 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33).

86 The Bundesgerichtshof asks whether national legislation may generally limit the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It states that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking.

87 Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

88 As for the various heads of damage referred to in the Divisional Court's second question, Community law imposes no specific criteria. It is for the national court to rule on those heads of damage in accordance with the domestic law which it applies, subject to the requirements set out in paragraph 83 above.

89 As regards in particular the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

90 Accordingly, the reply to the national courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

Extent of the period covered by reparation (question 4(b) in Case C-46/93)

91 By this question, the Bundesgerichtshof asks whether the damage for which reparation may be awarded extends to harm sustained before a judgment is delivered by the Court finding that an infringement has been committed.

92 Following from the reply to the second question, the right to reparation under Community law exists where the conditions set out in paragraph 51 above are satisfied.

93 One of those conditions is that the breach of Community law must have been sufficiently serious. The fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for that condition to be satisfied (see paragraphs 55, 56 and 57 of this judgment).

94 Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to reparation conferred by the Community legal order.

95 In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking

action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement (see, to this effect, Joined Cases 314/81, 315/81, 316/81 and 83/82 *Waterkeyn and Others* [1982] ECR 4337, paragraph 16).

96 Accordingly, the reply to the national court's question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

**The request that the temporal effects of the judgment should be limited**

97 The German Government requests the Court to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before. It considers that such a temporal limitation of the effects of this judgment is necessary owing to the scale of its financial consequences for the Federal Republic of Germany.

98 It must be borne in mind that, were the national court to find that the conditions for liability of the Federal Republic of Germany are satisfied in this case, the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty.

99 However, those conditions may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (*Francovich and Others*, paragraph 43).

100 In view of the foregoing, there is no need for the Court to limit the temporal effects of this judgment.

Costs

101 The costs incurred by the Danish, German, Greek, Spanish, French, Irish and Netherlands Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 28 January 1993, and by the High Court of Justice, Queen's Bench Division, Divisional Court, by order of 18 November 1992, hereby rules:

**1. The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is**

applicable where the national legislature was responsible for the breach in question.

2. Where a breach of Community law by a Member State is attibutable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the state must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

3. Pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

4. Reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not

including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

5. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

Rodríguez Iglesias Kakouris Edward

Hirsch Mancini Schockweiler

Moitinho de Almeida Gulmann Murray

Delivered in open court in Luxembourg on 5 March 1996.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President

# JUDGMENT OF THE COURT (Fourth Chamber)
26 September 1996 *

In Case C-168/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Vicenza (Italy) for a preliminary ruling in the criminal proceedings before that court against

**Luciano Arcaro**

on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291 p. 1),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar

* Language of the case: Italian.

after considering the written observations submitted on behalf of the Commission of the European Communities by Laura Pignataro and Dominique Maidani, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

## Judgment

1 By order of 22 April 1995, received at the Court on 30 May 1995, the Pretura Circondariale (District Magistrate's Court), Vicenza, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 179, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

2 Those questions have been raised in criminal proceedings brought against Luciano Arcaro pursuant to Articles 5, 7 and 18 of Legislative Decree No 133 of 27 January 1992 on industrial discharge of dangerous substances into the aquatic environment (Ordinary Supplement No 34 of GURI No 41 of 19 February 1992, and corrigendum published in GURI No 124 of 28 May 1992, hereinafter 'the Decree').

3 Article 3 of Directive 76/464 provides that all discharges of substances in List I of its Annex 'shall require prior authorization by the competent authority of the Member State concerned'. That list includes substances particularly dangerous for the aquatic environment, including cadmium.

4 For that category of substances, discharge authorizations must be issued in accordance with Articles 3 and 5 of the same directive. According to those provisions, discharge authorizations must lay down in particular emission standards, namely the maximum concentration and maximum permissible quantity of a substance in a discharge, the conditions on which the discharge is authorized and the period in which it may be made.

5 According to Article 6(1) of Directive 76/464, emission standards must not exceed the value limits laid down by the Council.

6 In the case of cadmium, the national authorities are to observe the limit values, time-limits and monitoring procedures laid down in the Annexes to Directive 83/513.

7 However, Annex I (footnotes 1 and 7) to that directive provides that, as regards sectors not mentioned in that annex, limit values for cadmium discharges are to be fixed by the Council at a later stage. In the meantime, the Member States are to fix emission standards autonomously, in accordance with Directive 76/464, and those standards must not be less stringent than the most nearly comparable limit value in that annex.

8 In Italy, the Decree was adopted in order to implement a number of Community directives on discharges containing dangerous substances, including Directives 76/464 and 83/513.

9 It applies to discharges of dangerous substances included in the groups of substances as mentioned in List I and II in its annex A (Article 1). Annex B lays down the 'limit values for emission standards' for certain of the dangerous substances referred to in List I of Annex A.

10 The Decree lays down the rules for authorization by local authorities of discharges of the substances in List I of Annex A. Those rules are based on a distinction between discharges from new industrial plant and discharges from industrial plant existing on 6 March 1992 or brought into operation before 6 March 1993.

11 All industrial plants, whether new or already existing, must, in order to be able to carry out discharge operations, obtain authorization (Article 5 of the Decree). In the case of both categories, local authorities, when issuing discharge authorizations, prescribe emission standards in conformity with the limit values laid down in Annex B. However, if the discharge concerns substances for which no limit value has yet been laid down in Annex B, the following rules apply.

12 In the case of new plant, prior authorization for discharge is compulsory and is issued in accordance with the tolerance limits laid down by Law No 319 of 10 May 1976 (GURI No 141 of 29 May 1976), as amended (Article 6(3) of the Decree). On the other hand, in the case of existing plant, Article 7(7) of the Decree provides that the Decree, and therefore the obligation to obtain authorization, is to be applicable only after adoption of the ministerial decrees provided for in Article 2(3)(b).

13 According to the case file, Annex B does not indicate the limit values for the cadmium discharges with which the main proceedings are concerned. Consequently, according to the Decree, the obligation to obtain authorization applies to such discharges only if they come from new plant.

14 Article 18 of the Decree lays down the penalties applicable in the event of infringements of its provisions.

15 It appears from the case file forwarded to the Court that Mr Arcaro, the legal representative of an undertaking whose main activity is the working of precious metals, is being prosecuted under Articles 5, 7 and 18 of the Decree for discharging cadmium into surface waters (the River Bacchiglione) without having submitted an application for the relevant authorization.

16 In proceedings before Pretura Circondariale di Vicenza, brought by the Public Prosecutor, Mr Arcaro submits, first, that his undertaking is an existing plant within the meaning of the Decree and that, having regard to the production of his undertaking, the system of authorization laid down in Article 7 of the Decree would be applicable to it only if emission limit values, corresponding to that production, had been adopted by ministerial decree.

17 The Pretore finds that the provisions of Article 7(1) and (7) of the Decree exclude the majority of existing plant from the system of authorization which it introduces.

18 However, in point 8 of its order for reference, the Pretore expresses doubts concerning the conformity of those provisions with the Community directives which they implement and which, according to the Pretore, require authorization for all discharges which are subject to them, without any distinction between new plant and existing plant. In this regard, the Pretore refers, by way of example, to Article 1(2)(d) and Article 3 of Directive 76/464, and to Article 3 of Directive 83/513.

19 In view of those considerations, the Pretore has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does point 8 of this order for reference put forward a correct interpretation of the Community directives which Legislative Decree No 133/1992 is intended to implement?

(2) If Question 1 is answered in the affirmative, is it possible for direct effect to be given to the Community provisions, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen's legal position may as a result be impaired?

(3) If Question 2 is answered in the negative, what other method of procedure may be adopted under a correct interpretation of Community law to achieve the elimination from national legislation of provisions which are incompatible with those of Community law, where the direct application of the latter would result in impairment of the citizen's legal position?'

**The first question**

20 This question is vaguely formulated since it concerns an interpretation of all the Community directives which the Decree is intended to implement and the provisions of Directives 76/464 and 83/513, mentioned more particularly in point 8 of the order for reference, are mentioned only by way of example.

21 However, according to settled case-law, where questions are formulated imprecisely, the Court may extract from all the information provided by the national

court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject matter of the dispute (judgment in Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9).

22 In the present case, as explained in paragraphs 15 and 16 of this judgment, the documents concerning the main proceedings show that those proceedings concern cadmium discharges made without authorization by an existing plant within the meaning of the Decree.

23 Since, as far as cadmium discharges are concerned, the relative provisions of Community law are contained in Directives 76/464 and 83/513, the first preliminary question must be understood as seeking to ascertain whether the relevant provisions of those directives are to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of prior authorization.

24 In this regard, it should be observed that Article 3 of Directive 76/464 provides that:

'With regard to the substances belonging to the families and groups of substances in List I ...:

1. all discharges into the waters ... which are liable to contain any such substance shall require prior authorization by the competent authority of the Member State concerned;

...'

List I, contained in the Annex to the directive, mentions, in point 6, cadmium.

25 It follows that any discharge of cadmium is subject to the issue of prior authorization, without there being any exception for discharges coming from plant existing before a certain date.

26 That interpretation is not contradicted by Article 3, point 3, nor by Article 6(4) of Directive 76/464.

27 The first of those provisions provides:

'With regard to the substances belonging to the families and groups of substances in List I ...:

3. in the case of existing discharges of any such substance into the waters referred to in Article 1, the dischargers must comply with the conditions laid down in the authorization within the periods stipulated therein. This period may not exceed the limits laid down in accordance with Article 6(4).'

28 Article 6(4) provides:

'For those substances included in the families and groups of substances referred to in paragraph 1, the deadlines referred to in point 3 of Article 3 shall be laid down by the Council in accordance with Article 12, taking into account the features of the industrial sectors concerned and, where appropriate, the types of products.'

29 Consequently, although those provisions concern 'existing discharges' of the substances in List I, they make no exception, in favour of a plant existing before a certain date, to the obligation to obtain prior authorization; they simply refer to the time-limits which are to be laid down in the authorization for this type of discharge.

30 Moreover, that interpretation is not undermined by Directive 83/513, which, in Article 2(f) and (g), defines 'existing plant' and 'new plant'. Thus, Article 2 provides:

'For the purposes of this Directive:

...

(f) "existing plant" means an industrial plant which is operational on the date of notification of this Directive;

(g) "new plant" means:

— an industrial plant which has become operational after the date of notification of this Directive,

— an existing industrial plant whose cadmium-processing capacity has been substantially increased after the date of notification of this Directive.'

Nevertheless, that distinction is relevant only in relation to the first subparagraph of Article 3(4) of that directive, according to which 'Member States may grant authorization for new plants only if those plants apply the standards corresponding to the best technical means available when'.

31 It accordingly follows that that provision does not exempt the plants concerned from the obligation to obtain an authorization. On the contrary, it reinforces it.

32 The answer to the first question must therefore be that Article 3 of Directive 76/464 is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

## The second question

33 By this question the national court wishes to ascertain in substance whether, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may rely on that Article 3 against an individual, although this may impair that individual's position.

34 The Commission observes that the system for authorizing discharges provided for by Directives 76/464 and 85/513 entails the designation of competent national authorities for this purpose, having a real power of assessment. It concludes that the provisions of these directives cannot be regarded as unconditional, within the meaning of the case-law of the Court, and that they therefore have no direct effect.

It also submits that, in any event, a directive cannot by itself create obligations for an individual nor be relied upon as such against an individual before a national court.

35 Having regard to a situation such as that with which the main proceedings are concerned, it is not necessary to examine whether Article 3 of the Directive is unconditional and sufficiently precise.

36 The Court has made it clear that the possibility of relying, before a national court, on an unconditional and sufficiently precise provision of a directive which has not been transposed exists only for individuals and only in relation to 'each Member State to which it is addressed'. It follows that a directive may not by itself create obligations for an individual and that a provision of a directive may not therefore be relied upon as such against such a person (judgments in Case 152/84 *Marshall* [1986] ECR 723, paragraph 48, and in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9). The Court has stated that this case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law (judgments in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 22, and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 16).

37 In that same line of authority the Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (judgment in Case 14/86 *Pretore di Salò* [1987] ECR 2545).

38 The answer to the second question must therefore be that, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may not rely on that Article 3 against an individual.

## The third question

39 By this question the national court essentially seeks to ascertain whether, upon a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions which are contrary to a provision of a directive which has not been transposed, where the latter provision may not be relied on before the national court.

40 It should be observed first of all that there is no such method of procedure in Community law.

41 It should be added that the Member States' obligation, arising under a directive, to achieve the result envisaged by the directive and their duty, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgments in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).

42 However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (see the judgment in *Kolpinghuis Nijmegen*, cited above, paragraphs 13 and 14).

43 The reply to the third question must therefore be that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

## Costs

44 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to questions referred to it by the Pretura Circondariale di Vicenza, by order of 22 April 1995, hereby rules:

**1. Article 3 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.**

2. **In the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on that Article 3 against an individual.**

3. **There is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.**

Kakouris Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass C. N. Kakouris

Registrar President of the Fourth Chamber

# JUDGMENT OF THE COURT
18 December 1997 *

In Case C-129/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between

**Inter-Environnement Wallonie ASBL**

and

**Région Wallonne**

on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón (Rapporteur), Judges,

* Language of the case: French.

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Inter-Environnement Wallonie ASBL, by Jacques Sambon, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, Senior Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,

— the French Government, by Jean-François Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents,

— the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC, and

— the Commission of the European Communities, by Maria Condou-Durande, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Inter-Environnement Wallonie ASBL, represented by Jacques Sambon; the French Government, represented by Jean-François Dobelle and Romain Nadal; the Netherlands Government, represented by Johannes Steven van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt QC; and the Commission, represented by Maria Condou Durande, at the hearing on 5 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

## Judgment

1 By judgment of 29 March 1996, received at the Court on 23 April 1996, the Belgian Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

2 Those questions were raised in proceedings brought by Inter-Environnement Wallonie, a non-profit-making association, for annulment of the Order of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Order').

## The relevant Community provisions

3 The object of Directive 75/442 is to approximate the laws of the Member States on the disposal of waste. It has been amended by Directive 91/156.

4 Directive 75/442, as amended by Directive 91/156, defines waste in Article 1(a) as follows:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure.'

5 The list mentioned in that last provision was laid down in Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15). Paragraph 3 of the introductory note to that list states, first, that the list is not exhaustive and, second, that the fact that a material appears in it is only relevant when the definition of waste has been satisfied.

6 Articles 9(1) and 10 of Directive 75/442, as amended, provide that any establishment or undertaking which carries out the operations specified in Annex IIA or Annex IIB must obtain a permit from the competent authority. Annex IIA concerns disposal operations whilst Annex IIB lists the operations which may lead to recovery.

7 Article 11 of Directive 75/442, as amended, provides an exception to the requirement of a permit:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [OJ 1978 L 84, p. 43], as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production;

and

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

— if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

(...)'

8 Article 4 of Directive 75/442, as amended, provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

...'

9 According to the first indent of Article 2(1) of Directive 91/156, the Member States were to bring into force the laws, regulations and administrative provisions

necessary to comply with that directive not later than 1 April 1993 and forthwith to inform the Commission thereof. The second indent provides: 'When Member States adopt these measures, the measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.'

10 Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) refers, for the definition of waste, to Directive 75/442. Article 1(4) defines 'hazardous waste'.

11 Article 3 of Directive 91/689 provides:

'1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

— if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

— if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.'

12 Article 11 of Directive 91/689 repealed Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) with effect from 12 December 1993. However, Article 1 of Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) deferred the repeal of Directive 78/319 until 27 June 1995.

## The relevant national provisions

13 The Decree of the Walloon Regional Council of 5 July 1985 on waste, as amended by the Decree of 25 July 1991 ('the Decree'), defines waste at Article 3(1) as follows:

'waste: all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

14 Article 5(1) of the Order provides:

'Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process ...'.

15 The preamble to the Order makes particular reference to the Decree, Directive 75/442, as amended, and to Directives 78/319 and 91/689. Article 86 of the Order states that it is to come into force on the day of its publication in the *Moniteur Belge*. Publication took place on 23 June 1992.

## Facts of the case in the main proceedings

16 By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'État to annul the Order in its entirety or, in the alternative, certain of its provisions.

17 In its order for reference, the Conseil d'État has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.

18 In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms 'an integral part of an industrial production process'.

19 In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the permit requirement for undertakings carrying out

waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.

20 On that point, the Conseil d'État considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.

21 Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'État questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.

22 In the second part of its plea, Inter-Environnement Wallonie claims that the exception in Article 5(1) of the Order is contrary to the Decree which, it states, does not provide for any derogation for operations forming part of an industrial process.

23 On that point, the Conseil d'État finds that Article 3(1) of the Decree and the annex to which it refers are intended to be a faithful transposition of Directive 75/442, as amended. While the case-law of the Court makes it clear that waste means any substances and objects which the holder discards or is required to discard without intending thereby to exclude their economic reutilization by other persons, it does not make it possible to establish whether a substance or object referred to in Article 1 of Directive 75/442, as amended, which directly or indirectly forms an integral part of an industrial production process is waste within the meaning of Article 1(a) of that directive.

24 In those circumstances, the Conseil d'État has referred the following questions to the Court for a preliminary ruling:

'(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?'

## Question 2

25 By its second question, which it is appropriate to consider first, the national court is in essence asking whether a substance is excluded from the definition of waste in Article 1(a) of Directive 75/442, as amended, merely because it directly or indirectly forms an integral part of an industrial production process.

26 First of all, it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term 'waste' turns on the meaning of the term 'discard'.

27 It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term 'discard' covers both disposal and recovery of a substance or object.

28 As the Advocate General has pointed out in paragraphs 58 to 61 of his Opinion, the list of categories of waste in Annex I to Directive 75/442, as amended, and the disposal and recovery operations listed in Annexes IIA and IIB to that directive demonstrate that the concept of waste does not in principle exclude any kind of residue, industrial by-product or other substance arising from production processes. This finding is further supported by the list of waste drawn up by the Commission in Decision 94/3.

29 First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production.

30 Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.

31 Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 *Zanetti and Others* [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 47 and 48).

32 It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended.

33 That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be.

34 The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process.

## Question 1

35 By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.

36 According to Inter-Environnement Wallonie, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the Région Wallonne should have complied with that directive.

37 The Commission endorses that position and maintains that Articles 5 and 189 of the Treaty preclude Member States from adopting a provision contrary to Directive 91/156 during the period prescribed for its transposition. It states that in this respect it is irrelevant whether or not a particular measure is specifically intended to transpose the directive.

38 On the other hand, the Belgian, French and United Kingdom Governments consider that until the period prescribed for transposition of a directive has expired, the Member States remain free to adopt national rules which are at variance with it. The United Kingdom Government adds, however, that it would be contrary to Articles 5 and 189 of the Treaty for a Member State to adopt measures which would have the effect of making it impossible or excessively difficult for that State to transpose the directive correctly into national law.

39 The Netherlands Government is of the opinion that the adoption of a directive means that the Member States are no longer free to undertake anything which might make it more difficult to achieve the result prescribed. None the less, it considers that a Member State cannot be regarded as being in breach of Articles 5 and 189 of the Treaty where, as in the present case, it is not certain that the national provisions are inconsistent with the directive concerned.

40 It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 22; Case 152/84

*Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case 72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing* v *Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, and *Kraaijeveld*, cited above, paragraph 55).

41 The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, '[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.

42 Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.

43 Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.

44 Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.

45 Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

46 It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.

47 In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.

48 For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.

49 Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed.

50 The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive

91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

## Costs

51 The costs incurred by the Belgian, German, French, Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Belgian Conseil d'État by judgment of 29 March 1996, hereby rules:

**1. A substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, merely because it directly or indirectly forms an integral part of an industrial production process.**

2. **The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.**

Rodríguez Iglesias Gulmann Ragnemalm

Schintgen Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

In Case C-240/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 22 June 2009, received at the Court on 3 July 2009, in the proceedings

**Lesoochranárske zoskupenie VLK**

v

**Ministerstvo životného prostredia Slovenskej republiky,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2010,

after considering the observations submitted on behalf of:

– Lesoochranárske zoskupenie VLK, by I. Rajtáková, advokátka,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Polish Government, by M. Dowgielewicz, D. Krawczyk and M. Nowacki, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the United Kingdom Government, by L. Seeboruth and J. Stratford, acting as Agents,

– the European Commission, by P. Oliver and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

2 The reference has been made in proceedings between Lesoochranáske zoskupenie VLK ('zoskupenie'), an association established in accordance with Slovak law whose objective is the protection of the environment, and the Ministerstvo životného prostredia Slovenskej republiky (Ministry of the Environment of the Slovak Republic) ('the Ministerstvo životného prostredia'), concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

### Legal context

*International law*

3 Article 9 of the Aarhus Convention states:

‘1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures

prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

4 Article 19(4) and (5) of the Aarhus Convention states:

'4. Any organisation referred to in Article 17 which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation's Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in Article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

*European Union ('EU') law*

5 Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 Article 16(1) of the Habitats Directive further states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7 Annex IV to the Habitats Directive relating to animal and plant species of Community interest in need of strict protection, mentions, in particular, the species 'Ursus arctos'.

8 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) states in recital 5 in the preamble thereto:

'On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.'

9 Article 6 of Directive 2003/4 implements Article 9(1) of the Aarhus Convention, and reproduces almost word for word its provisions.

10 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC states in recitals 5, 9 and 11 in the preamble thereto:

'(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Århus Convention"). Community law should be properly aligned with that Convention with a view to its ratification by the Community;

…

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

…

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985 L 175, p. 40], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [OJ 1996 L 257, p. 26] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4) thereof.'

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

12 Decision 2005/370 states, in recitals 4 to 7 in the preamble thereto:

'(4) Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention.

(5) The Community, in accordance with the Treaty, and in particular Article 175(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 of the Treaty.

(6) The Community and most of its Member States signed the Aarhus Convention in 1998 and since then have pursued their efforts in view of their approval of the Convention. In the meantime, relevant Community legislation is being made consistent with the Convention.

(7) The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States.'

13 Article 1 of Decision 2005/370 provides:

'The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.'

14 In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

15 Articles 10 to 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) aim to ensure access to justice by non-governmental organisations with respect to

administrative acts adopted by the institutions and bodies of the European Union or omissions by the latter, in accordance with Article 9(3) of the Aarhus Convention.

*Slovak law*

16 Pursuant to Article 82(3) of Law No 543/2002 on the protection of nature and the countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings, an association having legal personality is to be regarded as a 'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

17 In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.

18 Under Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok) any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.

19 According to Article 250(m) of the Code of Civil Procedure, persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?'

24 By order of the President of the Court of 23 October 2009, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

## Consideration of the questions referred

*Admissibility*

25 The Polish and United Kingdom Governments submit that the questions are admissible only in so far as they concern the provisions of Article 9(3) of the Aarhus Convention, and are inadmissible for the remainder on the ground that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose.

26 In answer to those arguments, it is sufficient to note that the questions referred relate essentially only to Article 9(3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

27 In those circumstances, there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Aarhus Convention.

*The first and second questions*

28 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Habitats Directive for a species mentioned in Annex IV thereto, may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Aarhus Convention on direct effect, to which its questions relate.

29 A preliminary point to be made is that Article 300(7) EC provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman*[1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).

31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC

Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others*[2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *MerckGenéricos – Produtos Farmacêuticos*, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, *MerckGenéricos – Produtos Farmacêuticos*, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission* v *Ireland*, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03 *Commission* v *France* [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a 'party' to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure

effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

*The third question*

53 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

## Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council**

**Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.**

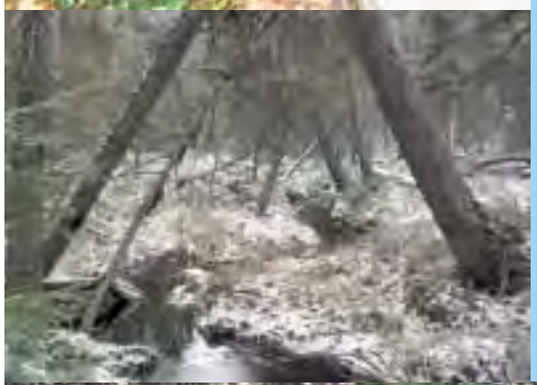
[Signatures]

---

* Language of the case: Slovak.







European
Commission

# *Natura 2000 and forests 'Challenges and opportunities'*

Interpretation guide





Cover photos:

— Tervon 1/J. Luhta
— Hainich02/G. Raeymaekers
— Purolp1/J. Luhta
— Metsämu1/J. Luhta
— ENV-Meditteranean forest2/V. González

# *Natura 2000 and forests*
# *'Challenges and opportunities'*

## Interpretation guide



111-1105-IMG/F. Vassen

European Commission
Directorate-General for the Environment
Nature and Biodiversity Unit
Forests and Agriculture Unit

A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (http://europa.eu.int).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2003

ISBN 92-894-6069-5

© European Communities, 2003
Reproduction is authorised provided the source is acknowledged.

*Printed in Italy*

PRINTED ON WHITE CHLORINE-FREE PAPER



# CONTENTS


**1. Executive summary** . . . . . 7

**2. Introduction** . . . . . 11

2.1. Purpose of this document . . . . . 11

2.2. Why a comprehensive report on Natura 2000 and forests? . . . . . 12

2.3. The importance of stakeholder involvement . . . . . 14

**3. Natura 2000** . . . . . 15

3.1. The concept . . . . . 15

3.2. The technical implementation . . . . . 16

**4. Facts about EU forests, forestry and the environment** . . . . . 19

**5. Integration of environmental policy into other EU policy fields** . . . . . 23

5.1. The Treaty of Maastricht . . . . . 23

5.2. Cross-compliance . . . . . 23

5.3. The EU forestry strategy . . . . . 24

**6. Management of Natura 2000 forest sites** . . . . . 25

6.1. Forestry and nature conservation . . . . . 25

6.2. General requirements for forest management on Natura 2000 sites . . . . . 27

6.3. Operational-level guidelines for sustainable forest management on Natura 2000 sites . . . . 29

6.4. The importance of formal adoption of management principles . . . . . 32

6.5. Recommendations for biodiversity conscious forestry on protected areas and beyond . . . . 33

**7. Financial instruments** . . . . . 35

7.1. Existing support systems . . . . . 36

*7.1.1. Contract conservation* . . . . . 36

*7.1.2. Forestry measures under EU environmental policy: LIFE* . . . . . 36

*7.1.3. The new generation of Community funds, 2000–06* . . . . . 37

7.2. Working group on Article 8 of the habitats directive . . . . . 39

7.3. Conclusions of the working group on Article 8 of the habitats directive . . . . . 40

**8. Best practices, examples and experiences** . . . . . 45

8.1. Examples submitted by Member States . . . . . 45

*8.1.1. Belgium* . . . . . 45

*8.1.2. Denmark* . . . . . 47

*8.1.3. Germany* . . . . . 49

*8.1.4. Greece* . . . . . 53

*8.1.5. Finland* . . . . . 54

*8.1.6. France* . . . . . 56

*8.1.7. Ireland* . . . . . 60
*8.1.8. Italy* . . . . . 61
*8.1.9. Netherlands* . . . . . 63
*8.1.10. Spain* . . . . . 65
*8.1.11. Sweden* . . . . . 66
*8.1.12. United Kingdom* . . . . . 67
8.2. Examples from selected LIFE Nature and LIFE Environment projects . . . . . 69
8.3. Leader + and Interreg III examples . . . . . 77
8.4. Rural development plans and forestry . . . . . 77
8.5. Pro Silva: practical close-to-nature forestry . . . . . 77
8.6. Conservation easements: the American way . . . . . 79
8.7. A look down under: nature protection on private land in Tasmania . . . . . 79

**9. General conclusions about forestry and Natura 2000 sites** . . . . . 81

**10. Bibliography** . . . . . 83

**11. Useful Internet links** . . . . . 87

**Annex I: General information about forests and forestry** . . . . . 91
1. Global forest condition . . . . . 91
2. Forests in the European Union . . . . . 92

**Annex II: The framework for biodiversity protection in Europe** . . . . . 97
1. The birds directive . . . . . 97
2. The Bern Convention . . . . . 97
3. The habitats directive . . . . . 97
4. The EU enlargement and the emerald network . . . . . 98
5. The Convention on Biological Diversity (CBD) . . . . . 98
6. The EU biodiversity action plans . . . . . 99
7. National forest programmes . . . . . 99
8. The Ministerial Conference on the Protection of Forests in Europe (MCPFE) . . . . . 99
9. Overview of discussions on biodiversity protection and forest issues, 1992–2002 . . . . . 101

# FOREWORD

We depend on our forests for a lot. They have to provide timber and other products, but they are important for recreation too. They also play an essential environmental function in protecting biodiversity, enhancing the landscape, and regulating climate, water and soil.

So forests are perhaps the most important natural resource in Europe. That they protect biodiversity is evident from the fact that, compared to other ecosystems, they are home to the largest number of mammals, birds, reptiles and amphibians on our continent. But, sadly, our forests are increasingly under threat, and there is a risk that many species could disappear from some European countries, especially species at the top of the food chain such as the large carnivores and birds of prey.

But European public opinion has consistently demonstrated its interest in the long-term survival of Europe's most valuable and threatened species and habitats. For this reason, in the 1990s, the Community created Natura 2000, and then at the Göteborg summit in 2001 undertook to halt biodiversity decline by 2010. These decisions are crucial in maintaining the Community's commitment to conservation of its natural heritage.

As establishment of Natura 2000 is now virtually complete, with adoption of the lists of designated sites, the 'El Teide' ministerial declaration made clear commitments about involving stakeholders, managing the network and targeting resources. This is especially important for forests, as forest habitats and forest species will be included in over half of all sites. This means that more attention will have to be paid to integrating conservation objectives into forest management.

This document was developed with extensive stakeholder consultation and is designed to give Community citizens a better understanding of Community legislation on conservation of our forests. It makes it very clear that Natura 2000 is not opposed to economic activity in the forestry sector. It explains how sites are designated, and the practical consequences of designation. As another example of the European Commission's policy of openness and transparency, it recommends identifying the measures required to maintain biodiversity through discussion with stakeholders, and expressing the outcome of this process as formal management objectives. A separate section gives numerous examples of creative approaches to implementing Natura 2000 in forests and of the successful combination of forestry with nature conservation objectives. These examples were submitted by Member States and by stakeholders. They come not only from specific conservation programmes such as LIFE projects, but also from integrated projects where nature conservation is just one of several objectives, such as rural development programmes.

I trust you will find this publication informative and will rise to the challenges and opportunities it contains. We may depend on our forests — but they depend on us too!

**Margot Wallström**
**Commissioner for the Environment**



118-1873-IMG/K. Sundseth

# 1. Executive summary

This document aims to clarify the role of forests and forestry in the Natura 2000 ecological network, in order to facilitate the uptake of Natura 2000 among forestry operators.

The document provides an overview of the Natura 2000 concept, the legal framework for biodiversity conservation and the specific requirements of the habitats directive, and the importance of European forests in the global conservation context.

The document then provides indicative guidelines for forest management on Natura 2000 sites. These are based on existing interpretations of the European *acquis* for nature conservation, on initiatives to promote sustainable and multi-functional forest management (SFM — Ministerial Conference for the Protection of Forests in Europe) and on relevant literature.

The premise of this document is that Europe's natural heritage has been transformed by centuries of human use, and that the conservation and sustainable use of this heritage within Natura 2000 sites requires a spectrum of measures ranging from no or minimal human activity to various regimes of sustainable use. This assumes that stakeholders can reach a compromise between the objectives of nature conservation and of economic production. The Natura 2000 network is not intended to block all economic activity in designated sites, but requires that the management of each site is tailored to local circumstances and takes into account both the requirements of nature conservation and economic production.

This text recommends that appropriate site management objectives and measures be identified through meaningful stakeholder consultation, and that the outcomes of such consultation be laid down in transparent, long-term management plans.

In order to further facilitate take-up among forest operators, this document also provides:

- an overview of existing and potential Community funding mechanisms and information on their successful use for nature conservation and ecosystem management on forest sites in the Natura 2000 network;

- examples of the successful combination of economically viable forestry with nature conservation objectives on Natura 2000 sites from various Member States and elsewhere;
- a bibliography and useful Internet links.

## Abbreviations and acronyms

| | |
|---|---|
| AASCI | area of special conservation interest (in the emerald network) |
| BD | birds directive |
| CAP | common agricultural policy of the European Union |
| CBD | Convention on Biological Diversity (UNCED, Rio de Janeiro 1992) |
| CEEC | central and east European countries |
| CEPF | Confederation européenne des proprietaires forestiers |
| COP | Conference of the Parties |
| COPA | Comité des organisations professionnelles agricoles de l'Union européenne |
| DG | Directorate-General of the European Commission |
| EAGGF | European Agricultural Guidance and Guarantee Fund |
| EC | European Community |
| EEA | European Environment Agency |
| EEC | European Economic Community |
| EIA | environmental impact assessment |
| EFI | European Forest Institute |
| ESF | European Social Fund |
| EU | European Union |
| FAO | Food and Agriculture Organisation of the United Nations |
| HD | habitats directive |
| IFF | Intergovernmental Forum on Forests |
| IPF | Intergovernmental Panel on Forests |
| IUCN | International Union for the Conservation of Nature |
| MCPFE | Ministerial Conference on the Protection of Forests in Europe |
| MS | Member States (of the EU) |
| NFP | national forest programme |
| NGO | non-governmental organisation |
| pSCI | proposed site of Community importance (for Natura 2000) |
| ERDF | European Regional Development Fund |
| RDR | rural development regulation |
| SAC | special area of conservation (for Natura 2000) |
| SFM | sustainable forest management (as defined by the MCPFE) |
| SPA | special protected area (for Natura 2000, emanating from the birds directive) |
| UNCED | United Nations Conference on Environment and Development |
| UNECE | United Nations Economic Commission for Europe |
| UNEP | United Nations Environmental Programme |
| WWF | World Wide Fund for Nature |



## Acknowledgements

The basic research and editorial coordination for the first draft of this document was conducted by Tim Christophersen during a traineeship at Unit B2 'Nature and Biodiversity' in the Directorate-General for the Environment.

We especially acknowledge the contributions of the Directorate-General for Agriculture, the European Environment Agency (EEA), the Liaison Unit in Vienna of the Ministerial Conference on the Protection of Forests in Europe (MCPFE), the UNEP Regional Office for Europe in Geneva, the Confederation européenne des proprietaires forestiers (CEPF), the European Policy Office of the WWF (World Wide Fund for Nature), the IUCN office in Brussels and the European Specialist Group on Sustainable Use of IUCN, the Union des sylviculteurs du sud de l'Europe (USSE), the Confederation of European Paper Industries (CEPI), English Nature, Birdlife International, the European Landowners Organisation and the Société royale forestière de Belgique (SRFB). We would also like to thank EU Member State administrations for the remarks and examples that they have submitted.

## Nature and limitations of this document

This document has been drafted by the services of the Directorate-General for the Environment of the European Commission, following relevant informal discussions that led to constructive inputs from other Commission services, from stakeholders and from the authorities of the Member States. The document reflects only the views of the Environment DG and is not of a binding nature.

The interpretations provided by Commission services cannot go beyond the directives. This is particularly true for the habitats directive as it enshrines the subsidiarity principle and as such allows Member States a wide margin of manoeuvre for practical implementation of specific measures in relation to specific sites within the Natura 2000 network. In any case, Member States are free to choose how to implement practical measures provided these serve the general purpose of the directive.

This document is not intended to provide definitive answers to site-specific questions. Each site should be dealt with on a case-by-case basis, with reference to the guidelines.

Future revisions of this document are anticipated as further experience is accumulated on forestry and Natura 2000 in Member States and any relevant future case law. The Directorate-General for the Environment may also produce a simplified version of this text for wider distribution at a later stage.

The scope of this document is limited to the 15 current Member States and does not take into account specific situations in the candidate countries. This is because the Commission does not have any competence over nature-protection issues outside the EU, and because preparatory consultations did not include the candidate countries.

# 2. Introduction

## 2.1. Purpose of this document

This document aims to clarify the role of forests and forestry for the conservation of Europe's natural heritage within the Natura 2000 network. It is hoped that it will facilitate understanding of the mechanics of the habitats directive among various stakeholders, and that this document may be complemented by more country-specific guidance drawn up by Member States.

Taking into account the large variety of forest habitats throughout Europe and the widely differing socioeconomic situations at regional and local levels, this document proposes general guidelines and recommendations for dealing with forest areas within Natura 2000. This text was written with full awareness of Article 5 of the Treaty to establish the European Community, which institutes the principle of subsidiarity, one of the main pillars of the architecture of the European Union. Following this principle and the implementation procedures of the habitats directive, every decision taken in relation to a certain site should always be made at the most appropriate administrative level, taking into account the specific local circumstances.

Specific objectives of these guidelines are:

- to inform private and public forest owners, forestry operators, nature conservation authorities, NGOs and other stakeholders of existing experiences across Europe in the field of Natura 2000 and forestry;
- to initiate and facilitate communication between different stakeholders;
- to give a framework of non-mandatory guidelines for management of Natura 2000 forest sites and to present case studies on how to achieve the goals of the habitats directive;
- to inform stakeholders of existing and forthcoming funding opportunities for forests and forestry arising from the establishment of Natura 2000.

## 2.2. Why a comprehensive report on Natura 2000 and forests?

As over half of all proposed sites for the EU-wide ecological network Natura 2000 will include forest areas, specific guidance for forest sites is appropriate. The ongoing establishment of the Natura 2000 network, the most ambitious nature conservation initiative in European history, cannot be completed without the understanding and the contribution of the EU forest sector. This publication is a compilation of existing information regarding forests, protected area management and forest management within the context of Natura 2000. It is addressed at national administrations, forest owners, forestry operators, conservation NGOs and citizens working in or with forests. It forms part of a series of publications by the Directorate-General for the Environment on technical and legal issues concerning Natura 2000 ([1]).

During the establishment of Natura 2000, many misunderstandings arose across Europe (see Table 1). These are partly caused by the fact that different Member States have, very rightly, given different interpretations to what their contribution to Natura 2000 should be. The most widespread misconception is that Natura 2000 is intended to establish a system of strict nature reserves where no economic activities can take place. Although, undoubtedly, many of the most endangered species and habitats listed in the annexes of the habitats directive must be better conserved in future, the majority of sites of Community importance (SCIs) and special protection areas (SPAs — see 3.1) have been influenced by human culture for hundreds of years. In many cases, it is this very human influence that has contributed to development of an ecologically valuable habitat. Thus, Natura 2000 aims to permit appropriate economic activity to maintain or improve the conservation status of certain sites.

The general principle that the conservation of flora and fauna will receive priority when managing natural resources is the basis for management of Natura 2000 areas. As long as favourable conservation status can be maintained or restored in combination with the commercial management of forests expected on most forest sites, economic activities can continue without substantial change. In some cases these economic activities might have to be restricted or, on the contrary, more cost-efficient management may help to meet conservation needs. This can only be decided on a case-by-case basis, depending on the conservation status of each site and, if considered necessary, in the framework of site management plans or site-specific conservation objectives.

Natura 2000 offers opportunity for rural development and the reorientation of forest management, in particular through the possibility of compensation for restrictions of ownership rights. These issues must be addressed by Member States, possibly with the help of co-financing through the Community budget (see Chapter 7).

Council resolution of 15 December 1998 on a forestry strategy for the European Union ([2]) recognises the need for the conservation of areas representative of all types of forest ecosystems and of specific ecological interest. The resolution states that the establishment of Natura 2000 should take into account economic, social and cultural requirements, regional and local characteristics and the involvement of forest owners. Consequently, this report formulates recommendations for a participatory approach, involving all relevant stakeholders, to management measures or management plans for the Natura 2000 sites.

([1]) For further information on Natura 2000 as well as all legal texts of the habitats directive and other relevant information, the reader is referred to the nature conservation homepage on the Europa server: http://europa.eu.int/comm/environment/nature/home.htm

([2]) http://www.europa.eu.int/comm/agriculture/fore/index_en.htm



**Table 1: Dispelling some of the myths about Natura 2000**

| Popular 'myths' about Natura 2000 | Legal and administrative facts |
|---|---|
| 'The habitats directive is a Community initiative that was concocted in secret by Brussels technocrats' | Ministers of the Member States unanimously adopted the habitats directive in 1992 after five years of debate in the Council and the European Parliament. Many interest groups communicated their position to both the Member States and to Brussels during that period and their observations were taken into account. |
| 'The European Commission decides the sites to be included in Natura 2000' | The responsibility for proposing sites within Natura 2000 lies first and foremost with the Member States.<br>1. Member States propose a list of sites for their territory.<br>2. From these national lists, the Commission establishes, in agreement with each Member State, a European list of sites of Community importance (SCI).<br>3. The Member States designate these sites as special areas of conservation (SACs).<br>For the birds directive the Member States designate sites directly as special protection areas. |
| 'Natura 2000 sites will all become nature reserves' | Member States have a choice of mechanisms to use to manage a site. These can be:<br>■ statutory (for example, making a nature reserve);<br>■ contractual (for example, signing a management agreement with the landowner);<br>■ administrative (providing the necessary means). |
| 'Brussels will dictate to us what can or cannot be done in each site' | The habitats directive, and Natura 2000, are based on the principle of subsidiarity. It is up to the Member States to decide how best to conserve the sites, in compliance with the objectives of the directive.<br>Although not an obligation, management plans are mentioned as a useful tool. |
| 'We will have to stop all our activities within a site for the sake of preserving nature' | Conserving species or habitats can be quite compatible with well-managed human activities,such as tourism, hunting and forestry.<br>Many natural areas are highly dependent upon human activities (such as agriculture).<br>Nature conservation also provides additional opportunities for human activities (environmental tourism, pursuit of leisure activities, labelling of natural produce, etc).<br>Any restricting or stopping of certain activities that are a significant threat to the species or habitat needs to be addressed on a case-by-case basis. |
| 'It is the inhabitants of the Natura 2000 sites that will have to support the costs of this protection' | Member States and the European Commission ensure that the costs of Natura 2000 are shared by all.<br>Member States are asked, at the time of submitting their national list of sites, to evaluate the cost of managing those areas hosting priority species or habitat types and to communicate this to the European Commission. The European Commission will then be required to set up a scheme to co-finance these costs.<br>There are a number of existing Community funds that may be used for this process (such as, agri-environment measures, structural funds, LIFE, etc.). |
| 'There is a general lack of transparency on Natura 2000' | Every effort is made to ensure that the European Commission's activities with regard to the establishment of Natura 2000 are as transparent as possible.<br>A newsletter is produced three times a year and is made available to all those who are interested in following this process. |
| 'Once a site is included in Natura 2000 it becomes untouchable as regards future developments' | The habitats directive does not a priori prevent any new activities or developments within a Natura 2000 site from taking place.<br>Any new plans or programmes that are likely to have a significant effect on a designated site have to undergo an appropriate impact assessment before being implemented. If a proposed activity is likely to cause significant damage to a site and all possible alternatives have been exhausted, it may still go ahead only if it is of overriding public interest and if there is compensation foreseen. |

## 2.3. The importance of stakeholder involvement

The public's right of access to information on environmental issues and legislation has improved over the last years, and the Commission is continuously striving to improve the transparency of its actions in all policy fields. The Commissioner for the Environment, Margot Wallström, expressed this view quite clearly in her foreword to the publication *Managing Natura 2000 sites: the provisions of Article 6 of the habitats directive* ([3]): 'To be successful [Natura 2000] requires, in the first instance, the active involvement of the people who live in and depend upon these areas.'

Widespread concern about the public right of access to information on environmental legislation led to the adoption of the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters on 25 June 1998 in the Danish city of Aarhus. All EU Member States and the European Community have signed the Convention. After the adoption of three directives — on public access to information, participation in consultation exercises and on access to justice — the European Union will be a full party to the Convention.

The 'Aarhus Convention' ([4]) is a new kind of environmental agreement, with far-reaching consequences for European citizens. It links environmental rights and human rights and is based on the fact that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and the authorities in a democratic context and it forges a new process for public participation in the negotiation and implementation of international agreements.

Since the habitats directive came into force in 1992, all Member States have, to varying degrees, made efforts to inform stakeholders and the general public about the establishment of Natura 2000. Some Member States followed a very participatory and transparent approach in the designation process, whereby consultations took place and appeals before administrative courts were possible. Other Member States have favoured a more top-down approach. In many regions there has been, and still exists, a lack of information on Natura 2000 at operational level. This shows that further efforts are needed to effectively communicate to the public and each other the important role of Natura 2000 for the future of the European natural heritage. Although it is principally the task of the Member States to inform the stakeholders concerned and the public about Natura 2000, the Directorate-General for the Environment aims to assist these information campaigns where possible.

In the case of forestry, the participation of all concerned (including forest owners, rural communities and forestry operators such as contractors, forest industries and conservation NGOs) in managing Natura 2000 areas is particularly important, as the conservation of biodiversity often depends on the maintenance of human activities, especially if non-climax vegetation formations are to be maintained.

([3]) The publication can be downloaded from the Internet or requested from the European Commission, Directorate-General for the Environment, Unit B.2, Rue de la Loi 200, B-1049 Brussels. Information on the European nature conservation legislation can be found under http://europa.eu.int/comm/environment/nature/legis.htm

([4]) For further information see the Convention homepage at: http://www.unece.org/env/pp/

# 3. Natura 2000

## 3.1. The concept

Directive 92/43/EEC (the 'habitats directive') from 1992 sets the goal of establishing a European network for nature conservation, called Natura 2000, consisting of 'special protection areas' (SPAs) under the Birds Directive 79/409/EEC and the forthcoming 'special areas of conservation' (SACs) under the habitats directive. The underlying idea of Natura 2000 is simple: nature does not stop at administrative borders, so if we want to preserve the vitality and the diversity of our natural surroundings, we have to think and act on an international scale. A successful protection of natural resources and their variety on the European continent can therefore only be reached at European level. The approach of the habitats directive is an integrated one — as well as ensuring the conservation of biodiversity it also aims to promote sustainable activities supporting the conservation objectives for the Natura 2000 areas. It can thus be used as an opportunity for promoting new models of also rural development, in particular in some of the EU's most marginal regions. The habitats directive also has an important political significance because its provisions are legally binding for EU Member States.

It is expected that the network will eventually cover some 450 000 km², which means on average ([5]) 10–15 % of EU territory. Natura 2000 is an important joint effort of the EU Member States to comply with international conventions and agreements in the field of biodiversity protection, such as the Convention on Biological Diversity that was adopted at UNCED in 1992.

The European Parliament stated in its resolution ([6]) on the European Community biodiversity strategy COM(98)0042 that 'in contrast to a number of other environmental problems, it is impossible to make up for losses of diversity of species, ecosystems and natural gene banks.' According to information compiled by the European Environment Agency in Copenhagen, biodiversity in Europe is decreasing, many

([5]) This figure is not to be seen as an objective, as it is a mean value around which large deviations will occur because of specific situations in the Member States and differences between regions within Member States.

([6]) OJ C 341/12, 9.11.1998.

species face severe threats, or are nearing extinction (*Europe's environment: the second assessment'*, EEA, 1998 and *The environment at the turn of the century*, EEA, 1999). The declining species are mostly indigenous, associated with natural habitats, clean water and air and little human disturbance. Establishing Natura 2000 will be of great importance in halting the continuous loss of habitats and species and, if possible, reverse the trend of impoverishment of our natural heritage and countryside resources.

Therefore, a coherent network like Natura 2000 will be a step towards a successful protection of our indigenous habitats and species. Even with 15 % of EU territory expected to be ultimately part of Natura 2000, the remaining land area of the EU will still be important for the overall goal of sustainable development and management of biodiversity, in forestry too. This shows the need for much wider integration of biodiversity concerns in national forestry programmes and initiatives, and into general forestry practices for which Natura 2000 can have a pilot function.



## 3.2. The technical implementation

For the establishment of Natura 2000 it was necessary to elaborate a scientific basis for the site designation process. The habitats listed in Annex I to the habitats directive were originally grouped in five biogeographical regions, based on the Corine land cover identification system. These are the Alpine, Atlantic, Continental, Macaronesian and Mediterranean region. In 1995, when Austria, Finland and Sweden joined the EU, the boreal region was added to this list by a Council decision. The biogeographical regions allow for an assessment that is objective and is not based on national boundaries of the existing natural heritage and the habitats and species in the annexes of the habitats directive.

A total of 59 forest habitat types that are rare or residual and/or host species of Community interest are listed in Annex I to the habitats directive, grouped into the following six forest habitat categories of European conservation interest:

- western taiga
- oak and beech forests
- deciduous Mediterranean forests
- sclerophyllous Mediterranean forests
- temperate mountain conifer forests
- Mediterranean and macaronesian mountain forests.

Next to habitats, the habitats directive also identifies some 200 animal and over 500 plant species as being of Community interest. This implies that several types of measures have to be taken to assure their conservation status, such as designation of sites (Annex II), general protection measures (Annex IV) and regulation of use (Annex V).

The birds directive lists in its Annex I over 180 bird species for which special protection areas (SPAs) have to be designated by a procedure of direct notification from Member States to the Commission. Many of these species are associated with forest habitats, either directly (woodpeckers, grouse, finches and warblers) or

**Table 2: The biogeographical regions (see map on p.14)**

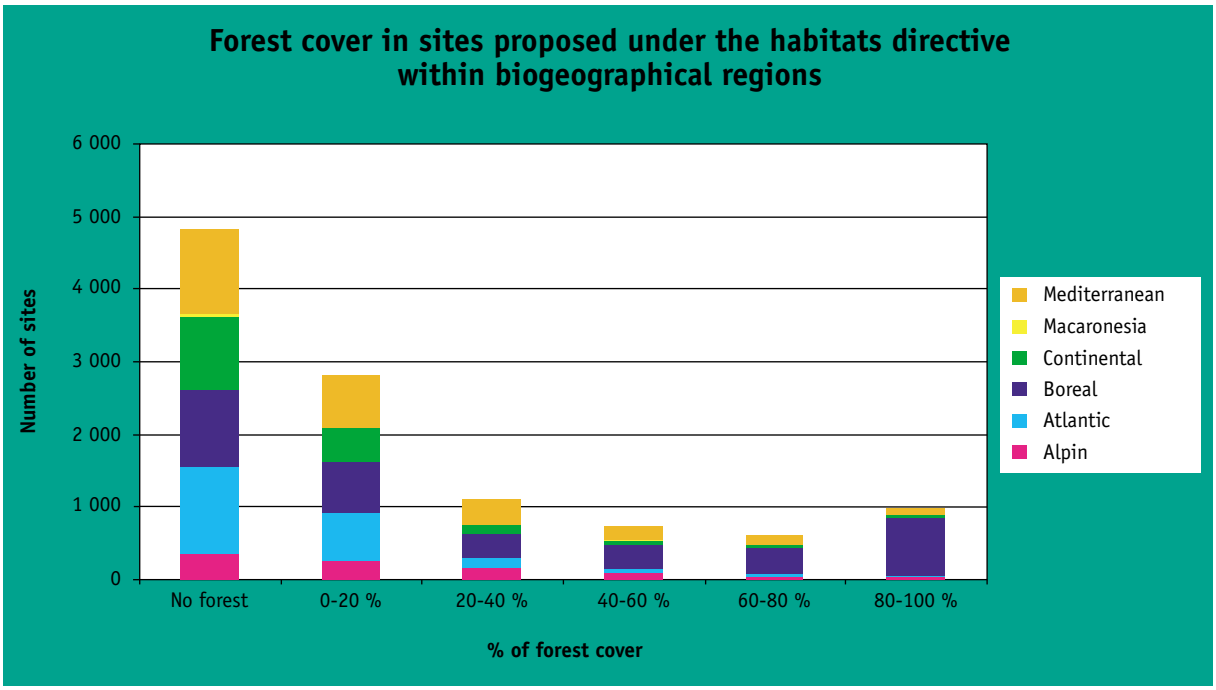
| *Biogeographical region* | *Countries whose territory falls in this region* |
|---|---|
| Alpine region | Germany, Spain, France, Italy, Austria, Finland, Sweden |
| Atlantic region | Belgium, Denmark, Germany, Spain, France, Ireland, the Netherlands, Portugal, Sweden, UK |
| Boreal region | Finland, Sweden |
| Continental region | Belgium, Denmark, Germany, France, Italy, Luxembourg, Austria, Sweden |
| Macaronesian region | Spain, Portugal |
| Mediterranean region | Greece, Spain, France, Italy, Portugal |

in connection with varying landscape features like small wetlands (waders, shorebirds) and forest edges (owls and other birds of prey).

According to Article 4 of the habitats directive, Member States are required to propose sites of Community importance related to these forest habitats for each of the six biogeographical regions. It is the explicit aim of the European Commission to ensure that Natura 2000 includes a coherent network of forest areas. The biodiversity action plan for the conservation of natural resources ([7]) sets the ambitious target of having all forest types from Annex I to the habitats directive assessed and sufficiently represented by 2002. This highlights the importance of forest habitats for Natura 2000 and for the overall protection of biodiversity.

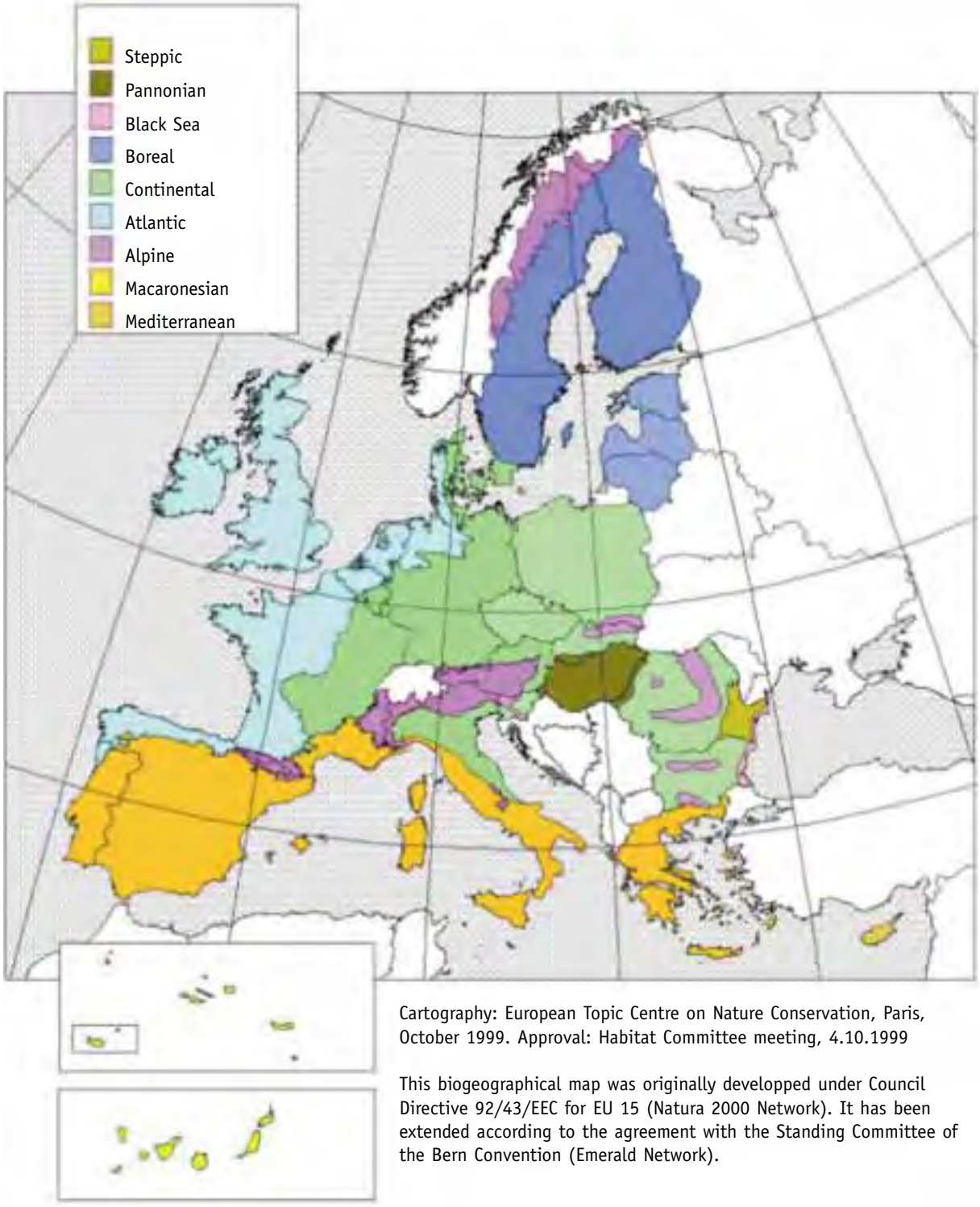
Since 1992, the establishment of Natura 2000 has progressed to varying degrees in all Member States. Some 14 000 sites in the six biogeographical regions in all 15 EU Member States have been listed as proposed sites (pSCI — proposed sites of Community importance) for the network. These proposed lists are then discussed between the Member States, the Directorate-General for the Environment, and observing NGOs such as landowner associations and nature conservation organisations. Revised lists of special areas of conservation (SACs) have then to be designated by Member States, at the latest in June 2004.

The figure above gives an overview of the importance of the forest cover (Annex I HD habitats) within Natura 2000 sites in the different biogeographical regions, according to the actual state of the pSCI designation ([8]).




([7]) The action plan (COM/2001/0162 f) is an instrument for the implementation of Article 8 of the CBD.
([8]) All figures mentioned in this report reflect the data that were available in February 2002.

# Indicative map of biogeograpical region EU-15 + 12




Cartography: European Topic Centre on Nature Conservation, Paris, October 1999. Approval: Habitat Committee meeting, 4.10.1999

This biogeographical map was originally developped under Council Directive 92/43/EEC for EU 15 (Natura 2000 Network). It has been extended according to the agreement with the Standing Committee of the Bern Convention (Emerald Network).

# 4.

# Facts about EU forests, forestry and the environment

EU forests cover approximately 113 million hectares (36 % of the Union territory), of which 87 million hectares are considered productive forests. Some 65 % of EU forests are privately owned.

With the accession of Austria, Finland and Sweden, the EU became the world's second largest paper and sawn-wood producer. It is the foremost importer and the third largest exporter of forest products. Forests are also of high importance in the Mediterranean area because of their protective functions and importance for biodiversity. Altogether, the EU forest-based industries' production value amounts to nearly EUR 300 billion, employing some 2.2 million people.

## Differences in forest type, forest cover and ownership structure within the EU

- Austria, Finland and Sweden are heavily forested and have substantial forest products industries based predominantly on coniferous forest;
- Greece, Spain, France, Italy and Portugal have Mediterranean woodland, managed primarily for protection and where fire is potentially a serious threat. France and Italy, in particular, also have large areas of temperate forest and mountain forests, including coppice areas, farm woodlots and community forests;
- Belgium, Germany, France and Luxembourg have a mixed ownership structure and a range of forest types with production being significant but not always the primary aim in any forest;
- Denmark, Ireland, the Netherlands and the UK have predominantly artificial forest, based on plantations, although the objects of management have been widened in the last decade to encompass service values;
- south-west France, northern Spain and parts of Portugal have large areas of industrial wood plantations, mainly destined for pulping.

## The environmental state of EU forests

(*Sources:* Europe's environment, the second assessment, EEA 1998 and *The environment in the EU at the turn of the century*, EEA, 1999.)

- Forest cover has fluctuated greatly during this millennium, with very low or poor coverage in many countries.
- Present forest cover is a result of a steady increase in recent decades, mainly by planned afforestation and regrowth in semi-natural areas after abandonment of cultivation or grazing. The forest area is still growing and will continue to do so as a result of the evolution of the CAP, which is expected to free more land.
- Forest habitats are changing through intensification of management, the increase in uniformity, fragmentation, the use of exotic tree species, the introduction or maintenance of animal species for hunting, drainage and air pollution.
- Productivity and total production are increasing in many areas, despite declining forest health and severe pest attacks. The increase is probably due to a combination of use of high-yield strains, management including fertilisation and pest control, high levels of airborne $CO_2$ and eutrophication.
- Only a very small proportion of the natural forest which once covered most of Europe remains untouched, mostly in isolated pockets, and the loss continues for old natural and semi-natural deciduous and coniferous woodlands. In western Europe, less than one third of total forest area is semi-natural and there are nearly no truly natural old forests left.
- Some new forest habitat types are being created, for instance the habitats associated with short rotation Christmas trees, energy woodlands or the use of exotic species such as eucalyptus; these generally have low biodiversity.

Summarising, one can say that, although the absolute area of EU forests is expanding, the environmental quality of the forest ecosystems is often in decline.

## Biological importance of European forests

Forests can still be considered as the most important component of European nature. One indicator of the vitality of forests is that the forest biotope remains home to the largest number of vertebrates (mammals, birds, reptiles and amphibians) on the continent.

The distinctive nature of European ecosystems is often forgotten. Even the dominant species of the forests are virtually restricted to Europe. Trees like the European beech and holm oak are not found further east than the Black Sea or the Caucasus. The ordinary sessile oak does not survive further east than the Ural mountains, on the border of Europe. European hornbeams still thrive in the Caucasus but not in Asia proper. Thousands of species of insects and invertebrates are confined to forest habitats constituted by these trees.

Many habitats and plant associations are indeed exclusively European and thus it is solely the responsibility of European countries to safeguard their future. Moreover, Europe hosts a number of restricted-range endemic species.

The changes that forests have undergone over the last few centuries (see Annex I) have brought a great number of species to the verge of extinction. Many species are about to disappear from several European countries and perhaps from the whole continent. This is especially true for organisms at the top of the food chain such as large carnivores and birds of prey.

As part of a new UN/ECE/FAO assessment of the temperate and boreal forests of the world (TBFRA 2000), new data on forest dwelling species were gathered, showing that the number of threatened taxa is alarmingly high. Typically, 20 to 50 % of mammals, and 15 to 40 % of birds of the forest-dwelling species were categorised as threatened. A typical European country harbours several endangered mammals and bird species. In many countries, the proportion of endangered mammals and birds was over 40 %. The situation was almost as bad for lichens, mosses and vascular plants — in some countries, nearly half of the forest-associated lichen species are thought to be at risk.

## Sustainable forest management — SFM

Article 10 of the Convention on Biological Diversity encourages the sustainable use of components of biological diversity. For forests, this use should be ensured in the form of sustainable forest management.



### Box 1: The first Rio principle

'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'
(Principle 1 of the Rio Declaration, United Nations Conference on Environment and Development, 1992.)

The definition of 'sustainable forest management' has evolved over time according to the changing needs of society. Although comprehensive regulations to balance timber yields and harvests can be traced as far back as the 'ordonnance' of Colbert under Louis XIV in 1667, the first recorded mentioning of the word 'sustainability' actually appeared in connection with forestry in the early 18th century. In 1713, in the German mining town of Freiberg, the local mining authorities urged the foresters to observe the sustainable annual yield of the forest. This historic meaning of sustainability, as it was developed by the forest sector almost three hundred years ago, mainly considered the sustainable yield of woody biomass to cope with historic timber and energy shortages. However, the modern definition of sustainability also includes important social and ecological aspects.

The Brundtland Report ([9]), a key document for the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, defined sustainable development as follows:

'Sustainable development is development which meets the needs of the present without compromising the ability of future generations to meet their own needs.'

On the basis of this UNCED concept of sustainability, the Ministerial Conference on the Protection of Forests in Europe (MCPFE) ([10]) has developed a common definition of SFM that was adopted at the Helsinki Conference in 1993 ('Resolution H1'):

'The stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national and global levels, and that does not cause damage to other ecosystems.'

This document uses the abovementioned definition of the MCPFE as it was agreed during discussions between experts from the more than 40 States participating in the Council of Europe, including the current 15 EU Member States and all CEECs currently negotiating EU accession.

The same definition was also endorsed by the EU Council in its resolution on the EU forestry strategy ([11]) that was proposed by the Commission in 1998 ([12]) (see below).

More specifically, criteria for sustainable forestry include (Helms, 1998):

(a) conservation of biodiversity;

(b) maintenance of productive capacity of forest ecosystems;

(c) conservation and maintenance of soil and water resources;

(d) maintenance of forest contributions to global carbon cycles;

(e) maintenance and enhancement of long-term benefits to meet the needs of societies;

(f) a legal, institutional and economic framework for forest conservation and sustainable management.

The application of this modern, multi-functional understanding of sustainability can lead to a higher biodiversity in forests. Certain forms of forest management can have positive effects on biodiversity, by creating a high diversity of habitats on a small area and by imitating natural processes of disturbance in the forest ecosystem, including certain forms of agroforestry such as cork production in southern Europe.



([9]) The report 'Our common future' was presented by the World Commission on Economic Development in 1987, and is often referred to by the name of the chairperson, former Norwegian Prime Minster Gro Harlem Brundtland.
([10]) Please refer to the information on the MCPFE in Chapter 5. Further information at: http://www.mcpfe.org
([11]) Council resolution of 15.12.1998, OJ C 56/1, 26.9.1999.
([12]) COM(1998) 649 final of 3.11.1998.

## The changing role of forestry in Europe

From being feared as wild, uninviting frontiers that have to be conquered to yield their natural riches, forests are increasingly perceived as a valuable, limited resource that provide much more than timber. Many economic activities in the EU depend on forests as a source of raw material, but forests also provide conservation of the gene-pool and protect other natural resources such as air and water. They provide us with tranquillity, peace of mind, natural beauty and relaxation. These important 'forest services' are becoming increasingly valuable in a rapidly changing world where people tend to prioritise the creation of human living spaces over natural habitats.

### Box 2: Framework for Community actions according to the EU forest strategy

- Promotion of forestry activities in rural development action, notably concerning the conservation and the enhancement of ecologicial values of forests.
- Conservation of forest biodiversity, both as an integrated component of forest management and in the establishment of protected forest areas , such as those falling under Natura 2000 designations.
- Enhancement of the role of forests in the mitigation of climate change, both by promoting of woody biomass as a source of energy and increasing the role of forests as a carbon sink.
- Analysis of the possibilities of supporting objectively verifiable, comparable and credible forest certification schemes.

The objectives of forest management are changing towards sustainable management for a variety of results in many Member States and other countries, focusing on new aims as well as the traditional objective of sustainable yield of timber. Different management concepts are becoming closely linked through initiatives such as forest management for sustainability, assessments of external benefits of forests and the introduction of certification schemes for timber extracted from forests where the management regime meets environmental criteria. More attention is being given to the environmental and social functions of forests, for example, for biodiversity, water resources, $CO_2$ sequestration and recreation. However, most European forest areas are still under the type of management that takes little account of general biodiversity concerns and gives priority to the traditional objective of sustainable timber yield (*Europe's environment, the second assessment*, EEA, 1998).

More detailed information on global forest issues, importance of EU forests, European forest history, naturalness of forests and the role of forestry can be found in Annex I 'General information on forests and forestry'.

## The framework for biodiversity protection

Biological diversity is not only of ecological and economic benefit, but also an irreplaceable part of our cultural heritage and history, and a legitimate resource for future generations. At the same time, the rate at which biological diversity is decreasing shows no sign of easing up (*Europe's environment: the second assessment*, Chapter 8, EEA, 1998). The main reasons for this development in the EU are highly intensive forms of land use, pollution, and the break-up of natural habitats through infrastructure and urbanisation. Over the past decades, a series of international instruments have been developed with the objective of protecting our natural heritage.

**At the European Council in Göteborg on 15 and 16 June 2001, the Heads of State or Government of the EU Member States agreed on the ambitious target of halting the loss of biodiversity in the EU by 2010 ([13]).** This target has also been set in the sixth Community environmental action programme of the EU. The successful establishment of Natura 2000 will be one of the key requirements in reaching this goal.

Annex II summarises the instruments for the protection of natural heritage in Europe.

([13]) See Presidency conclusions at http://europa.eu.int/comm/gothenburg_council/index_en.htm

# 5. Integration of environmental policy into other EU policy fields

Although the Treaty establishing the European Community does not contain any reference to a comprehensive common forest policy, Community policies on nature conservation, as a part of overall environmental policy, have an effect on national forest policies. The birds and habitats directives are examples of Community legislation that is cutting across forest policy and other policy fields throughout the Member States.

## 5.1. The Treaty of Maastricht

With the Maastricht reform of the EC Treaty in 1992, the Member States of the European Community agreed on the integration of environmental issues into all fields of Community policy. The Treaty in its consolidated version, last amended by the Amsterdam Treaty, which was signed in 1997 and came into force in 1999, now has a number of articles that are relevant for policy integration at European level.

To further ensure the integration of environmental policy into other EU policy fields, the Treaty of Amsterdam added an explicit reference to sustainable development. In Article 2 of the Treaty, describing the tasks of the European Community, the importance of a 'high level of protection and improvement of the environment' is stressed. Article 6 of the Treaty now demands that environmental protection requirements must be integrated into all Community policy fields.

Article 10 of the Treaty requires that Member States abstain from any measures that might jeopardise the achievement of its objectives. This is important in the context of Natura 2000, as it effectively prevents the development or implementation of any plans or projects that could endanger the conservation status of habitats and species on sites not yet part of Natura 2000 but fulfilling the designation criteria.

## 5.2. Cross-compliance

According to the cross-compliance principle, projects in the Member States can only be (co-)funded by the Community budget if they comply not only with the

legislation for the operation of the specific budgets, but also with all other existing Community legislation. To stress the importance of an effective implementation of the habitats and birds directives, the Commission requested all Member States in June 1999 to screen measures proposed in their regional development plans for compliance with the nature protection directives. In practice, this means that Member States should not propose any actions to be funded by the EC budget which might have negative effects on Natura 2000 sites.

This support for Natura 2000 was reinforced by an agreement between the Directorates-General for Regional Policy and Environment, signed by Commissioners Wallström (Environment) and Barnier (Regional Policy) and resulting in clear instructions from Commissioner Barnier to avoid deterioration of Natura 2000 sites in connection with Structural Funds spending. The same principle was also applied by Commissioner Fischler to the rural development programmes.

Therefore:

- the rural and regional development plans of the Member States must contain clear and irrevocable commitments to ensure compliance with Community legislation on nature protection (habitats and birds directives);
- the implementation of EU co-financed plans or projects must not have any negative effects on proposed or potential Natura 2000 sites.

Failure to comply with these requirements may result in the loss or delay of the transfer of structural funds and rural development funds to Member States or regions.

## 5.3. The EU forestry strategy

To coordinate all activities related to forestry at EU level, the Commission communicated to the Council and the European Parliament a 'Forestry strategy for the European Union' in 1998 (see Section 4). This strategy contains a framework for Community action, in which a section on 'Conservation of forest biodiversity' addresses biodiversity concerns in three areas: conservation, sustainable use and equitable benefits arising from the use of forests' genetic resources, as demanded by the CBD. As there are only a few forest areas in Europe which are withheld from commercial use, the most important action for the protection of biodiversity is finding appropriate forest management systems that take biodiversity concerns sufficiently into account, thereby observing multi-functional management objectives throughout all forestry operations.

The EU forestry strategy therefore calls on forest managers to take into account the following guidelines for the conservation of biodiversity:

- appropriate ecological site adaptation measures through diverse silvicultural techniques combined with accessory measures (such as respecting dead wood and other key micro-habitats present in forests);
- maintenance of forest ecosystem health and vitality by enhancing regenerative capacity, resistance and adaptive capacity of forest ecosystems;
- restoration and rehabilitation of degraded areas, species, populations, habitats and ecosystems;
- maintenance of traditional management of those silvo-pastoral systems with high levels of biodiversity which may be lost if these areas are abandoned (for instance, in the Mediterranean regions);
- improving harvesting techniques to keep related damages as limited as possible;
- conducting afforestation measures in a manner that does not negatively affect ecologically interesting or noteworthy sites, habitats and ecosystems (for example, the chosen tree species should be well suited to local conditions and ecosystems; native species or local provenances should be preferred; whenever species are introduced, sufficient attention should be taken to ensure the conservation of native flora and fauna).

Moreover, the EU forestry strategy calls for the establishment of protected forest areas as a complement to sustainable management of forests, especially through Natura 2000. Such protected areas should contribute to enhance social, cultural, environmental and economic benefits of forests.

# 6. Management of Natura 2000 forest sites

As it is the responsibility of Member States to establish concrete conservation measures and possible restrictions on use of Natura 2000 sites, the local conditions will be the decisive factor for the management of each individual site. However, the habitats directive sets some principles for the management of Natura 2000 sites, based mainly on Articles 4 and 6. This chapter presents a set of non-mandatory guidelines, based on existing interpretations of the directive and on the widely recognised criteria for sustainable forest management adopted by the Ministerial Conference on the Protection of Forests in Europe (MCPFE). These guidelines should be understood as a broad framework within which the concrete negotiations for management plans or measures at site level will be conducted by the stakeholders and local authorities involved. They are not intended, however, to change regulations concerning those Natura 2000 sites that are under strict protection regimes.

During the consultations for this document, forest owners have repeatedly mentioned that many Natura 2000 sites will already comply with the main requirements which are to be listed in this chapter. On the one hand, it is true that there is no need to change existing forest management practice on Natura 2000 forest sites, provided the present management has helped to create or maintain a forest of high biodiversity with a structure and species composition which are in line with the conservation objectives for which it was designated. In this context, the merits of both private and public European forest owners, who stand as a worldwide role model for the sustainable use of forest resources, have to be acknowledged. On the other hand, it has been reported that some Natura 2000 sites are under management that is contrary to the conservation objectives compulsory after their designation.

## 6.1. Forestry and nature conservation

The concept of multi-functional forestry lies at the heart of the EU forestry strategy and is widely acknowledged in Europe. This concept integrates all the important benefits that forests can yield to society (ecological, economic, protective and social functions).

The nature conservation strategies which Member States have used to implement the nature protection directives vary widely across the European Union (Sunyer and Manteiga, 1998).

In some regions, predominantly in central and northern Europe, there is a tendency towards the designation of small and medium-sized Natura 2000 sites. These regions are characterised by intensive land use, and nature conservation competes strongly with other land-use practices, leaving little room for natural or semi-natural areas. In this strategy, which could be termed 'intensive', the protection of natural sites often involves the purchasing of land or the rights to its use and direct interventions in the dynamics of the ecosystem. This type of management is based on a more distinct environmental culture, greater budgetary provisions and the motivation to recover lost habitats by conserving them at a fixed stage of the natural succession over a reduced area ('reserve'-based approach).

In regions where extensive farming and forestry systems with a high ecological value continue to exist, generally in the south and east European regions, but also in some highlands and mountains in other European countries, the proposed sites of Community importance tend to be larger in size. Here, their conservation is closely related to the maintenance of specific farming systems or forestry practices. In these regions, conservation strategies are different and tend to seek the integration of nature conservation and rural development, in what could be termed an 'extensive' nature conservation strategy.

These two main nature conservation strategies have also been termed 'integrative', that is, integrating all functions into the — rather extensive — land use of large areas, and 'segregative', that is, setting aside areas exclusively for nature conservation purposes amidst intensifying land use on the remaining areas, sometimes beyond the sustainable limit. However, when looking exclusively at forest habitats, this distinction may be less clear, as forestry has always had a considerably lower ecological footprint than, for example, agriculture. Forestry in Europe has mainly followed an integrative strategy in the past. Many forest areas today can be called 'semi-natural', and the need for habitat restoration is not as apparent as it often is, for example, in wetlands and mires where economic use has totally altered landscape features and biodiversity levels.

Preservation of biodiversity in forests across Europe calls for a careful balance between the two conservation strategies previously described, depending on the local and regional situation. The continuation of economic activities under sustainable forest management might very often be part of a nature conservation strategy for forest ecosystems in regions with widely accepted historical traditions of forest use.

Another distinction between existing nature conservation strategies can be made between a static and a more dynamic approach. In most cases, especially in forests, natural dynamics and change must be understood as an integrative part of the nature conservation objective. The natural disturbance of the forest ecosystem through windfalls, lightning and death of old trees, which is often 'simulated' by harvesting operations in sustainable forestry, is an important factor in maintaining a variety of habitat structures, a mosaic-like distribution of different

### Box 3: Multi-functional forestry in Europe, a promising model for the future?

A research project called EFISCEN (European forest information scenario model) recently examined the long-term development of European forests under alternative regimes until 2050. The project compared different scenarios by modelling a multi-functional scenario combining the objective of producing more wood (and thus more employment and more bioenergy possibilities) with ecological objectives (thus allowing more dead and decaying wood, forest reserves, more diversity in species, spatial and age structure).

The results showed that, apart from being able to provide society with sufficient renewable natural resources in the form of timber, active multi-functional forest management can also enhance the ecological and recreational quality of European forests (cf. Nabuurs et al., 2001).



age-groups and a high level of biodiversity. This dynamic understanding of nature conservation is needed on Natura 2000 forest sites if conservation strategy is to be integrative.

Yet, not all the objectives of nature conservation can be reached through sustainable forest management. The setting-aside of areas exclusively for nature conservation purposes has to be considered in the case of especially rare or valuable habitats whose conservation status would otherwise decline. Therefore, Natura 2000 will be a network of conservation areas, enjoying a varying degree of protection from absolute reserves to individual species-based restrictions.

In this context, the existence of forest areas undisturbed by economic activity is especially important from a scientific point of view, for example, as 'reference areas' for biodiversity monitoring, and from a nature conservation point of view, for example, as refuge areas for species that require dead or dying wood or large undisturbed habitats. Therefore, 'old growth' ([14]) or 'virgin' forest areas will deserve special attention among Natura 2000 forest sites. In the EU, such forests are now limited to small pockets in managed complexes or to certain regions with specific ecological and social conditions, such as northern Fennoscandia. The degree of human interference that can be reconciled with safeguarding the conservation value of such sites will depend on their regenerative capacity, which may mean that no intervention at all may be the rule in the case of very low growth rates.

Natura 2000 also has the task of consolidating existing systems of strictly protected zones as a scientific reference base and as a possibility of diversifying rural income, such as through tourism. Many of these strictly protected sites are already protected today, for example, as parts of national parks, others might have to be established, such as to safeguard remaining old-growth forests.

## 6.2. General requirements for forest management on Natura 2000 sites

The basic legal texts for the establishment of Natura 2000 are the Directives 79/409/EC ('birds directive') and 92/43/EEC ('habitats directive') ([15]). According to the habitats directive, the aim of Natura 2000 is to establish 'favourable conservation status' for the habitats and species that are listed as being of Community interest. The concept of 'favourable conservation status' is defined in Article 1 of the habitats directive by reference to species population dynamics, trends in the range of species and habitats and the remaining area of habitats.

The nature protection directives only indicate the result to be achieved through national implementation. They do not prescribe any concrete conservation measures. Therefore the Commission must assure that the objectives of the directives are reached, but it does not have any direct influence on the regional and local negotiation of the management measures on Natura 2000 sites. This also means that Member States may impose a stricter legal framework on their territory than what is required by the habitats directive, but should not fall back on Community legislation to justify this ([16]).

Therefore only a limited number of general forest management requirements can be derived from the directives and it is not possible to give specific indications on areas such as the restriction of harvesting levels, the dimensions of clearings, timing of interventions, etc. as these depend on management measures that have to be negotiated on a local level between the authorities in charge and the forestry operators/owners.

*Article 4 of the habitats directive* clearly states that as soon as an area is designated as a site of Community importance, it is to be treated according to the provisions of Article 6. First of all, it must be



([14]) Generally defined as not having had any human interference for over 100 years.

([15]) The text of the directives is available in all official Community languages on the nature conservation homepage of the Directorate-General for the Environment: http://www.europa.eu.int/comm/environment/nature/legis.htm

([16]) Environment DG letter of 19 September 2001 to the transport administrations of Belgium, Germany and the Netherlands in relation to the 'Iron Rhine' railway project.

ensured that land-use practices do not lead to a deterioration of the conservation value of the site. For forest sites, this could include, for example, not clearing large areas, not changing the form of land use or not replacing existing indigenous tree species by other, exotic tree species.

*Article 6 of the habitats directive* states that plans or projects which are not directly connected with or necessary for the management of Natura 2000 sites but which are likely to have a significant effect on them, either individually or in combination with other plans and projects, must undergo an appropriate assessment of the effects on the sites. For example, a forest management activity like logging, track construction or soil drainage falls under this provision, which means that it will have to form part of a management plan or be decided on a case-to-case basis.

*Article 6 of the habitats directive* also requires specific conservation measures of statutory, administrative or contractual nature to specify the management of the sites. These will be developed on a local basis. Contractual measures are, under certain conditions, generally more widely accepted amongst private forest owners than statutory or administrative measures and should therefore be preferred, where applicable.

The Directorate-General for the Environment has published an interpretation guide 'Managing Natura 2000 sites' ([17]) from which the following baselines for negotiations on site management with forest owners and operators can be derived ([18]).

- If the actual forestry practices do not lead to a decline in the conservation status of habitats or species and are not contradictory to the Member State's own conservation guidelines, then this form of economic use can be continued.
- If the actual forestry practices lead to a deterioration of the conservation status of the habitats or species for which a given site was designated or is contradictory to the Member State's own conservation objectives, then Article 6 of the habitats directive should be applied and forest management targets will have to be adapted.

The Directorate-General for the Environment has addressed the following guidelines and directions for forest management on Natura 2000 sites to Member State authorities ([19]).

- It is preferable to designate perimeters with a sufficient extension to allow conservation objectives to be integrated into existing management plans, rather than to designate small plots corresponding exactly to the descriptions in the habitats reference guide.
- Conservation of habitats and species at the level of an entire site should be the result of measures in favour of habitats and species for which the site was designated, leading to a stable 'biodiversity offer' for the site as a whole. It is self-evident that, in the case of cyclical interventions (in space and in time), such a situation is more easily attained on sites covering larger surfaces.
- Interventions leading to temporary disturbance of forest cover on a limited space (for example, group cuttings) or with a limited intensity (such as thinning) are legitimate, provided that they allow recovery of the initial situation by natural regeneration, even if several stages of natural succession have to follow one another.

These guidelines and orientations apply to habitats as well as species and sometimes a combination of the measures for habitats and species may be required to obtain the desired results.

An example of this is the conservation of the capercaillie (*Tetrao urugallus*), a species of Annex I to the birds directive. If this bird is living in a Natura 2000 forest site, the management should be able to demonstrate that silvicultural measures are adapted to maintain or improve the conservation value of the site for this species. As the capercaillie requires a mosaic of

([17]) Specific advice on the requirements for the management of sites can be found in the publication by the Directorate-General for the Environment 'Managing Natura 2000 sites — The provisions of Article 6 of the habitats directive' on http://www.europa.eu.int/comm/agriculture/fore/index_en.htm and http://www.europa.eu.int/comm/environment/nature

([18]) Letter of 22 September 2000 by Commissioner M. Wallstroem to Dr von Schorlemer, president of AG Deutscher Waldbesitzerverbaende e. V.

([19]) Letter of 23 April 2001 to Mr J. Happart, Minister for Forests and Nature Protection in the Wallonia region, Belgium.



### Box 4: Main requirements for forest management resulting from the habitats directive

- Nature conservation measures have to be considered for each Natura 2000 site, in the form of appropriate statutory, administrative or contractual measures. The development of a management plan is recommended (Article 6(1) of Directive 92/43/EEC).
- Nature conservation objectives must have priority on Natura 2000 sites, while the economic and social function of the forest should also be taken into account.
- The conservation status of the site, in relation to the quality of the habitat and the conservation value for the species, must be maintained or improved.
- Projects or plans which might have a negative impact on a Natura 2000 site must undergo an appropriate assessment (Article 6(3) of Directive 92/4/EC).
- The quality of the site must be periodically monitored and reported on by the competent Member State authorities.

different structures in its forest habitats, it is one of many animal species whose populations can benefit from appropriate and carefully planned forest management, without having to put an end to economic exploitation. So far, in most European countries, the few remaining local populations of the capercaillie are declining, because the management is not sufficiently focused on reaching nature conservation objectives.

Another example of conservation-oriented forest management comes from the French Jura, where large sections of the forests are exploited in a manner which leaves a diverse structure of small clearings, underbrush, tall trees, etc. (*futaie jardinée*) as a good habitat for the capercaillie. A LIFE project in the Jura (LIFE/99/ENV/F/00477) developed guidelines for forestry which were agreed with the representatives of the public forest service and the private forest owners. About 20 000 hectares in the project area are now managed under these guidelines (see Chapter 8).

Effective multi-functional management approach also exists in the Hainich beech forest in Thuringia, Germany. A large part of this forest was managed traditionally yielding a great diversity of structure. When the Hainich was designated a Natura 2000 area and a management plan was developed for it, this selective felling system (*Plenterwaldwirtschaft*) was explicitly encouraged and maintained.

## 6.3. Operational-level guidelines for sustainable forest management on Natura 2000 sites

This section proposes to adopt elements that are relevant for nature protection from the resolutions of the Ministerial Conferences on the Protection of Forests in Europe (MCPFE- cfr. Annex II) at Helsinki (1993) and Lisbon (1998) as the basis for forest management guidelines on Natura 2000 sites.

Using these resolutions as guidelines for the management of sites has several advantages:

- the acceptance amongst stakeholders is high, as the resolutions were developed using a participatory approach involving national authorities and civil society;
- all EU Member States, as well as all candidate countries for EU accession, have been involved in the pan-European process on the protection of forests since its beginning;
- all resolutions and guidelines were prepared by working groups consisting of recognised forestry experts and drawing on national, regional and local experience in forest management from forest authorities, scientists, forest owners' associations and environmental NGOs across Europe;
- the findings of the working groups were endorsed at political level by the ministers responsible for forests
- the EU Council endorsed the results of the pan-European discussions on forests as one of the most important elements of the EU forestry strategy ([20]).

([20]) Council resolution of 15.12.1998, OJ C 56/1, 26.9.1999.

The 'Pan-European criteria and indicators for SFM' adopted at the MCPFE in Lisbon (1998, Resolution L2), have been developed on the basis of resolutions H1 and H2 of the Helsinki MCPFE which concern SFM and forest biodiversity.

**The six pan-European criteria providing a basis for monitoring sustainable forest management are:**

- **C1**: maintenance and appropriate enhancement of forest resources;
- **C2**: maintenance of forest ecosystem health and vitality;
- **C3**: maintenance and encouragement of productive functions of forests (wood and non-wood);
- **C4**: maintenance, conservation and appropriate enhancement of biological diversity in forest ecosystems;
- **C5**: maintenance and appropriate enhancement of protective functions in forest management (notably soil and water);
- **C6**: maintenance of other socioeconomic functions and conditions.

As a complement to these criteria, the MCPFE has defined a series of operational-level guidelines for sustainable forest management, from which many elements can be applied to verify the compatibility of forest management with Natura 2000 designation on a given site.

A selection from both the guidelines for forest management planning and the guidelines for forest management practices, based on nature conservation as a priority management objective for Natura 2000 sites, is given below:

## C2: Maintenance of forest ecosystem health and vitality

- 'Forest management practices should make best use of natural structures and processes and use preventive biological measures wherever and as far as economically feasible to maintain and enhance the health and vitality of forests. Adequate genetic, species and structural diversity should be encouraged and improved to enhance stability, vitality and resistance capacity of the forests to adverse environmental factors and strengthen natural regulation mechanisms.'
- 'Appropriate forest management practices such as reforestation and afforestation with tree species and provenances that are suited to the site conditions or the use of tending, harvesting and transport techniques that minimise tree and/or soil damages should be applied. The spillage of oil through forest management operations or the indiscriminate disposal of waste on forest land should be strictly avoided.'
- 'The use of pesticides and herbicides should be minimised, taking into account appropriate silvicultural alternatives and other biological measures.'

## C3: Maintenance and encouragement of productive functions of forests (wood and non-wood)

- 'Regeneration, tending and harvesting operations should be carried out in time, and in a way that does not reduce the productive capacity of the site, for example by avoiding damage to retained stands and trees as well as to the forest soil, and by using appropriate systems.'
- 'Harvesting levels of both wood and non-wood forest products should not exceed a rate that can be sustained in the long term, and optimum use should be made of the harvested forest products, with due regard to nutrient offtake.'
- 'Adequate infrastructure, such as roads, skid tracks or bridges should be carefully planned, established and maintained to ensure efficient delivery of goods and services while at the same time minimising negative impacts on the environment. '

## C4: Maintenance, conservation and enhancement of biological diversity in forest ecosystems

- 'Forest management planning should aim to maintain, conserve and enhance biodiversity on



ecosystem, species and genetic level and diversity at landscape level.'

- 'Forest management planning and terrestrial inventory and mapping of forest resources should include ecologically important forest biotopes, taking into account protected, rare, sensitive or representative forest ecosystems such as riparian areas and wetland biotopes, areas containing endemic species and habitats of threatened species, as well as endangered or protected genetic *in situ* resources.'
- 'Natural regeneration should be preferred, provided that the conditions are adequate to ensure the quantity and quality of the forests resources and that the existing provenance is of sufficient quality for the site.'
- 'For reforestation and afforestation, origins of native species and local provenances that are well adapted to site conditions should be preferred. Only those introduced species, provenances or varieties should be used to supplement local provenances if their impacts on the ecosystem and on the genetic integrity of native species and local provenances has been evaluated, and if negative impacts can be avoided or minimised.'
- 'Forest management practices should, where appropriate, promote a diversity of both horizontal and vertical structures such as uneven-aged stands and the diversity of species such as mixed stands. Where applicable, the practices should also aim to maintain and restore landscape diversity.'
- 'Traditional management systems that have created valuable ecosystems, such as coppice, on appropriate sites should be supported when economically feasible. '
- 'Infrastructure should be planned and constructed in a way that minimises damage to ecosystems, especially to rare, sensitive or representative ecosystems and genetic reserves, and that takes threatened or other key species — in particular their migration patterns — into consideration.'
- 'Standing and fallen dead wood, hollow trees, old groves and special rare tree species should be left in quantities and distribution necessary to safeguard biological diversity, taking into account the potential effect on health and stability of forests and surrounding ecosystems.'
- 'Special key biotopes in the forest such as water sources, wetlands, rocky outcrops and ravines should be protected or, where appropriate, restored when damaged by forest practices.'

## C5: Maintenance and appropriate enhancement of protective functions in forest management (notably soil and water)

- 'Areas that fulfil specific and recognised protective functions for society should be registered and mapped, and forest management plans or their equivalents should take full account of these areas.'
- 'Special care should be given to silvicultural operations on sensitive soils and erosion-prone areas as well as on areas where operations might lead to excessive erosion of soil into watercourses. Inappropriate techniques such as deep soil tillage and use of unsuitable machinery should be avoided on such areas. Special measures to minimise the pressure of animal population on forests should be taken.'
- 'Special care should be given to forest management practices on forest areas with a water protection function to avoid adverse effects on the quality and quantity of water resources. Inappropriate use of chemicals or other harmful substances or inappropriate silvicultural practices influencing water quality in a harmful way should be avoided.'

## C6: Maintenance of other socioeconomic functions and conditions

- 'Forest management planning should aim to respect the multiple functions of forests to society, have due regard to the role of forestry in rural development, and especially consider new opportunities for employment in connection with the socioeconomic functions of forests.'

- 'Property rights and land tenure arrangements should be clearly defined, documented and established for the relevant forest area. Likewise, legal, customary and traditional rights related to the forest land should be clarified, recognised and respected.'
- 'Sites with recognised specific historical, cultural or spiritual significance should be protected or managed in a way that takes due regard of the significance of the site.'
- 'Forest management practices should make the best use of local forest-related experience and knowledge, such as of local communities, forest owners, NGOs and local people.'

## 6.4. The importance of formal adoption of management principles

The general requirements for management of Natura 2000 sites are given in Article 6 (1) and (2) of the habitats directive. These provisions have been dealt with in detail in the Commission's guidance document 'Managing Natura 2000 sites' ('The provisions of Article 6 of the Habitats Directive 92/43/EEC ') which was published in all Community languages in 2000 and is available on the Directorate-General for the Environment's website: *http://europa.eu.int/comm/environment/nature/*.

It should be recalled that Article 6 of the habitats directive does **not** prescribe any format, procedure or structure for the management measures concerning Natura 2000 sites. The directive only mentions 'the necessary conservation measures' and 'appropriate statutory, administrative or contractual measures' to be taken **by the Member States**. This means that the principle of subsidiarity is fully applicable to the way in which the management of Natura 2000 sites, including forests, is applied at field level. It is also clearly indicated that adopting management plans is not a mandatory but an optional step. Section 8.1 provides numerous examples of management measures taken and procedures followed by Member States' national, regional and local authorities.

In practice, the way in which management decisions or options are formalised will depend on different factors, such as ownership of the site, intensity of economic use, occurrence of priority species and habitats, the relative rarity and sensitivity of the habitats or species concerned and the existing traditional or customary rules on use of natural resources.

Given past experiences with pilot projects (see Section 8.2 — LIFE projects) and the existing practices in the EU forest sector (see Section 8.1 — examples from the Member States), the Directorate-General for the Environment recommends that management objectives for Natura 2000 forest sites be formalised in long-term management plans with legal value. Such management plans may be part of existing or general forest management plans but they may also be specifically designed for Natura 2000 sites or for certain habitats or species. It is clear that the management objective for a very small site, such as a core area of high conservation value, will be quite different from that for a whole national park in which there are obvious possibilities for continuing resource use without loss of conservation values. Management plans are particularly appropriate for establishing a coherent approach to interrelated sites or for cross-border sites. Along with management plans, other instruments, such as contract conservation and conditional compensation payments can also be considered (see Chapter 7).

The following is a non-limitative indicative overview of factors which can be taken into account when defining management principles for Natura 2000 forest sites:

- felling system: clear felling (size), strip felling, group felling, selection felling, absence of exploitation;
- regeneration technique: planting, vegetative multiplication, natural regeneration (with any additional measures to influence the species composition);
- use of exotic vs indigenous trees; use of site-specific indigenous species composition;
- origin of regeneration material (in compliance with the mandatory Community regulatory framework on movement of forest seeds, cuttings and plants, it should be borne in mind that use of indigenous species for reforestation can result in



failure and genetic pollution if the provenance of material is not verified);

- rotation length (by stand or by tree);
- ploughing or other soil disturbing activities;
- thinning regimes;
- game management and grazing;
- use of controlled fire;
- continuation of traditional practices (for example, coppice and standards, *taillis-sous-futaie/Mittelwald*).

These factors are of key importance to biodiversity, which is why they should be taken into account in relation to Natura 2000 implementation. In cases of designation based on existing natural resources use, it will mean these factors may not need to be changed, unless on a voluntary basis and/or with the help of financial incentives from outside. However, changing these factors in an environmentally negative way (for example, increasing clear felling size or shortening rotations) could come into conflict with the guidelines mentioned in Section 6.3. On the contrary, optimising these factors for environmental benefits on a voluntary basis and/or with the help of incentive measures, is to be welcomed as a positive contribution to the overall enhancement of Natura 2000.

## 6.5. Recommendations for biodiversity conscious forestry on protected areas and beyond

In addition to the points raised in the preceeding sections, a series of practical recommendations can be given for day-to-day management practices in Natura 2000 sites and beyond.

Indeed, as only 5 % of the land surface of the earth falls under some form of nature protection status, one should be aware that there will always be more net biodiversity in the countryside in general than in areas targeted especially for conservation — which are principally a refuge from where the recolonisation of cultural landscapes can take place after disturbance. Therefore, the ideal form of biodiversity management is an integrated approach that does not affect parts of a territory for one function exclusively. Just as Natura 2000 should not only be a system of strict reserves, the surrounding cultural landscape should not be a monofunctional production line where everything but a few cultivated plants or animals can be eradicated.

Forest managers and planners may consider the following recommendations for preserving biodiversity at the management unit level, that is, taking into account local circumstances:

- conserving individual, mature and dead or decaying trees, which offer suitable habitats for woodpeckers, birds of prey, insects and many lower-level plants (fungi, ferns, bryophytes, etc);
- conserving trees with cavities which could be used as nesting sites for small birds and mammals;
- conserving large trees and their immediate surroundings if they appear to be regularly occupied by nesting raptors;
- maintaining forest ponds, brooks, springs and other small water bodies such as mires and fens in a state that allows them to play their role in the reproductive cycle of fish, amphibians, insects, etc., by avoiding excessive fluctuation in water levels, damage to natural embankments and water pollution;
- appropriate zoning, both regarding forestry operations and tourism/recreation, of large forest areas according to different levels of management intervention, allowing to apply buffer zone measures around protected areas;
- using management decisions after natural disasters such as large-scale windfall and fires to take account of the possibilities for biodiversity enhancement by allowing natural succession processes to proceed in potentially interesting areas;
- adapting the timing of silvicultural and logging operations so as to avoid interference with the reproductive season of sensitive animal species, most notably the spring nesting and breeding of forest birds;

- maintaining adequate distances to avoid disturbance of rare or threatened species whose presence has been confirmed;
- allow a cyclical rotation of areas with different degrees of intervention in time and space;
- if not contradictory to existing forest laws and regulations, it is worth considering not filling up all the available space when replanting, so as to maintain small natural environments associated with forests, such as grassy patches, calcareous grasslands, heaths, mires, bogs, alluvial bottomlands and landslides. All these can enormously enrich the overall biodiversity offer of an estate, because of the increased occurrence of transitions ('ecotones') between different vegetation types;
- by the same logic, a decision not to replant the 'fallout' spots in recent economical plantations may provoke additional variation and scattered spontaneous recolonisation by pioneer species, which leads to an increase in biodiversity in the long term by providing adequate niches for a large variety of species; moreover, the added value of 100 % complete regeneration is usually low, as replanting operations are very expensive;
- assuring regular monitoring of the richness of natural species, so as to gauge the effects of certain measures and to assure awareness of the presence of rare or threatened fauna and flora elements.

This type of measure and the absence of certain interventions can easily be introduced in the management of public forest holdings, given the political will to do so. For private forests they may well be subject to grants, contractual agreements, tax breaks, technical assistance, etc. in order to compensate owners for income foregone, services rendered to society as a whole and, if applicable, capital depreciation.





Metsäpanoraama/J. Luhta

# 7. Financial instruments

An adequate approach to the financial and economic implications of Natura 2000 is one of the most important conditions for the acceptance of the network amongst the rural population, landowners and economic operators using natural resources on designated areas. Such an approach is required according to Article 2 of the habitats directive, which holds that measures related to Natura 2000 have to take account of social, economic and cultural circumstances. It must also be mentioned that this issue has to be seen in the light of Article 17 of the Charter of Fundamental Rights of the European Union ([21]), which sets the principle of compensation for income foregone. On 9 May 2002, the 'El Teide Declaration' ([22]) endorsed the prominent role of Natura 2000 in delivering the EU's biodiversity objectives. It also recognised that the delivery of the EU's biodiversity objectives 'requires targeted resources'.

Article 175(4) of the EC Treaty holds that environmental measures have to be paid for by the Member States. This implies that costs resulting from the operation of a network for the protection of the European natural heritage have to be settled by the Member States. This chapter gives more information on the possibilities for Member States to use financial support from the EC budget for managing Natura 2000 sites. Until now, not many of these possibilities have been used by national, regional or local authorities and the forestry sector has not been well informed about them.

Community financing of Natura 2000 is dealt with in Article 8 of the habitats directive. At the moment, the only Community funding dedicated exclusively to Natura 2000 is the LIFE-Nature fund, which is used to promote management planning and pilot/demonstration projects for habitats and species management. In several Member States, local compensation schemes or grant funds operate on a reduced scale.

---

([21]) Article 17: Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.
(OJ C 364/12, 18.12.2000).

([22]) The declaration was made by the Commissioner for the Environment, Margot Wallström, and the Spanish Minister for the Environment, Jaume Matas, on behalf of the Council.

Other policy measures, in particular elements of the rural development programmes, are already providing substantial support to the implementation of the network by way of payments for non-intensive agricultural management of land or for more ecologically oriented forestry. In some Member States, there has also been significant use of regional development funding to finance specific investments related to Natura 2000 sites ([23]). On the basis of these various elements, the Directorate-General for the Environment created a working group on Article 8 of the habitats directive in 2001 to formulate proposals for developing a structured approach to financing Natura 2000. An outline of the conclusions of this working group ('Final report on financing Natura 2000' — available to the public at the end of 2002 ([24])) is given hereafter.

## 7.1. Existing support systems

### 7.1.1. Contract conservation

Contract conservation consists of establishing management measures on privately owned land by specifying the measures in contractual agreements between conservation authorities and landowners. These agreements usually lead to financial benefits for those landowners whose income from land-use practices is affected by restrictions that result from conservation measures. The advantage can be in the form of direct payments, tax breaks, soft-lending conditions, other land-use rights, etc. The conservation measures can be carried out by the landowners or holders of user rights themselves (who are then paid for the work) or they can be carried out by others, such as contractors or volunteers of NGOs. Under specific circumstances, the measures can also be co-financed by the Community budget (rural development and regional development policies).

Contract conservation has been successfully applied in several Member States to meet the requirements laid down by the habitats directive under the national nature conservation legislation for privately owned Natura 2000 sites. To ensure the maximum acceptance of this instrument, a number of basic recommendations about the characteristics of such contracts can be made (based on Giesen, 2001).

- The most important aspect of a contract should be that it offers security, that is, that the contract should, as far as possible, be final in its requirements. The forest owner must be able to depend upon the negotiated agreement, and be free from further demands from the nature conservation authorities, insofar as this security is possible under national legislation. This means that contracts should be of long duration and their application should be adequately monitored.
- A conservation contract must be economically viable. Any form of compensation for measures must be proportional to the incurred costs or the loss of income. Compensation does not have to be limited to monetary remuneration: even the guarantee of fast and effective cooperation with the authorities can be a valuable form of compensation.
- Conservation contracts must be tailored to local circumstances, but at the same time they must be based on a certain national or regional standard. The owner must be able to rely on this basic standard contract, without having to carefully check each new contract agreement and without having to consult professional advice.
- Standards for assessment of compensation levels should be jointly agreed between competent authorities, forest owners' organisations and scientific experts.

Contract conservation should not, however, be seen as an alternative to designation of Natura 2000 sites.

### 7.1.2. Forestry measures under EU environmental policy: LIFE

#### General description

The LIFE programme is intended to fund pilot environmental actions, the results of which can be applied to the 'main' financial instruments of the EU,

([23]) The EC has already published a full study on this: 'Financial instruments for the Natura 2000 network', Sunyer & Manteiga, 1998.
([24]) See website http://europa.eu.int/comm/environment/nature/

such as the agricultural and Structural Funds budgets.

LIFE was created in 1992. The first phase was completed in 1992–95, the second phase ran from 1995 to 1999 and LIFE III is now continuing from 2000 to 2004 with a total budget of EUR 640 million. Before LIFE, other financial instruments, such as the ACE fund ([25]), provided Community support to actions in the field of the environment.

Actions eligible for LIFE funding belong to three fields:

- **LIFE Environment**: innovative and demonstration actions for industry; demonstration, promotion and technical assistance actions for local authorities; and preparatory actions to support Community legislation and policies ([26]).
- **LIFE Nature**: pilot actions aimed at the conservation of natural habitats and of wild fauna and flora of EU interest ([27]). This means that LIFE Nature is directly targeted at priming the operation of the Natura 2000 network.
- **LIFE Third countries**: technical assistance in the establishment of environment-related administrative structures, nature conservation actions and demonstration actions to promote sustainable development.

Maximum rates of support for LIFE projects are 50 % of the eligible costs (exceptions: 30 % of eligible costs for income-generating actions) and 75 % of eligible costs for actions concerning priority natural habitats or priority species as defined in Directive 92/43/EEC or species of birds in danger of extinction.

LIFE is open to 'all natural or legal persons'.

#### LIFE Nature and forestry

With an annual budget of approximately EUR 80 million completely devoted to nature conservation measures linked to Natura 2000, LIFE Nature is the most important financing mechanism for the establishment of the network. Since 1992, 237 projects with relevance to forests or forest management have been funded under LIFE Nature. These can be divided into three categories (Table 3). Table 4 shows the key activities of the funded projects, grouped in 18 categories. Here, only the projects of category I and II (*Key forestry project* resp. *Relevant forestry project*) are examined.

Many of the LIFE Nature projects focus on an extensification of forest management or on more ecologically friendly forms of forestry. Achieving a balance between nature conservation objectives and the economic aspects of land use and landowners rights is often the main focus of LIFE Nature projects.

#### LIFE Environment and forestry

The scope of LIFE Environment is much wider than that of LIFE Nature and is **not directly related to Natura 2000**. This part of the LIFE programme has financed projects for setting standards to integrate biodiversity concerns in forestry outside Natura 2000 areas. It has also supported projects for improving the environmental efficiency of forest industries. Some examples of relevant LIFE Environment projects are given in Section 8.2.



### 7.1.3. The new generation of Community funds, 2000–06

Once the common agricultural policy had guaranteed food security and modernised European agriculture, a need to develop more economically oriented and environmentally sustainable agriculture became apparent at the end of the 1980s. The 1992 CAP reform made the first changes towards decreasing market support, reduction of surpluses and agri-environmental and afforestation programmes. Forestry profited from rural development measures through the afforestation premiums within the framework of Regulation 2080/92. This regulation led to the afforestation of over 900 000 hectares of agricultural land between 1994 and 1999, and contributed to rural development by the

([25]) A brief history of the Community financing for nature conservation, environment and third countries projects is available at http://europa.eu.int/comm/environment/life/life/nature_history.htm
([26]) Further information is available on the LIFE-Environment homepage: http://www.europa.eu.int/comm/life/envir/index.htm
([27]) Further information is available on the LIFE-Nature homepage: http://www.europa.eu.int/comm/life/nature/index.htm

**Table 3: Main categories of LIFE Nature projects with relevance for forestry**

| *Category* | *I* *Key forestry project* | *II* *Project with relevance for forestry* | *III* *Horizontal forestry project* |
|---|---|---|---|
| Relevance for forestry | The relation between forest management and biodiversity is the main focus of the project, for example, forest management is used to achieve nature conservation objectives. | Forest management is one of several aspects of the project, for example, as part of a management plan. | The project involves one or more forest areas without focusing on forest management. |
| Number of projects | 43 | 105 | 88 |
| Number of countries | 10 | 15 | 14 |
| EC contribution in EUR | 37 042 454 | 67 049 095 | 60 961 844 |
| Total budget in EUR | 74 118 538 | 125 393 704 | 116 442 514 |

(In total, EUR 315 954 757 has been spent on forestry related projects since 1992 under LIFE Nature, with an EC contribution of EUR 165 053 394.)

**Table 4: Main types of activities under LIFE Nature projects with relevance for forestry**

| *Main type of activity* *(Basic data about and brief descriptions of all LIFE Nature and environment projects is available online at http://www.europa.eu.int/comm/life/home.htm)* | *Number of projects with this type of activity* *(including 148 projects of categories I and II, several types of activities possible for each project)* |
|---|---|
| Habitat restoration, for example, afforestation or removal of trees | 111 |
| Public relations and environmental awareness raising (aimed at informing the general public) | 92 |
| Development or implementation of a management plan | 78 |
| Tourism/visitor management | 70 |
| Wildlife management, for example, hunting | 67 |
| Land purchase | 65 |
| Stakeholder participation/private public partnership (aimed at communication with stakeholders) | 63 |
| Biodiversity inventory and monitoring | 59 |
| Ecological forestry, such as sylvi-environmental measures | 39 |
| Compensation for income foregone | 30 |
| Contract conservation | 29 |
| Environmental disaster prevention | 19 |
| Traditional management, for example, extensive grazing | 18 |
| Rural development, for example, through support of local market structures | 13 |
| Extensification of landuse | 12 |
| Extension and training | 12 |
| Multilateral/ transboundary cooperation | 3 |
| Local Agenda 21 implementation | 1 |

creation of a total of 150 000 jobs in forestry (IDF, 2001).

As the European public became increasingly aware that agriculture is not just about food production, but also about maintaining traditional landscapes and rural communities, the Commission submitted a communication on 27 January 1999 entitled 'Directions towards sustainable agriculture', which stressed the need for better integration of environmental requirements in agriculture. The ensuing 'Agenda 2000 reforms' of the CAP introduced links between support to farmers and compliance with environmental standards and gave a much higher profile to the objective of supporting a 'greener' agriculture. It is the explicit aim of the EU biodiversity action plans ([28]) to further promote the integration of biodiversity concerns into programming documents under the Rural, Structural and Cohesion Funds and other programmes relevant for EU and third countries.

Possibilities for supporting Natura 2000 under EU rural development policy and under EU regional policy have been explored by a working group on Article 8 of the habitats directive.

## 7.2. Working group on Article 8 of the habitats directive

### Financing Natura 2000

Article 8 of the habitats directive foresees Community co-financing of measures required for the implementation and ongoing management of Natura 2000. The text of the article makes reference to the use of existing Community instruments, but until now the provisions of Article 8 have not been implemented. In addition, the nature of the legal interpretation of Article 8 may be of importance in deciding on what kind of financial support systems to establish in the future.

When considering the financing of Natura 2000 one has to be aware that in the near future the European Union will expand, resulting in an obligation to co-finance a network for 25 Member States. Rough estimates indicate that a higher percentage of land area in the candidate countries will be designated as Natura 2000 sites than in current Member States. At the moment no precise figures are available regarding numbers of sites or the area that will have to be added. Therefore the working group has concentrated on the current EU network of 15 Member States.

### Composition and mandate of the working group on Article 8 of the habitats directive

In order to address the financing issue in a comprehensive and effective way the European Commission set up, in December 2001, a working group on Article 8, involving experts from Member States and stakeholders**.** Representatives from the Directorate-General for the Environment along with those for Agriculture, Regional Affairs and Budget supported this group. The Habitats Committee of 30 November 2001 agreed with the establishment of this working group.

The remit of the group includes the following main objectives:

- to develop a common understanding of the provisions of Article 8 of the habitats directive;
- to obtain estimates of the financial costs associated with the future management of the Natura 2000 network of sites across the Member States;
- to make recommendations on the necessary Community funds for the co-financing of these costs.

### Proceedings of the Working Group on Article 8 of the habitats directive

Three meetings were held (on 17 December 2001, 28 February 2002 and 18 April 2002) to decide the approach of the group, to examine relevant publications, to develop a questionnaire to be sent to Member States and to discuss potential procedures, methods and results.

In April 2002, the questionnaire was sent to Member States, asking for information on the way in which financial aspects of Natura 2000 had been worked out at national or regional level. The response was

([28]) Available on the Europa server at http://europa.eu.int/scadplus/leg/en/lvb/l28023.htm

considered at a meeting of the group held on 11 and 12 September 2002, and the content and approach of this final report were also decided. The last meeting of the working group was held on 4 November 2002 to finalise the report.

The approach has been based on the need to explore solutions to the current absence of an agreed framework for funding Natura 2000. Without such agreement the objectives of the network will never be realised. This meant that the group did not confine itself to an examination of Article 8 alone. Instead, it set out to explore options which take into account the changes which have taken place since 1992 in the use and the purpose of EU funding instruments, in the Community budget, and in policy initiatives — such as the environmental action programmes and in the integration of biodiversity and sustainable development considerations.

## 7.3. Conclusions of the working group on Article 8 of the habitats directive

### General aspects

Taking account of the opinion of the legal services and having regard to the original rationale behind Article 8, the working group came to the common understanding that Article 8 was drafted in recognition of the 'exceptional financial burden' that the habitats directive might place on Member States, and particularly on those countries rich in biodiversity. Since 1992, the habitats directive and Natura 2000 have assumed greater strategic importance than many people anticipated. They are now recognised as being the EU's principal tools for achieving the CBD commitments and the new global and EU objective of halting the decline in biodiversity by 2010. At the same time, there has been a continuous improvement in the level of integration of environmental aspects in the legislation that governs the use of the main EU financing instruments directed to the rural world, such as the Rural Development Regulation (1257/99) and the Structural Funds Regulation (1260/99).

The working group has made an estimation of the total cost that would arise for managing a completed Natura 2000 network, on the basis of different calculation techniques (extrapolation/addition), a literature review, the nature of activities to be considered and information submitted by Member States through a questionnaire. From this has resulted a best estimate for the total cost of managing Natura 2000 of between EUR 3.5 and 5.7 billion per annum.

The working group has identified the range of existing and potential Community funding mechanisms which can be used for managing Natura 2000 sites. An overview of these sources of financing is given in Table 5. During this work it was also concluded that there is a clear perception amongst the authorities responsible for Natura 2000 that current EU co-financing has been insufficient, too subject to chance, and too time-limited to form an adequate basis for providing support to Member States in meeting the requirements of the directive. Funding arrangements are very complex, potentially involving a large number of funds, each with separate application processes and each designed to deliver against their own objectives, rather than those of Natura 2000.

### Analysis of future funding options

On the basis of existing funding possibilities, the working group concluded that current arrangements are inadequate to meet the needs of Natura 2000. Based on this analysis, the group agreed that three main options are available for securing future co-financing for Natura 2000. These three options are:

- **Option 1** — using existing EU funds, such as the RDR, Structural Funds, etc, but modify these as necessary in order to deliver against Natura 2000 needs;
- **Option 2** — enlarging and modifying the LIFE Nature instrument to become the principal delivery mechanism;
- **Option 3** — creating an entirely new funding instrument dedicated to Natura 2000 management.

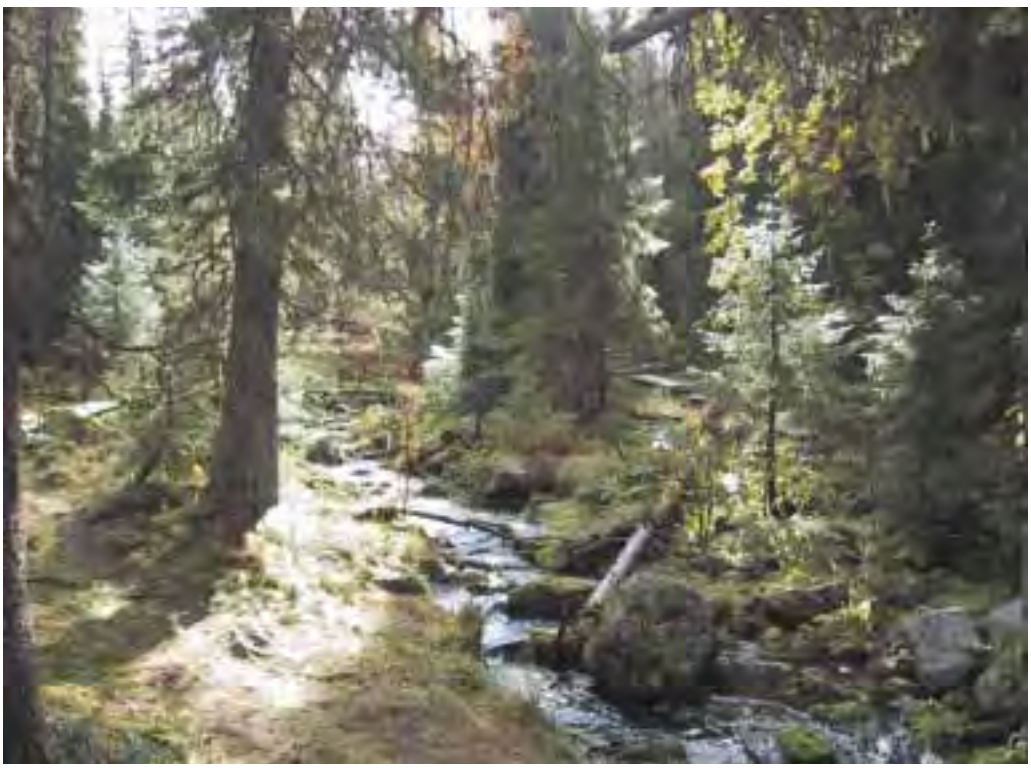
The working group further examined the various strengths and weaknesses of these funding options, drawing on the experience of the group members and on the responses to the Member State questionnaire.

**This led to the following final recommendations:**

1. In the short term (actual budgetary period 1999–2006), the mid-term review of the CAP would be the most straightforward opportunity to increase funding for managing Natura 2000 sites. If the trend of shifting resources from direct support to farmers to rural development measures can be confirmed and even enhanced, important opportunities will emerge for the forest sector, and not least for more ecologically conscious forest management. At the same time, the conclusions of the group should be taken into account when deciding about a future fourth phase of the LIFE fund after 2004.

2. In the long term, the financing of managing Natura 2000 should be an intrgral part of the discussions about the use of Community financial instruments during the next budgetary period starting in 2007. Introducing a specific requirement in all major EU funding instruments, including EAGGF, ERDF and ESF, for them to support the achievement of EU environmental legislation and in particular, the proper management of the Natura 2000 network should certainly be among the options to be considered during the upcoming budget negotiations.

3.To aid the development of EU funding measures as well as promoting the provision of adequate funding by the Member States themselves, nature planners and land managers from across the EU should work together to prepare guidelines to improve the coherence and cohesion of the Natura 2000 network, and promote the development of multiannual management programmes to enable the proper planning and delivery of funding for site management. This work needs to be supported by further research to improve knowledge about site condition and management requirements, which is crucial for setting appropriate intervention levels for management of sites across the EU.



120-2068-IMG/K. Sundseth

**Table 5: Overview of financing instruments of the EU, which could potentially be used for Natura 2000 and forestry**

| *Financing mechanisms:* | *Main objective of the funds* | *Responsible Directorate-General* | *Budget per year (in the financial year 2001):* | *Possibilities for the funding of sustainable forestry on Natura 2000 sites (examples):* |
|---|---|---|---|---|
| LIFE III (2000–04)<br><br>(LIFE Nature and partly LIFE Environment) | Promote and support nature conservation, support the establishment of Natura 2000 | Directorate-General for the Environment | EUR 0.08 billion | Pilot projects for Natura 2000:<br>■ Measures towards ecological forestry<br>■ Habitat restoration<br>■ Direct conservation measures<br>■ Land purchase<br>■ Development of management plans<br>■ Information campaigns<br>■ Stakeholder involvement<br>■ Inventory and monitoring of Natura 2000 sites |
| EAGGF<br><br>(Guidance Section) | Afforestation, according to Article 31 of RD Regulation 1257/99 | Agriculture DG | | ■ Afforestation |
| Structural Funds for rural development<br><br>(Regulation 1257/99, for example Articles 30 and 32); | Improvement of the economic, social and ecological structures of rural areas, especially in the fields of agriculture and forestry | Agriculture DG | EUR 4 495 billion | ■ Training of farmers and foresters<br>■ Agro-tourism<br>■ Measures towards ecological forestry<br>■ Fire-protection corridors<br>■ Innovative projects for rural development, for example regional tourism concepts |
| Community initiative<br><br>Leader + | Development of rural areas through high quality and ambitious integrated strategies for local rural development | Agriculture DG | EUR 2 020 billion (financed by the EAGGF Guidance Section) | ■ Strategic, innovative concepts for rural development, especially multi-stakeholder and intersectorial concepts<br>■ Visitor and information centres |
| Community initiative<br><br>Interreg III | Support for transboundary, transnational and interregional cooperation in balanced rural development, especially in areas adjoining accession countries | Regional Policy DG | EUR 4 875 billion (total 2000–06) | ■ Transboundary projects, for example, in the field of nature tourism<br>■ Transboundary management for protected areas |

**Table 5: Overview of financing instruments of the EU, which could potentially be used for Natura 2000 and forestry**

| *Financing mechanisms:* | *Main objective of the funds* | *Responsible Directorate-General* | *Budget per year (in the financial year 2001):* | *Possibilities for the funding of sustainable forestry on Natura 2000 sites (examples):* |
|---|---|---|---|---|
| European Regional Development Fund (ERDF) | Creation of jobs by fostering competitive and sustainable development | Regional Policy DG | EUR 30 billion | ■ Diversification of farm income<br>■ Training and further education of land and forest hosts<br>■ Innovative rural development initiatives<br>■ Exchange of experience between regions and countries |
| ESF (European Social Fund) | Creation of jobs through further education | Employment and Social Affairs DG | EUR 60 billion (total 2000–06) | ■ Training and further education for foresters and nature conservation staff |
| Cohesion Fund<br><br>(minimum volume of projects: EUR 10 million | Strengthening the economic and social cohesion within the Union through projects in the fields of environment and trans-European traffic networks | Regional Policy DG | EUR 2 717 billion | ■ Natura 2000 databases<br>■ Reafforestation<br>■ Development of management plans<br>■ Habitat restoration<br>■ Strategic territorial and spatial planning |

*Source:* IEEP, 1999; European Commission, 2001–02.







Käpytikka1/J. Luhta

# 8. Best practices, examples and experiences

Examples and experiences about management of Natura 2000 forest sites can be drawn from various sources. Though far from complete, this section lists some examples and experiences throughout the EU that combine nature conservation and forest management objectives on Natura 2000 sites. It also gives indications of the kind of 'statutory and administrative measures' mentioned in Article 6(1) of the habitats directive that have already been taken by Member States.

These following examples have been selected from the LIFE Nature database ([29]), from various other Commission programmes and from information supplied by Member States after a request by the Directorate-General for the Environment to the Habitats and Standing Forestry Committees. They show the potential for finding practical solutions and the importance of communication and exchange of experiences between Member States.

## 8.1. Examples submitted by Member States

Forestry and nature protection authorities from 12 Member States have submitted information for this chapter. As expressly requested by several Member States, selected examples are reproduced here for the benefit of sharing and disseminating ideas for the implementation of the birds and habitats directives and for the management of Natura 2000 sites throughout the EU.

### 8.1.1. Belgium

#### Walloon Region

*Fiscal measures:*

In the Walloon Region of Belgium, all Natura 2000 sites are exempted from inheritance tax and from property tax. By this positive example of indirect financial support towards private owners of protected sites, the loss of property value that has been reported to be a possible effect of the designation as a Natura 2000 site can be compensated.

([29]) http://www.europa.eu.int/comm/life/nature/index.htm

*Management measures:*

- The 10 forest habitats of Annex I to the habitats directive that occur in the Walloon region would originally have covered 130 000 hectares of forest land. Of the total area of 160 000 hectares that has been designated as pSCI until present, more than 40 000 hectares lie in public forests which are administrated by the regional forest service according to legally binding management principles. These are based on a multi-functional approach to forestry which takes into account biodiversity concerns and protection of water resources. This is put into practice by providing management unit directors with guidelines on:
  - conservation *in situ* of old trees and deadwood;
  - maintaining clearings and forest edge vegetation;
  - regulation of forest exploitation activities with respect for nesting and breeding seasons of birds;
  - avoiding afforestation of peat soils;
  - limitation of the dimensions of clearcuts;
  - prohibition of drainage measures on certain soils.
- For private forest owners, the forestry chapter of the regional rural development plan for 2000–06 foresees possibilities of financial compensation for the following actions:
  - establishment of private forest reserves;
  - forest biodiversity conservation measures;
  - protection of soils and water;
  - establishment of ecological corridors between forest areas;
  - establishment of management plans.

It is expected that these measures will make designation under Natura 2000 more attractive to landowners.

*Legislative measures*

On 28 November 2001, the Regional Assembly adopted a specific 'Décret Natura 2000', which establishes the legal bases for designation of sites, establishment of constraints and associated management measures.

*Contact person:* *Mr Patrick De Wolf*
*Tel. (32-81) 33 58 16*
*E-mail: p.dewolf@mrw.wallonie.be*

**Flemish Region**

*Specific conservation measures*

The Decree on Nature Conservation of 1997 foresees the creation of a 'Flemish nature structure' consisting of the Flemish Ecological Network (VEN — 125 000 hectares of core conservation areas with other activities being allowed only under specified conditions) and the Integral Supporting and Interweaving Network (IVON — 150 000 hectares of multi-functional conservation area, linked by interconnecting areas.

The proposed VEN designation includes at least 90 % of the pSCI, of which almost half are in forests. Public consultations on the VEN/IVON designations started in September 2002 and will run into 2003. It is assumed that all pSCIs and SPAs will ultimately be taken up in the Flemish Nature Structure.

For all sites included in VEN, IVON and for all pSCI and SPAs, a nature objective plan has to be developed indicating the site-specific measures to be taken to implement the objectives developed for that site. A proposal for general measures and the site-specific measures that can be taken in VEN areas was accepted in principle by the Flemish government and is now scheduled for final approval. This decision includes financial support for private owners to carry out conservation measures on their land.

*Nature and forest reserves*

About 7 000 hectares of forests are included in both private and public nature reserves. Another 1 650 hectares are currently included in forest reserves. Both protection statutes have nature conservation as their primary goal: the biological value of the forests will be enhanced through specific management or non-intervention (spontaneous development: estimated area = 5 000 ha). A large majority of these areas are included in the pSCI (for example, 1 440 out of 1 650 hectares of forest reserve).

*General measures*

In Flanders, the Forest Decree of 1990 replaced the Forest Act of 1854, which is still valid in Wallonia. The new legislation defined the 'forest' concept, which applies to public as well as private property and explicitly states that all forests are multi-functional. Together with the Nature Conservation Decree of 1997, this has resulted in forest management being quite tightly regulated for all types of property status and a general principle of 'stand-still' being applied to most valuable biotopes by limits on afforestation and drainage.

Practically, this means that the actual extension of most habitat types — such as heaths, fens, bogs, wetlands, marshes, inland dunes and historic permanent grasslands — which have declined after the intensification of forest management, is 'frozen' and their management made subject to specific conservation measures. There is also a general ban on timber harvesting during the spring breeding season and an absolute ban on deforestation.

In 2001, management rules for public forests were adopted which address the objectives of biodiversity conservation and nature protection by permitting the natural succession of vegetation types in a spatial variation — this is achieved by cyclic interventions in forest complexes with a mosaic-like age–class distribution. The same guide sets out an official policy for replacing conifer plantations with forests with indigenous species by natural regeneration. As the larger part of Flemish public forests are designated under Natura 2000, these policy measures are an important step towards their adequate management.

*Contact persons: Ms. Els Martens,*
*Tel. (32-2) 553 78 85*
*E-mail:*
*els. martens@lin.vlaanderen.be*
*Mr Raoul Van Haeren,*
*Tel. (32-2) 553 80 11*
*E-mail:*
*raoulj.vanhaeren@lin.vlaanderen.be*

## 8.1.2. Denmark

As in other countries with reduced forest cover and highly anthropised rural areas, forest conservation discussions in Denmark are mainly about naturalness of existing forests and about the composition of 'pristine' forests that preceded them. The question of the 'openness' of primeval ecosystems and the role of herbivores in them has led to different models of primeval ecosystems (of north-west Europe) such as the 'high forest model' and the 'wood-pasture model'. This has increasing influence on the setting of management objectives for protected areas that are part of Natura 2000 sites.

### Danish designation criteria for Natura 2000 and forests

The Danish pSCI series has been proposed on the basis that Annex I forest habitats are mainly semi-natural woodland and that such woodland in general is rare (structurally natural or near-natural stands) or residual (other stands — including coppice, wood pasture and other quite intensive management types). Certain cases, this can also include planted forests of native trees if they form high forest, have typical undergrowth (meaning that they can be referred to as a forest community/association) and host species of Community interest. For planted stands, Denmark has taken the view that such stands must have attained a fairly high age, implying that young, even-aged, planted monocultures do not qualify.

Several Danish SPAs comprise large forest districts. These are mostly planted forests including large spruce plantations managed to a wide extent with clearcuts and replanting. This has proven beneficial and seems to be a necessary feature for the continuous presence of *Lullula arborea, Lanius collurio* and *Caprimulgus europeaus* of Annex I to the birds directive. These species usually decline or disappear in Danish forests without clearcuts.

Denmark has about 163 000 hectares of broadleaved forest (status 2000), of which about 25 000 hectares or 15 % are in accordance with one of the Natura 2000 forest types. The rest are either other Corine forest types (not in Annex I to the habitats directive) or planted stands without sufficient semi-natural quality or without species of Community interest.

In order to develop and disseminate a better understanding in Denmark of the Natura 2000 habitat types including forests, the Danish Forest and Nature Agency has published a book with descriptions, key

and photographs of the Danish Natura 2000 habitat types (Buchwald and Søgård, 2000). A preliminary edition of the book (text only) was used in 1999 when mapping the Natura 2000 forest types in State forest pSCIs. The book represents the official Danish understanding of what is included under the definition of each Natura 2000 habitat type in Denmark.

Denmark made a preliminary proposal in the range of one third to three quarters of the area of each Natura 2000 forest type as pSCI, depending on their rarity, representativity and other qualities as described in Annex III to the directive. The figures are preliminary because field inventories and mapping/digitising of the Natura 2000 forest types have only been carried out in the pSCI of the forests of the Ministry of the Environment (State Forests), while other areas are estimated.

#### Thoughts about future management

Denmark is preparing/updating the scientific and legal framework for establishing the necessary conservation measures for SACs as stipulated in Article 6.1 of the directive. A very significant contribution to the conservation of forests has been the 'Strategy for natural forests and other forest types of high conservation value in Denmark' launched in 1992 and implemented mainly since 1994.

The natural forest strategy defines terms and objectives (overall aim is biodiversity protection) and sets targets for protecting large areas with a variety of conservation management schemes for which management principles are defined (untouched forest, grazing forest, coppice woods, selective felling and other special forest management systems). From 1992 to 2000, the area of protected forest in these categories greatly rose, partly financed by the LIFE project No B4-32000/95/513- 'Restoration of large areas of natural forest for the benefit of endangered birds, plants and biotopes'.

#### Conservation objectives

For each Natura 2000 habitat type and species found in Denmark, conservation objectives at national and SAC/SPA levels are being set — British publications have been used as inspiration for this (English Nature 1999). Guidelines will be further developed after the involvement of stakeholders.

In general, the guidelines must take into account that many pSCIs/SPAs consist of a mosaic of different Natura 2000 habitat types, and that each of these may be represented in each pSCI by several (sub)localities, which may have differing quality, management, species content, continuity, representativity, etc. and therefore should also in the future have differential management.

#### Flexibility concerning Natura 2000 forest habitats in SPAs/SACs

Requirements for Natura 2000 forest habitats may allow the following approach when setting conservation targets and associated management measures:

*National/biogeographic level:*

favourable conservation status as defined in Article 1 (e) of the directive.

*pSCI/SAC level:*

1. Management activities and prescriptions shall ensure that the natural qualities and features, structures, functions, species and variations of relevance to Natura 2000 are preserved or enhanced. The approach shall allow for dynamic evolutions and changes.

2. No 1 may be deferred by way of specific prioritisation in conservation objectives/management plan, for example, by allowing/planning for a priority type/species to be enhanced in area or population at the cost of population or area of a non-priority type/species.

3. No 1 may be deferred because of natural dynamics for example, natural vegetation evolution/succession or natural coastal/hydrological/aeolian sand movements, etc.

4. No 1 may be deferred because of economic, social and cultural requirements, pursuant to Article 2.3 and 6.4 of the habitats directive.

Examples of the application of this flexible approach to restoration projects:

1. In a SAC there is a raised bog (7110) surrounded by degraded bog (7120) and bog woodland (91D0). Both the last two types were type 7110 before human impact in the form of peat extraction and drainage. The management plan can (but



does not need to) prescribe that type 7120 and 91D0 wholly or partly be managed in a way which enhances restoration to type 7110. This can mean total clearcutting of the 91D0 forest, which in this case is acceptable. In other cases preservation of the woodland with or without forest management would be the case.

2. Several of the largest Danish forest districts are wholly or partly appointed pSCI and are SPAs already. The areas are typically a mixture of non-forest, non-native plantation forest, native planted forest, managed semi-natural forest and semi-natural forests. They may be under non-intervention or planned management (for example, selective cutting) from before their appointment as pSCIs. Several different Natura 2000 forest types usually occur, parts of which are native planted forest, while other parts are semi-natural with variable degrees of management from intensive to non-intervention, and with a variable age–class structure. In these cases, the *minimum* requirement must be to preserve the balance between management regimes (because different typical species like different regimes) or to change the balance in a way which is deemed beneficial (or unchanged) for the relevant biodiversity/typical species. As mentioned above, at least some Annex I BD birds in Denmark are known to thrive in the clearcuts of plantation forests (*Lullula arborea, Caprimulgus europeaus* and *Lanius collurio*), while they cannot live in forests without clearings. Therefore the minimum requirement must not include a ban on clearcuts or planting.

3. In 1996, the Danish Forest Act was changed. One of the changes was a paragraph stating that 'Oak scrubs shall be conserved…'. The State subsequently had to register oak scrubs in order to ensure their conservation. Almost all stands of Natura 2000 type 9190 'Old acidophilous oak woods with *Quercus robur* on sandy plains' fall under the definition of oak scrub in the Forest Act. Since 1996, all oak scrubs have been registered and most were deemed worthy of conservation. For a large number of them, agreements have been made on a specific management regime with the private owners, including economic compensations. As a principle, planting of tree species non-native to this habitat type is now prohibited, and any deliberate regeneration must use the local oaks by either coppicing, natural regeneration or planting/sowing offspring from the same stand. Use of pesticides and fertilisers is banned and the same goes for (deep) ploughing. Harrowing is permitted to enhance regeneration. The authorities have the right to remove non-native invasive trees/shrubs if it is deemed necessary and the owner does not do it.

*Contact person: Mr Erik Buchwald,*
*Tel. (45) 39 47 20 00*
*E-mail: ecb@sns.dk*

## 8.1.3. Germany

**I.** A working group set up between the federated states to deal with nature protection and recreation issues was indicated by the federal authorities as the best source of information about the state of implementation of Natura 2000. They submitted the following elements.

Since the implementation of Natura 2000 is still in full progress and the local coordination with the forest authorities for the necessary conservation measures has not yet been completed in many *Bundesländer*, there is still a lack of concrete experience of conservation-oriented forest management in Natura 2000 areas. A number of projects were initiated in the *Bundesländer* and the administrative background for the implementation of Natura 2000 in forests is progressing well. It appears that the individual *Bundesländer* use different means in order to achieve a lasting protection for the Natura 2000 areas. Indeed, adaptation of legislation, formats for management plans, relations with forest owners and with the public are all handled differently. On the whole, about half of the *Länder* (not counting the city states) have started statutory and/or administrative procedures related to forest management in Natura 2000 areas.

The following selection of projects was highlighted by the abovementioned working group:

1. **Implementation of conservation measures within the framework of large-scale-projects for nature protection (*Naturschutzgrossprojekte*)**

Large-scale projects for nature conservation are funded by the federal government, and are carried out in areas with important natural resources. In the

project areas, conservation measures are financially supported.

The federal government deals with 75 % of the costs, the *Bundesländer* with 20 % and a regional body with 5 %. The funds are spent principally in the so-called core zones, where the habitats or species to be conserved are concentrated. The regional body is a local NGO, with representatives of the local political groups, land users, regional planners and conservation authorities. Wooded areas are included in these projects and the required conservation measures are set out in a management plan. Such projects are run, for example, in Sachsen-Anhalt at the middle Elbe and in the nature park Uckermaerkische Seen in Brandenburg (lakes in the Uckermark).

**2. Assurance of property rights by assignment of land to conservation foundations or nature conservation associations**

In accordance with an agreement between the *Bundesländer* and an association or a foundation, land is given in custody without payment for conservation purposes. This is done by a public tender in which the basic management criteria are specified and to which conservation organisations can apply with detailed implementation proposals in order to be selected. The areas concerned are either already safeguarded as a protected area or their designation as a protected area is underway. The contractual partners have to comply with the provisions of the regulation on protected areas and/or obligations going beyond that which are specified in the agreement. In order to assure the durability of the conservation objectives, a written guarantee of custody for nature protection over the assigned land is recorded in the land register. The agreements furthermore include stipulations for ecologically sound forest management. Forest areas which are designated as pSCI must, beyond that, according to the agreements, be treated in compliance with formally stated conservation aims. This approach was used in Brandenburg on land which was assigned for nature conservation purposes from the federal government to the *Länder*.

**3. Contractual conservation measures for the implementation of the habitat directive**

For special conservation measures undertaken by the forestry owners, which go beyond traditional practice and natural forestry, forest owners can underwrite contracts, which honour the special expenditure required for nature protection measures to be carried out. In the *Bundesländer* Schleswig-Holstein, Bavaria, Nordrhein-Westphalia and Saxony the legal conditions for this type of 'contract conservation ' have been established.

In Schleswig-Holstein, for example, conservation contracts can be concluded for private forests which have special conservation functions. Thus, it is possible to implement conservation measures which otherwise could only be carried out by land purchase or formal legal procedures. Some of the contracts are co-funded by EU instruments, such as the rural development plans. For such measures, forests in Natura 2000 areas are given priority. Other contracts, which are concluded under a local programme 'The future of the rural area' (without EU co-funding), run for over 30 years.

**4. Management plans for nature parks and national parks**

For large protected areas, such as national parks or natural parks, specific conservation plans are prepared, which contain explicit articles about forestry practices. These plans are established after consultations with a specialised advisory body, consisting of local politicians, regional authorities, NGOs, representatives of land users and specialists. The plans are advertised in the region and are discussed. In order to make these plans accessible to the maximum number of people, executive summaries of the final versions are published. It has to be noted that German national and natural parks are not nature reserves. They mostly consist of areas in which legal restrictions of land use already exist (for example, on landscape protection) and in which the forest administration has made a commitment to taking a more ecological approach.

**5. Cooperative agreement between forest and conservation authorities in Thuringia for the protection of bogs**

With regard to the implementation of the habitat directive, the bogs situated in the Thüringer Wald and in the Westliches Schiefergebirge are of special importance. These bogs are not large areas of con-



tinuous habitat types listed by the directive, but they are outstanding and rare ecosystems.

Because most of these bogs are in a bad state of conservation, it was vital to act in order to conserve these valuable biotopes and/or to restore the damaged bogs. Since most of the bogs were already wooded to a certain degree, a close collaboration was necessary between conservation and forest administrations for the implementation of necessary conservation and restoration measures. A common operational framework was agreed, with the goal of ensuring favourable conservation conditions for the bog habitats. Important outcomes were a coordinated overall concept for the future development of the bog woodland as well as a priority list of measures to be taken.

**6. The LÖWE programme in Lower Saxony**

In the German forests of Lower Saxony, the forest administration is implementing a strategy for 'close-to-nature forestry' called 'LÖWE' (an acronym for long-term ecological forest development in the State forests of Lower Saxony: *Langfristige Ökologische Walderneuerung*). One of the effects of LÖWE since its introduction was that costs for harvesting per cubic metre were drastically reduced, as well as the costs for planting, as LÖWE uses the forces of nature wherever possible, such as for the natural regeneration of forests. LÖWE was supported by measures that are essential for the change to ecological forest management, in particular ensuring an adequately low number of deer per hectare to be able to naturally regenerate the forests without the use of expensive fencing (Janssen, 2000; www.forstnds.de/portrait/loewe.htm).

The realisation of the LÖWE programme has been carried out with great success until now. The LÖWE programme was drafted in 1991 as a comprehensive production and nature protection strategy. Economical considerations were originally not part of the 13 principles of the LÖWE programme, but they can be derived from them. The objectives of girth limit felling, for example, have resulted in a profit increase. After only eight years of realisation praxis, ecologically orientated forestry based on the principles of the LÖWE programme has already led to a considerable reduction in expenditure and a corresponding income increase in the Lower Saxon state forests.

This example shows that ecologically based forestry can also, under certain conditions, be the most economically viable form of management.

The working group also mentioned the kind of financing techniques that were used.

**1. *Länder*-owned forest**

The measures are an integral part of the management of the state forest by the state forest authority (*Landesforstverwaltung*). The implementation lies within the scope of the executive work by the local forestry authorities.

**2. Corporate and private forest**

The necessary measures are coordinated by mutual agreement between the forest administration and the forest owners. The measures can be implemented by state forest workers. The costs are shared by the forest and nature conservation administrations, with no costs arising for forest owners.

In this manner, spruce plantations have been cleared in the nature reserve Saukopfmoor on the Regenmoorkalotte over an area of more than 7 ha, which is the property of the private company Bodenverwertungs- und -verwaltungs GmbH. Similar measures can also be funded under the programme for the promotion of nature conservation and the preservation of the countryside in Thuringia.

**3. Job-creation measures (ABM) and/or structural adjustment measures (SAM)**

In the case of the implementation of nature protection measures forestry administrations have often been supported by employees of the secondary job market. The implementation of certain measures (for example, water engineering projects, cleaning clear cut areas) represent a meaningful opportunity to employ jobseekers, at little cost to the employer.

**4. Compensation measures for impacts in nature and landscape**

In the western slate mountains (Westliches Schiefergebirge) disturbed forest moors were restored in compensation for the impact the building of the power station *Goldisthal* had on nature and land-

scape in the area. These measures were planned together by forest and nature authorities and undertaken under the direction of the local forestry commissions.

**II**. In Nordrhein Westphalia (NRW), comprehensive legislation for Natura 2000 implementation with the following basic characteristics is currently being adopted.

- All pSCIs in NRW must receive the status of nature protection areas or form part of landscape planning regulations.
- Obligatory state-wide models for contracts between landscape authorities and forest owners were developed. Thus habitats directive-compliant management of designated forest complexes is ensured and forest owners have a long-term planning security. Furthermore, a decree of the *Land* (Nordrhein-Westfalen) regulates the involvement of the nature conservation associations.
- Regular monitoring of the state of conservation of habitats and species in pSCIs will take place in all forest areas, whereby forest structure, species inventories and outside influences will be taken into account. To carry out this work, NRW has developed specific guidance on cartography and assessment methodology.
- The designation of forest Natura 2000 sites has to focus on surfaces containing 'natural forest cells' that are able to function as core areas in which natural developments can take place with human intervention. Existing forest management in surrounding stands must strive towards a balance between the different succession stages that can exist in semi-natural forests.
- Characteristics of existing habitat types listed in Annex I of the habitats directive must be preserved by forest management measures if possible (for example, maintain more than 50 % oak in 'Old acidophilous oak woods with *Q. robur* on sandy plains' / 9190).
- General management prescriptions are as follows:
  - no replacement of broadleaves by conifers;
  - conifer percentage to be stabilised at actual occurrence;
  - up to 10 trees per hectare to be maintained to provide nesting space for bats, day raptors, owls, woodpeckers, black stork;
  - clearcuts larger than 0.3 hectares not allowed.
- Detailed guidelines and decrees regulate the degree to which these measures are obligatory or voluntary in relation to specific habitats and species.
- Compensations for economic losses are foreseen in relation to:
  - the maintenance of well-defined levels of decaying trees and deadwood;
  - transformation of conifer stands into indigenous broadleaved forest.
- A separate support facility has been created for the conservation of *Luzulo-Fagetum* beech forests (hab. type 9190) and 'Old acidophilous oak woods with *Q. robur* on sandy plains (hab. type No 9190)

**III**. Bavaria has introduced management planning measures for Natura 2000 forest sites with the following characteristics:

- Implementation of Natura 2000 should be completely transparent and should have the cooperation of stakeholders.
- Division of tasks between several public bodies who are involved:
  - the state Ministry of the Environment has overall steering competence;
  - the state Forest Service and nature conservation authorities work out the concrete conservation objectives;
  - the state Forest Service is completely responsible at site level (planning and carrying out of management plans, monitoring, controls, reporting) because it has long-standing experience with ecologically sound forestry, disposes of considerable administrative resources and enjoys a high level of confidence from private forest owners.
- Landowners are involved and informed at all stages of management planning: before starting the work, during field studies, by commenting on



draft plans and during completion of the work. They have full access to complete text versions and maps on the Internet.

- The knowledge of local experts and conservation NGOs is seen as a valuable source of information for management planning.
- All the above-listed procedures and principles were first tested in pilot projects.
- For state forests, a Natura 2000 management plan will be an obligatory component of the valid forest management plan.

**IV**. The Federal Nature Protection Authority (BfN) commissioned a study by the University of Freiburg with the objective of defining the concept of 'good forestry practice' on the basis of existing rules and regulations in the 15 federal states.

- This study, led by Professor G. Winkel, defined good forestry practice on the basis of a series of criteria for the integration of nature protection in forest management. Meeting these criteria would then be seen as a threshold that forest management must reach in order to become eligible for compensation of lost income resulting from specific ecological requirements.
- It has to be stressed that BfN has only presented this study as the basis for initiating a more intensive dialogue with the forest sector and not as a series of mandatory rules. Most of the quantitative figures that are needed to make the criteria operational will have to be established by intersectoral discussion.
- The criteria for 'good forestry practice' presented by Prof. Winkler are:
  - use of natural regeneration;
  - use of natural succession processes;
  - strictly regulated use of forest machinery;
  - minimising soil disturbance by tillage;
  - careful planning of forest road systems;
  - setting of minimal rotation lengths;
  - protection of specific biotope elements, such as individual trees;
  - integration of nature protection measures in commercial stands;
  - respecting the ecological functions of structurally diverse forest edges;
  - limitation of the use of pesticides, herbicides and chemical timber protection;
  - maintaining adequate game densities;
  - avoiding the use of genetically modified organisms;
  - limiting the establishment of large single-species stands;
  - limiting the use of exotic tree species;
  - avoiding the use of nitrogen fertilisers;
  - limiting clearcuts to a minimum size.

*Contact person at federal level:* *Dr H.-J. Mader, Head of Unit, Brandenburg Ministry of Agriculture, Environmental Protection and Spatial Planning. Tel. (49-331) 866 75 00, Fax (49-331) 866 71 58 E-mail: hajo.mader@mlur.brandenburg.de*



### 8.1.4. Greece

Greece submitted experiences derived from several LIFE projects, where forestry should be viewed in an integrated way, taking into account biological diversity and landscape conservation. One of the first steps in the planning process is the drawing up of management plans. Up-to-date forest management plans should not just include sustainable logging practices, but should also reflect biodiversity conservation issues.

In the case of Natura 2000 forest sites, management plans have to prescribe actions targeted to habitat types and plant and animal species of Community interest. Monitoring the results of management actions in relation to the conservation status of the species listed is considered as essential feedback to management. A national project 'Conservation and management of sites of Community importance in Greece' was executed on 10 pSCIs of which five are forest sites where the following principles were applied.

1. The project began by setting the context, that is, the elaboration of guidelines and specifications that reflected the current scientific knowledge and the spirit and content of Directive 92/43/EEC and the Biodiversity Convention. The pilot element was that, for the first time since the adoption of Directive 92/43/EEC, specifications for management plans for forest areas were elaborated (addressing the abovementioned requirements) and a monitoring guide was produced, providing the framework for the design of monitoring programmes, at site, habitat type, and species level.
2. Existing forest management practices were reviewed and management actions were prescribed with special emphasis on logging, road network design and construction, and visitor management. Inherent to the management plans was a monitoring system which was proposed for each site, at site, habitat type and species level, based on the monitoring guide.

As an overall benefit, it can be concluded that these projects have re-oriented forest management to take into consideration the conservation objectives of Natura 2000 sites.

Another interesting example, in this case for the use of forest areas for tourism, comes from Crete, where the palm forest of Vai lies on the north-east coastal tip of the island, covering around 20 hectares, within a semi-arid ecosystem. Its significance is inversely related to its size, since it is the only natural palm forest in Europe, and possibly the only forest of *Phoenix theophrasti* in the world. It is one of Crete's main tourist attractions, with some 200 000 visitors every year. The project combined awareness raising, restoration and reforestation efforts to create a sustainably managed tourist destination.

*Contact person: Mr Panagiotis Drougas,*
*Tel. (30-1) 362 83 27*
*E-mail: daspro5@minagr.gr*

## 8.1.5. Finland

The Finnish Ministry of the Environment submitted the following examples of best practice concerning relations between forest management and management of the Natura 2000 network.

### National forest programme 2010

At national level the Government of Finland has adopted the national forest programme 2010 as a tool for forest policy. The drafting process of this programme has been accessible both to experts and to a large number of interest groups and private citizens. According to this programme, the ecological sustainability of forestry will be secured by further development of the ecosystem management of commercial forests and by the establishment of nature conservation areas on the sites included in national conservation programmes. Most of these sites also belong to the Natura 2000 network.

Since the adoption of the national programme in 1999, regional forest programmes have been prepared for all provinces. In addition, the government has set up a special working group to prepare a forest protection programme covering the south of Finland, the western parts of the province of Oulu and the southwestern region of Lapland. The working group is expected to give its proposals by the end of June 2002.

### Natura 2000 network in Finland

In accordance with the Finnish government decision on the designation of Natura 2000 sites, the network in Finland includes around 1 500 sites and covers roughly 4.77 million hectares. Most of these sites are existing nature conservation areas (30 %), wilderness areas (30 %) or belong to the national conservation programmes (30 %), which means that they will be protected as nature conservation areas in the near future. In general, commercial forestry is not allowed on these sites or is allowed only within certain limitations. On certain sites, however, more flexible implementation is possible because of the habitat types or species found on them.

### Example from the public sector: Landscape ecological forest management planning by the forest and parks service Metsähallitus

This method is applied especially on those Natura 2000 sites which are mainly used as State-owned national hiking areas (about 28 000 hectares) but also on some other forested sites, which include, for example, habitat types such as 'Coniferous forests on eskers' (9060), 'Bog woodland' (91D0), 'Fennoscandian springs and springfens' (7160), 'Western Taiga' (9010).



Landscape ecological planning (LEP) is integrated with forest management planning. The idea is that ecological goals are aligned with different forms of forest use, while bearing in mind the objectives of forestry in the area. LEP views an extensive forest area as a whole including managed forests, nature conservation areas, game areas and special areas for recreational use.

The long-term objective of LEP is to assure the survival of the area's native species as viable populations. Among other things, this requires the conservation of valuable existing habitats and allows for new ones to evolve. In this way planning contributes to the continued existence of valuable habitats as defined in the Forest Act and the Nature Conservation Act in Finland. Planning can also be used to focus nature management activities including restoration operations on the sites that are the most crucial in ecological terms. The planning also attempts to assure the necessary conditions for the spread of various species. In this scheme, the valuable habitats and ecological processes in managed forests complement and enhance already existing nature conservation areas. Together these form an ecological network, which preserves biodiversity.

Another central goal of planning is to ensure that the conditions exist for multiple forest uses and for nature-based sources of livelihood. The procedure thus involves inventories of game habitats, scenic value and cultural, educational and research sites. In northern Finland, the demands of reindeer husbandry play an important role. The weight given in planning to recreational use depends on the characteristic features of the area and on the recreational needs of the region.

Landscape ecological plans are drawn up in an open, interactive and people-oriented way. The participatory management as applied in the LEP includes disseminating information, gathering value-based and geographic input, talking with the stakeholders and the public and giving them feedback. The aim is to improve the working relationship with all those stakeholder groups and citizens interested in the use of State lands and in the LEP process of Metsähallitus (Finnish Forest and Park Service). For this purpose, open forums and working groups of stakeholders are arranged during the planning process. All public input is documented, analysed and, if feasible, taken into account. It is envisaged that, through participatory management, Metsähallitus will take care of the common property in a broadly acceptable way.

More than 100 people, including more than 20 professional biologists, have participated in the fieldwork during the past five years. The costs of this work totalled EUR 7.5 million. The results, including the map material, are published as landscape ecological plans and they are available on request from Metsähallitus at a nominal price.

Currently, the completed LEP covers 6.4 million hectares. Some 3.3 million hectares of this is standard production forest by land use. Of the productive forestland, 129 400 hectares have been designated as key-biotopes and ecological corridors. Commercial forestry activities will no longer be carried out on these lands. These new areas increase the strictly protected forest area in Finland by 18 %. Furthermore, 205 000 hectares of productive forest land subject to conservative forestry activities has been designated as an area subject to limited forestry operations. The aim of forestry activities is to secure the special characteristics and functions of these areas. These areas consist mainly of valuable scenic areas such as riparian forests and important game areas such as Capercaillie leks.

It is obvious that the positive impact of the key biotopes and ecological corridors on biodiversity is higher than their proportion of the commercial forest land area, since they are based on a systematic analysis and field inventory of the natural resources of each individual LEP area. These areas are concentrated in older forest stands on more fertile sites than commercial forest land in general. These stands are the most valuable ones in economic terms as well. Subject to the extended rotation periods, the key biotopes, ecological corridors and stands reduce the annual cutting budget of Metsähallitus by 12 %. In other words, the investment in nature conservation, recreation, culture and other resources reduces the business profit of Metsähallitus annually by EUR 24 million.



**Example from the private sector:**
**LIFE project 'Protection of taiga and freshwater ecosystems in central Finland' (management plan preparation by the Forestry Centre of Central Finland)**

This project concerned two Natura 2000 sites in central Finland owned by private landowners.

The Forestry Centre of Central Finland supervises the forestry legislation in central Finland. The aim of the LIFE project was to prepare forest management plans for two Natura 2000 sites, protected under the Forest Act, totalling 400 hectares. The management planning areas are owned by private landowners. The Forestry Centre prepared the management plans for the two Natura 2000 sites: 'Vaarunvuoret' (FI0900039) in Korpilahti and on 'Iilijärven alue' (FI0900083). The Forestry Centre was responsible for negotiations with private landowners and for the preparation of plans which included suggestions for the management of each forest compartment and the supervision of possible harvesting.

Thorough inventories were needed before the plans could be drawn up. Aerial photography was an important tool for this task. Inventories that targeted species and habitats under the habitats directive and the birds directive were carried out. Additionally, a Centre expert identified key habitats under the Forest Act and sites of endangered and rare birds, insects, fungi and vascular plants, which were taken into account in the management plans.

Inventories were essential to avoid the harmful effects of forest management on biodiversity. Some of the inventory work was carried out in collaboration with biologists from the Central Finland Regional Environment Centre. Several endangered and rare beetle species were observed in the planning areas. Detailed suggestions of management were prepared for each forest compartment by the Forestry Centre.

Landowner participation was essential for the success of the project. Therefore, the Forestry Centre contacted 27 landowners directly. Nine forest management plans were drawn up, covering 488 hectares of forest. Compensation was paid to some landowners because they agreed to preserve the most diverse sites of their forests by leaving them outside commercial management. Much effort was put on the personal guidance of landowners in order to increase understanding of the plan contents and targets. The forest management planning procedure was welcomed because most of the landowners held the view that the project would provide new choices and approaches for managing their forests. Earlier, before the project began, landowners were uncertain about the targets of the Natura 2000 network and in doubt as to how they would be allowed to manage their forests. The project was successful in adapting forestry activities to the conservation aims of the sites. The landowners will be able to use their property efficiently without causing the deterioration of habitats or the disappearance of the species for which these forested areas were designated as Natura 2000 sites.

*Contact person:* *Mr Heikki Korpelainen*
*E-mail:*
*(heikki.korpelainen@ymparisto.fi)*

## 8.1.6. France

**A.** General presentation of Natura implementation in France

In 2001, France completed the transfer of the nature protection directives in its legislation by enacting separate legislation on site designation and on site management.

Three essential choices were made:

- acting in transparency and cooperation, at all the stages of the procedures, in particular through the steering committee set up for each site;
- development of contract management, based on the initiative and motiviation of the owners and managers of the territories concerned;
- incorporating environmental aspects into the management and development of rural areas.

Essential elements of the French approach to implementing Natura 2000 are the following:

*The 'objectives document' (document d'objectifs — DOCOB)*

The DOCOB defines the management guidelines and the contractual conservation measures and indicates, if necessary, the administrative and regulatory measures to be implemented on the site. It specifies methods of financing the contractual measures. It is established by a technical operator chosen by the State administration, in cooperation with the local actors concerned who meet on the steering committee for the site. On the basis of the objectives doc-



ument, approved by a prefect's decree, Natura 2000 contracts are drawn up.

To help with drawing up objectives documents, several tools are at the disposal of the public services and the operators:

- a methodological guide worked out following an experimental operation on 37 'pilot' sites, co-financed by the European Union;
- a training plan which has been functioning since 1999 for officials and operators, and which includes exchange of experiences between the regions;
- a series of habitat guides giving a synthesis of knowledge on the habitats and the species targeted by the habitats directive and their management.

*The steering committee*

The steering committee is the main instrument for the exchange of information and for cooperation on each site. It is set up and chaired by the local prefect and brings together partners concerned with the site such as elected representatives, owners, users, NGOs etc. It meets regularly and can set up specialised working parties.

This committee is associated with the drawing up of the objectives document. The technical operator reports to the commitee on the results of his work and takes account of its opinions. After approval of the DOCOB by the prefect, the committee is informed about its implementation and is asked to come to conclusions about the measures being applied and subsequently to evaluate them.

*Natura 2000 contracts*

Individual participation in the implementation of the DOCOB by the actors who are in charge of management and maintenance of the natural environments will be regulated by public service contracts called 'Natura 2000 contracts'. These contracts will enable the signatories (owners, farmers, foresters, hunters, associations and communes) to be remunerated for the work and the services rendered to the community and have to be passed directly between the State (via the prefect of the department) and the holders of land-use rights to the sites concerned. Their duration will be at least five years.

Natura 2000 contracts will define the tasks required to achieve preservation or restoration of the natural habitats and the species which justified the designation of the site. They will give the nature and the modalities for remuneration by the State (and the local authorities if necessary) in exchange for the conservation benefits to be provided. Partly financed by the European Union, under the rural development budget in particular, this public aid will be granted as investment subsidies or annual aid per hectare. The contracts will have to be in conformity with the regulations of the objectives document and will offer attractive conditions of financing in the case of Natura 2000 sites.

In this way, Natura 2000 will be endowed with substantial financial resources, and will be a genuine tool for territorial development, guaranteeing the conservation of flora, fauna and natural habitats.

**B.** Implementation of Natura 2000 in forestry environments in France

*Scientific and technical tools*

The French authorities have published guidance documents for biodiversity-oriented forest management which are of an exceptional quality because of the way in which they link scientific accuracy and practical recommendations.

1. With the support of a LIFE Environment project that was carried out together with the Walloon Region in Belgium and the Grand Duchy of Luxembourg, an excellent guide for identification and integrated management of forest habitats and species was published in 2000. This guide, called *Forest management and biological diversity,* consists of three volumes, relating to Wallonia and the Grand Duchy and to Atlantic and continental France respectively. It is a useful tool which allows forest owners to identify habitats and species found in their own forest and to draw management conclusions with the help of a vast range of descriptions of practical situations. The publications also contain a substantial chapter with basic information about biodiversity and nature protection. A most interesting aspect of the project is that forest owners' organisations cooperated in the compilation of the reference book,

making it a kind of bottom-up, participatory approach that aimed at increasing the acceptance of Natura 2000 amongst key stakeholders.

2. In 2001, the Ministry of the Environment and the Ministry of Agriculture, together with the national Museum for Natural History, started the publication of a series called *Natura 2000 habitats references*, with a comprehensive guidance document about forest habitats in France. This is the first publication of a series of detailed guides on the habitats and species listed in the annexes to the habitats directive, to be followed by editions about coastal, humid pastoral and rocky habitats and also by two volumes about species, one on fauna and one on flora.

This forest habitat guide has been conceived as a system of records, in which each habitat is listed under its French name with the Natura 2000 and Corine codes. Next follows information about diagnosis, phytosociological position, succession stages, associated habitats, floristic composition, conservation value, potential threats, production capacities and economic use, management practices and research needs.

The outstanding value of this guide lies in its integrating approach, which presents forest managers with a systematic linking of conservation-related data and economic use.

### *Specific measures under rural development for the contractual management of forest environments*

The French national rural development plan envisages Community co-financing under the Guarantee Section of EAGGF for measures of contractual management of Natura 2000 sites (individual measures carried out in the perimeters of pSCIs and SPAs forwarded to the European Commission). As regards collective actions for Natura 2000, the RDP also comprises training and awareness-raising measures.

Aid for the contractual implementation of the management of the Natura 2000 sites in forests and associated environments is thus envisaged in measures I.2.7 and I.7.2 of the RDP (corresponding to Chapter VIII, Articles 30 and 32 of the rural development regulation). This concerns investment as well as management support (cfr. first indicative list of eligible forestry measures).

Indicative list of measures for contractual management of Natura 2000 sites in forests and associated environments eligible for measures I.2.7 and I.7.2 of the French RDP:

*I. TYPOLOGY OF ELIGIBLE MEASURES UNDER MEASURE I.2.7 OF THE RDP (ARTICLE 30 OF THE RDR — operations not dealt with within the framework of forestry investment aid):*

- creation and restoration of clearings in closed forest stands, in order to create environments favourable to maintenance and to the reproduction of habitats or of species habitats of Community interest;
- creation and restoration of forest ponds essential to maintenance and to the reproduction of habitats or of species habitats of Community interest;
- enrichment of plantations with non-productive objectives, with a view to restoring habitats or species habitats of Community interest;
- preparation and monitoring of natural regeneration in stands which are not very productive and where existing forest policy would have recommended artificial regeneration;
- clearing and thinning of stands with non-productive logic, with a view to restoring habitats or species habitats of Community interest that need significant increase in the light on the forest floor;
- creation and restoration of riverine forests, including the works for stabilisation of banks, with a view to restoring habitats or species habitats of Community interest;
- establishment of complex, multi-storey and gradual forest edges, with a view to restoring habitats or species habitats of Community interest;
- covering excess costs connected with manual clearing or undergrowth thinning, corresponding to the protection of habitats or of species habitats of Community interest on sites where the existing forestry policy would have resulted in resorting to mechanical or chemical interventions;
- creation of simple and sturdy crossings of small water-courses in forests that include aquatic habitats or fish species of Community interest, in order to prevent forest machinery from destroying these habitats;



- fencing and safeguarding small areas with natural regeneration, making it possible to reduce the surface of the basic unit of regeneration significantly when the maintenance of habitats or of particularly fragile species of Community interest habitats requires the creation of a mosaic-like horizontal forest structure.

*II. TYPOLOGY OF ELIGIBLE MEASURES UNDER MEASURE I.7.2 OF THE RDP (Article 32 of the RDR):*

- participation in the financial charges resulting from increased stand heterogeneity, with a view to restoring habitats or species of Community interest, when it leads to losses of expected value and reduced exploitability;
- maintenance of clearings and ponds in forests, in order to guarantee the conservation of habitats and reproduction species of Community interest;
- establishment of complex, multi-storey and gradual forest edges, with a view to restoring habitats or species habitats of Community interest.

### STUDY FOR THE DEVELOPMENT OF A TECHNICAL-ECONOMICAL REFERENCE FRAMEWORK FOR THE MANAGEMENT MEASURES IN FORESTS AND ASSOCIATED ENVIRONMENTS

To facilitate the drafting of the DOCOB and of the contractual measures following from them in forest environments, the Ministry for Ecology and Sustainable Development launched a study in June 2002 to define an initial technical and economic reference framework and to assemble the existing data in this field at regulatory level, especially in relation to technical matters and financing methods. This reference framework does not aim to draw up a limitative and exhaustive list of contractual measures eligible for financing Natura 2000. On the contrary, its design envisages simple updating methods to supplement it along with the advance of Natura 2000 implementation.

The study, carried out by a consultancy, is co-managed by the Ministry of the Environment and the Ministry of Agriculture. It will last 10.5 months and presents three phases:

*National phase*

The following will be worked out in parallel:

- a national practical guidebook on the general methods of implementation: administrative procedures, eligibility conditions, general principles of calculation of aid, organisation of the various sources of financing and definition of good forestry practices excluded from the field of financing;
- a national guidance book of technical measures (compensatory investments or payments) for forest habitats, forest species, habitats and micro-habitats associated with forests.

As a result of a national steering committee meeting which included the various Natura 2000 actors, and after joint validation of the choices by the Ministry of the Environment and the Ministry of Agriculture, final editions of these books will be produced in order to be able to start discussions at regional level.

*Regional phase: 'sylvo- environmental meetings'*

In order to further develop the national guidebook into 22 regional catalogues of measures and to refine the definition of tasks on the basis of field experience, 12 meetings will be organised in the various French regions. The technical and financial aspects of the measures will be approached during these meetings.

*Final phase: final catalogue of measures and financial reference framework*

On this basis, the national reference framework of measures (synthesis of the 22 regional catalogues) will be written with all the technical indications and their financial aspects. The production of the final documents and of the summary report will be based on the choices and proposals of the national steering committee and finally those of the Ministry of Agriculture and the Ministry of the Environment.

*Contacts: Mr François Bland,*
*Tel. (33-1) 42 19 19 26*
*E-mail:*
*francois.bland@environnement.gouv.fr*
*Mr Christian Barthod,*
*Tel. (33-1) 49 55 51 19*
*E-mail:*
*christian.barthod@agriculture.gouv.fr*
*Website:*
*http://natura2000.environnement.gouv.fr*

## 8.1.7. Ireland

The Department of Marine and Natural Resources of the Irish Forest Service 'Coillte' has submitted the following elements on forest management in and around Natura 2000 sites in Ireland.

The ways in which Natura sites and forestry can interact in Ireland may be broken into the following three categories:

1. Natura forest sites that have been designated for their intrinsic forest values;
2. forests within (larger) Natura sites;
3. afforestation in or near Natura sites.

These are more fully described below.

### 1. Natura forest sites that have been designated for their intrinsic forest values.

These are semi-natural (usually referred to as semi-natural woodland) and are those that most resemble natural forests. Many now require management in order to ensure that their biodiversity potential is realised and protected — the Native Woodland Scheme (described below) will support this. The People's Millennium Forests project (also described below) has been very successful in raising the profile of Ireland's semi-natural woodlands.

*Background.*

While Ireland has approximately 9 % forest cover, semi-natural woodland is quite rare and occupies a fraction of 1 % of the land cover. The area of semi-natural woodland in Natura (forest) sites is approximately 6 000 hectares — the forest types represented are old oak woodland, alluvial woodland, bog woodland and yew woods.

The threats to these forests are (a) the introduction and proliferation of exotic species — Rhododendron ponticum is a major threat to semi-natural woodlands on acid soils, conifers were planted in them in the past — and (b) grazing by sheep or deer. It is a common feature of many of these woodlands that they (a) are not managed (they may have been managed in the past but management often ceased about a century ago) and (b) they are even aged. The result is often a canopy dominated by one species. It is necessary to bring these woodlands within a management regime. It is envisaged that this management will be supported to a very significant extent by the native woodland scheme.

*Brief description of the native woodland scheme.*

The scheme has been launched by the Forest Service in close cooperation with Dúchas, the Heritage Service, Department of the Environment and Local Government and with the Native Woodland Scheme Development Group (which includes statutory bodies, all sectors of the forest industry, researchers, landowners and non-governmental organisations).

The scheme consists of two elements — native woodland conservation and native woodland establishment. It provides for grants for work carried out to approved standards and for annual premium payments. It is a key feature of the scheme that the plan for each project is drawn up by a forester and an ecologist. The primary objective is to protect and expand Ireland's native woodland resource and associated biodiversity using appropriate 'close to nature' silviculture. Where compatible, the realisation of wood and non-wood potential is also encouraged. Conservation and biodiversity are prioritised, with wood production encouraged where appropriate.

*The People's Millennium Forest Project.*

The People's Millennium Forests consisted of tree planting and woodland restoration. Much of this occurred on Natura 2000 sites where exotic species (including rhododendron and conifers) were removed, the fencing of the sites was secured and appropriate native species of trees were planted. Awareness of the concept of native woodlands was raised through an outreach programme and by involving local people and the schools in planning the work. In addition trees were planted where appropriate — each family in the country was assigned a newly planted tree. A certificate describing the location of the relevant tree was issued to each family. The trees for each family are on a permanent register.

### 2. Forests within Natura sites

Forests in this category tend to be in Natura sites because of their place in the landscape. For example they may be within a protected riparian zone or

within a special protection area (SPA) — they form part of a greater landscape. These forests may range from semi-natural to older and new plantations of both indigenous and exotic tree species.

In these cases the management objectives vary depending on the environmental constraints. In the case of the managed plantations at least, timber production is a primary objective. The environmental and economic values of the forests and of the larger landscape are balanced through consultation. The management plan for the Natura site (the responsibility of Dúchas) follows widespread consultation. In addition to that, the issuing of felling licences (as required by the 1946 Forestry Act) to enable harvesting within these sites requires prior consultation with Dúchas.

#### 3. Afforestation in or near Natura sites

There is consultation and regulatory procedures are in place to ensure that any afforestation that does occur does not diminish the Natura site in question.

Afforestation requires prior approval from the Forest Service, Department of Communications, Marine and Natural Resources. The following consultation is required before a decision is taken concerning approval in and near protected sites (including Natura 2000 sites):

- if the site proposed for afforestation is within a Natura site, the proposal is subject to public notification and consultation, including consultation with Dúchas as well as with An Taisce, the environment non-governmental organisation (eNGO);
- if the site is within 3 km upstream of a protected site, the Forest Service consults with Dúchas prior to making a decision on the issuing of afforestation approval.

*Contact: Mr Noel Foley*
*E-mail: tnoelfoley@eircom.net*

## 8.1.8. Italy

#### General management principles

The management of Natura 2000 forest sites in Italy intends to implement all necessary and reasonable conservation initiatives to maintain or improve the conservation status of the features (habitat or species) for which the site was notified (object-oriented conservation strategy).

The decision-making process requires an adequate knowledge of the following elements: the assessment, through appropriate indicators, of the condition of the features of interest in the given site; the detection of actual (or potential) local factors that (may) lead to a deterioration of those habitats or species; the application of the most appropriate management measures to preserve the site's features of interest.

Depending on the local situation, habitats may be maintained by continuing the economic activities traditionally carried out on the site and by undertaking appropriate remedial action (restoration measures) when the habitat is in unfavourable conservation status or when local influence may lead to decline of its conservation.

Forests in Italian Natura 2000 sites frequently represent areas where human intervention has complemented nature to produce an ecological equilibrium: in this way the management of semi-natural areas, a key component in maintaining the coherence of the Natura 2000 network, becomes an effective means of development for the rural areas and forests they contain. In this way, the state of conservation of forest habitats becomes a quality indicator of the environmental integration of human activities and, at the same time, a continual testing-ground for the effectiveness of management guidelines adopted.

#### Specific technical guidelines

**I.** Under the Life project 'Verification of the Natura 2000 network and management guidelines', the Italian Nature Conservation Direction has produced a primary framework of guidelines for managing Natura 2000 sites and a reference book with specific management indications. To demonstrate the network structure of Natura 2000 sites, these management indications are arranged according to the 24 categories into which the Italian Natura 2000 sites have been classified on the basis of their respective features of interest. In 10 categories the feature of interest is one or more forest habitat.

This project is specifically focused on the following.

- Information provided by the reference book on the management of forest categories: habitats of interest; habitat ecological requirements; parameters for a statistical description, at national level, of main deterioration factors (such as fire risk, grazing pressure, percentage of built areas in the site) acting upon the classified sites; indicators for the assessment of habitat conservation status; indication of the actual (or past) forestry practices that lead to a deterioration of the habitats of interest; sustainable forest management guidelines, that is, suggested forest management actions in relation to habitat conservation status.
- Guidelines for the development of conservation measures for three categories specifically related to Mediterranean forest habitats, as outlined in the table below:

**II.** Because a high number of forest sites are contained in nationally protected areas, another technical instrument was produced to promote and clarify the correct ways for managing Natura 2000 forest habitats: 'Guidelines for a sustainable management of the forest resources in protected areas'. This guidance document, a result of collaboration between Italian Nature Conservation Direction and the Italian Academy of Forest Sciences, is also aimed at designing measures to maintain or restore the favourable conservation status of natural and semi-natural forest habitats of Community interest, taking into account the economic, social and cultural requirements and the regional and local characteristics.

*Contact:* *Mr Eugenio Dupré,*
*Tel. (39-(0)6) 57 22 82 00*
*E-mail: Dupre.Eugenio@minambiente.it*

| | ***Habitat of interest*** | ***Measures of prevention from deterioration factors*** | ***Sustainable forest management guidelines*** |
|---|---|---|---|
| Mediterranean *Quercus* sp.forests | 6310, *91H0, 9280, 9330, 9340 | Fire control, suspension or regulation of grazing activities | Habitat in favourable conservation status:<br>1. continuation of coppice cultivation by application of less intensive management methods favouring retention trees and compositional diversity;<br>2. high stand conversion.<br>Habitat in favourable conservation status:<br>1. high stand conversion, where ecologically and economically feasible;<br>2. extension of cultivation cycles, application of appropriate management practices for the restoration of coppices. |
| | 9250, 9350 | Contractual measures for the acquisition of nearby lands suitable for a (new) establishment of the *Q.trojana* and the *Q. macrolepis* | |
| Mediterranean and (oro) Mediterranean *Pinus* sp. Forests | 9530, *9535, 9540 | Fire and pests control | Active management oriented to in situ conservation of genetic diversity of endemic pines (P.nigra, P. leucodermis) |
| Mediterranean dune scrub | 2260, *2270, 5211, 5212 | Coastal erosion control, regulation of accessibility and circulation of visitors in sand dunes. | Habitat in unfavourable conservation status: restoration of vegetation cover on sand dunes by plantation of dune herbaceous and sclerophyllous species |

* Priority habitats as defined in Article 1(d) and listed in Annex I of the habitats directive (92/43/EEC).

## 8.1.9. Netherlands

The Dutch Government submitted the following comment.

### 1. Management of Natura 2000 sites

Nearly all Natura 2000 sites are managed by either the State Forest Service, or by private nature conservation organisations (Vereniging Natuurmonumenten and Provinciale Landschappen), although up to now even these organisations have hardly been involved in the process of the selection of Natura 2000 sites. This means that, so far, no special projects or initiatives to involve NGOs or private forest owners have been carried out and that nearly all designated forest sites are already under a nature conservation-oriented management.

The existing experiences with forest management on Natura 2000 sites are mainly based on information from the State Forest Service (Staatsbosbeheer), which suggests that the concept of 'sustainable forest management' offers a useful and acceptable approach.

For the State Forest Service, sustainable forest management can have different objectives:

- in forests with emphasis on natural values: management activities are directed at increasing natural values, for example, stimulating structural diversity, removing introduced tree species, very limited harvest or no harvest, etc.;
- in multi-functional forests with normal forest management: management includes normal harvesting (but never more than 70 % of the annual increment), no clear fellings or clear felling of very small (< 0.5 hectare) size, avoidance of summer fellings, preference for natural regeneration and presence of dead wood and older trees with diameter > 40 cm.

An important prerequisite for sustainable (forest) management is the availability of a management plan with, among other things, a description of the actual situation, relevant processes (both internal and external), goals and management methods (including monitoring) and an evaluation of the management results. Such a management planning system is used by the State Forest Service and the private nature conservation organisations, Natuurmonumenten and Provinciale Landschappen, and it seems to work quite well for all habitats in the Natura 2000 network.

The State Forest Service has set up a sound and common set of indicators as an indispensable tool for the evaluation of management results. Experience so far suggests that further elaboration is needed on the basic characteristics (indicators) for the quality of the habitat types (including forest types).

For the near future, some aspects related to the national selection and delimitation of the Natura 2000 habitats seem to **need further clarification**; in a few years we hope to have more information on the following issues:

- the proper maintenance of small units of certain forest habitat types. (Often small areas only have one age class or development stage of a forest type);
- the status (and management) of non-target forest habitats, within the designated areas (such as the areas of oak and pine forest within 'de Sallandse Heuvelrug', where only the heathland communities are priority habitats);
- the impact of recent dramatic changes in abiotic conditions. The most obvious case here is De Biesbos — this is a floodplain forest where, after completion of the Deltaplan, the tidal regime has been replaced by a much more stable water level, but many other areas are affected by long-term changes in hydrology and nitrogen inputs.

### 2. Economic use and SFM in relation to Natura 2000

A special aspect of the management of Natura 2000 forest sites in the Netherlands is the role of recreation. Basically, all Dutch State forest land is open to the public and recreational use is incorporated in the management planning. So far there is no clear evidence that recreational use is in conflict with the Natura 2000 regulations. However, further analyses of the effects of recreational use on the quality of the designated habitat types might be necessary. Recreational use often offers opportunities for compromise between economic benefits and conservation measures.

The EU-funded research project 'Niche markets for recreational and environmental goods and services from multiple forest production systems' (RES-project / FAIR1 PL95-0743) developed market solutions and strategies for various forest outputs. These, however, were considered to be unmarketable or barely marketable.

A case-study-report of the RES-project describes several successful cases of multi-functional forest management on (or in the vicinity of) Natura-2000 sites in the Netherlands.

*National Park Foundation — De Hoge Veluwe*

The park area of about 5 500 hectares belongs to a private foundation (50 % of woodlands, the rest are dunes and fens). The park is well known for its game species (red deer, boars and does). Besides the beautiful natural resources, a variety of recreational and information facilities are offered. Another component of the park is a famous art museum.

The park is fenced and entrance fees vary according to the number of vehicles, the ages of visitors and the duration of their stay. The capacity of the park is approximately 700 000 visitors. In total, 42 permanent and 40 freelance staff are employed. At present the park covers its costs.

*Fees for the recreational use of a national park — Province of Noord-Holland*

The province of Noord-Holland lets a nature preservation area to a waterworks. The waterworks firstly uses the soil water, but the managers have also developed the area for recreational purposes and charge an entrance fee. The landscape in the area is very beautiful and attracts five million visitors annually. The visitors can choose between 30 different hiking paths, and the area has panoramic views and restaurants. The waterworks markets the area independently. Retailers are involved and they get commission on the sale of tickets. At present, a profit is made. An important legal framework condition was regulations concerning water preservation.

*Tree crown path — State Forest Service*

A national forest administration (3 000 hectares of woodlands) offers an information path visiting tree tops. Other RES products are paths for hiking and riding, educational nature paths, tours with a horse-driven tram and activities for children.

*Nature preservation weekend — Vereniging Natuurmonumenten*

The nature conservation organisation offers a package of a nature preservation weekend at the Loonse and Drunense Duinen (2 500 hectares), which consists of a stay at a luxurious hotel, a slideshow, a visit to an information centre, a bicycle tour, a bird-watching trek and an information package.

*Environmental sponsoring foundation — Het Gelders Landschap*

The nature preservation organisation, Het Gelders Landschap, maintains approximately 9 500 hectares of nature preservation areas, and for this purpose acquires sponsors for financing. The main sponsors are three waterworks which finance, for example, the transition from conifer plantations to hardwood forests to improve groundwater supply.

### 3. Other instruments to promote and support sustainable forest management

In a densely populated country like the Netherlands, the ecological and social forest functions have become more important than timber production. This situation is reflected in existing structures and regulations to support sustainable forest management which can play an important role in financing conservation-oriented management on Natura 2000 forest sites.

*Nature management scheme*

This scheme provides output-based financial incentives to private forest owners for the provision of social and ecological forest functions. The level of financial compensation is based on the type and level of services (biodiversity, landscape, recreational, environmental services) provided by the forest. A contract is signed between the forest owner and the government in which both parties agree upon a set of measures to be taken to achieve specified ecological and other goals.

*Tax exemptions and dispensations*

Three tax exemption rules, based on the Estate Act of 1928, are relevant for the forest sector:

- woodlands (and nature areas) with public access get dispensation from inheritance tax;
- legal bodies and private owners are exempted from property taxes for forests;
- income from forestry and nature management is free from income tax (but financial losses are not deductible).

According to the nature preservation law, landowners can benefit from a special tax advantage system on condition that they leave at least 30 % of their property under forest cover.

*Contact person:* *Mr Ghijs van Tol*
*E-mail: g.van.tol@eclnv.agro.nl*

## 8.1.10. Spain

The Spanish Ministry of the Environment has sent three examples of multi-functional forest management in large public and mixed property estates which are both SPAs and pSCIs. One example shows that the existing management can sometimes fit well under Natura 2000. In the other example, adequate management concepts were developed with support of the regional rural development plan.

As environmental and nature protection issues are a decentralised matter in Spain, regional governments have the responsablity of producing detailed guidelines for the management of Natura 2000 sites. Many regional governments have already enacted legislation on forest management plans that takes into account Natura 2000, and others are to follow ([30]).

### 1. The Valsaín forest in Segovia

The Valsaín forest complex covers almost 14 000 hectares on the northern slopes of the Sierra de la Guadarrama. An estate that formerly belonged to the crown, it has now passed into public hands and is managed by the autonomous Spanish National Parks Service. The forest is dominated by *P. sylvestris* with associated broadleave formations. It has been managed for the production of softwood timber of exceptional quality for centuries and current production is estimated at approximately 35 000 $m^3$/yr.

As well as the historic and current importance of commercial timber production and sawmilling, the area has always offered an exceptional range of biodiversity, which is why it was designated under Natura 2000. Over 800 plant species have been recorded and over 100 species of nesting birds, among which 10 from Annex I to the birds directive have been observed. The continuous presence of *Aguila adalberti* and *Aegypus monachus* as well as several endemic bat species has been confirmed. There are 54 species of endemic invertebrates in the area and over 400 insect species have been recorded.

Nevertheless, it is a truly multi-functional forest, in which different types of use such as timber cutting, grazing, collection of non-wood products, nature conservation and recreation are all being maintained by a forest management system that is based on cyclic selective group cuttings and natural regeneration. For special conservation purposes, one of the 25 *cuarteles* (management units) has been set aside as a non-intervention area. **In the case of the Valsaín forest, designation under Natura 2000 has not brought many changes in the existing management**.

### 2. The Alduide area in Navarra

Two thirds of this complex of more than 9 000 hectares in the foothills of the western Pyrenees consists of semi-natural beech stands, with the remainder under different types of traditional pastoral use. More than half of the area under beech is considered to be of Community importance, and pastoral use is in decline. The site is nearly completely owned by local public entities. The area is known as a major woodpecker site and has some of the best populations of river trout.

**In this case, the Natura 2000 designation has caused important changes in the management of the site because the previous forms of economic use had provoked a substantial decline in natural resources.**

- Positive aspects of previous management were the use of natural regeneration, the very marginal use of exotic species, a balanced age–class distribution, very effective protection against erosion and good conservation status of forest fauna.

([30]) See http://www.larioja.org/ma/econoticias/indexgob.htm for an example from La Rioja

- Negative aspects of the former management (from a conservation point of view) were the concentration on one economic species (*Fagus sylvatica*), the lack of ecological links between different forest stands, the build-up of standing timber volume in homogenous stands with little clearings or understories.

Under the rural development plan (2000–06) for Navarra, a project to develop an adequate management plan for the area was carried out in consultation with all local stakeholders. The agreed management plan included not only specifications of exploitation levels and regeneration techniques, but also an obligation to reinvest a fixed percentage of revenue in activities related to forest use and nature protection. Specific guidelines have been agreed to move away from the monoculture of beech, to establish more gradual transitions between forest stands and other types of land use, to increase the amount of dead wood on the forest floor, to increase the structural variability of the forest stands by opening the canopy, to allow non-wooded clearings to subsist and to manage wetland areas and water courses for conservation purposes.

#### 3. The 'Montes de Aralar' in the Basque Country

The Aralar Natura 2000 site in the Gipuzkoa province covers over 10 000 hectares of which two thirds are publicly owned. Multi-functional use in the past has produced a varied landscape dominated by beech forest ('Atlantic acidophilous beech forest' / Hab. No 9120) and extensive pastures ('Species-rich *Nardus* grasslands' / Hab. No 6230). One of the problems with the management of this site is that the natural beech stands are in a state of severe degradation because of a long history of exploitation under coppice and overgrazing. The regional Basque government has approved separate management plans for the wooded parts and the open landscapes with the aim of achieving a more balanced use of the natural resources. In the case of the beech forests, this is done by the implementation of a high forest restoration plan that is based on quite straightforward forest management: adoption of a rotation period of 140 years and subdivision of the existing stands in seven regeneration sectors. Timber production is an essential part of the scheme and occurs through group cutting, allowing the regeneration process to succeed according to the specific light requirements of *Fagus sylvatica*.

## 8.1.11. Sweden

The Conservation Section of the Swedish Environmental Protection Agency (SEPA) submitted the following best practice examples on Natura 2000 and forests. It is interesting to note that both of these examples relate to cooperation of the public and the private sector.

***Example 1:*** *Project Snöberget*

This is an example of a cooperation project between the county administration, the Regional Forestry Board and a private forest company SCA. The Nature Conservation Association (NGO) was also involved. The scope of the project was to reach both conservation and production goals in the area through ecological landscape planning and to get the authorities to cooperate on this. The project has involved ecological landscape planning, the development of new methods and the establishment of a nature reserve. Geographical information systems (GIS) also played an important role.

In 1993, the Forestry Board was given new goals, equally important for production and environment. Previously there was a production goal, which included a consideration for nature conservation. The State authority, the county administration, has the main responsibility for the creation of nature reserves.

Snöberget is situated in the north of Sweden in the county of Norrbotten and the municipality of Luleå. The involved bodies have all participated financially with their normal funding.

The result of the project is a model, the Snöberget Model, which is a concrete example of how the planning process should proceed when important conservation interests conflict with strong forestry interests. It is also an example of how the economical responsibility for a landscape's biological resources can be shared between the State and the forestry companies.

*Contact: The Regional Forestry Board, Håkan Håkansson.*



***Example 2:*** *Project white-backed woodpecker landscapes and new nature reserves (Fjornshöjden)*

This is an example involving the same groups as above, the Swedish Conservation Association, the Forestry Board and the county administration. The Swedish EPA was also involved. The white-backed woodpecker *Dendrocopus leucotos* is endangered in western Europe. Its most important habitat is the 'western taiga'. The population of these birds has declined considerably, mainly because of loss of habitat. The scope was to preserve and develop natural boreal forests with aspen to improve the white backed woodpecker habitat and to ensure the landowners were interested, involved and positive to the necessary measures. Among the activities were nature reserves, biotope reserves, and conservation agreements as well as environmental measures. The work was based on landscape planning. An information campaign targeting the landowners was launched in order to raise awareness of the need to preserve these ecologically important natural forests. The project also involved practical habitat management such as forest fire.

The project concentrated on 10 areas in southern Sweden where 'western taiga' is the dominating habitat. The total area for these 'Woodpecker landscapes' was some 20 000 ha. Fjornshöjden for example is situated in the middle of Sweden in the county of Värmland and municipality of Årjäng. This was financed by LIFE Nature and the groups involved financed the Swedish part with their normal funding for nature reserves and conservation agreements. A total of SEK 30 million (EUR 3 million) were spent, of which half came from LIFE Nature.

#### Results

The total area protected as nature reserves (NR), biotope reserves (BR) and conservation agreements (CA) was 1 913 ha. Another 250 ha were managed to increase natural values (AF). This included conservation burning, increasing the abundance of dead wood by girdling, removal of spruce to increase the proportion of deciduous trees, etc. It was important to involve the landowners in all parts of the project. Voluntary conservation and environmentally adapted forestry (EMF) without economic compensation cover a large part of the area.

Habitat restoration is being followed by experimental introduction of new specimens to increase the population size. This is being coordinated by a group with representatives from the Swedish Society for the Conservation of Nature, the Swedish Environmental Protection Agency, the National Board of Forestry, Stora-Enso forest-company and the Swedish University of Agricultural Sciences. This activity is being continuously evaluated.

*Contact person: Ms. Helene Lindahl,*
*Tel. (45-8) 698 14 22*
*E-mail: helene.lindahl@naturvardsverket.se*

## 8.1.12. United Kingdom

The UK Forestry Commission submitted information about the Sunart Oakwood Project as a good example of forest management in Natura 2000 areas. A characteristic element in this project is that it has managed to secure funding from different sources while continuously and patiently working towards the same objectives over a considerable period of time.

**Location:** Loch Sunart Atlantic Oakwoods, Ardnamurchan, Lochaber, Scotland.

#### The Sunart Oakwood Project

This project is a successful woodland restoration project covering almost 3 000 hectares which, from modest beginnings, has grown into a major woodland initiative. It is driven by efforts to conserve and restore the Atlantic oakwoods, but also to maximise rural development benefits provided by the woodlands to the fragile local rural communities of the area. The key to success has been the development of strong working partnerships, particularly with the community but also between agencies. These partnerships have helped to secure substantial funding, particularly from Europe, to implement restoration, community engagement, recreation and tourism work, to date in excess of GBP 1.5 million.

*Sources of public funding*

- **Domestic**. Forestry Commission (through the Woodland Grant Scheme and Forest Enterprise), The Highland Council, Scottish Natural Heritage,

Local Enterprise Company (Lochaber Enterprise), Millennium Forest for Scotland (Lottery), Crofters Commission and Rural Challenge Fund (Scottish Executive).

- **European**.
  - Leader 2: Initial survey of threats to oakwoods, chainsaw training, recreation and interpretation facilities and project manager.
  - LIFE Nature: Removal of threats on public and privately-owned SAC and adjacent catchment. Focus on control of grazing and rhododendron and removal of planted conifers, extended to access and interpretation with additional bid.
  - Objective 1 transitional fund administered by the Highlands & Islands Partnership Programme — Developing recreation, green tourism, community involvement and project staffing.

#### Best practice demonstrated by the project

Undertaking positive conservation work with the additional objective of maximising rural development opportunities has led to considerable local input to the project, a widening of its objectives and local economic and conservation benefits.

*Community involvement:*

- wide consultation using planning for real techniques;
- formation of steering group with strong community representation to coordinate the project;
- participation of local schools, for example, in developing the interpretation and establishing tree nurseries;
- employment of locally based project manager and community ranger;
- gaining local political support for restoration and expansion of the oakwoods;
- programme of meetings and events to demonstrate and discuss opportunities;
- greater awareness of the importance and potential of the area's woodlands and increased community capacity in woodland management;
- participation of local private woodland owners in positive forest management, in some cases as a diversification from agriculture.

*Economic benefits:*

- a locally run forestry and environment training programme resulting in an improved local skills base and a pool of locally based skilled contractors;
- employment of these local contractors to undertake most of the restoration work. Contractors have been employed on a flexible basis to fit in with other job commitments such as tourism, fishing and crofting. Some have invested in machinery capable of smaller-scale forestry work;
- improved access and interpretation of the woodlands and marketing through a local tourist association;
- support in the supply of timber to a locally based sawmill, and other small-scale wood users.

*Conservation benefits:*

- ongoing improvement in the condition of the woodlands through removal of threats (grazing, rhododendron, conifers and neglect), improving extent, age structure and species mix;
- ongoing refinement of restoration techniques in the light of experience;
- widespread monitoring of regeneration, butterfly and deer populations to inform management decisions;
- public education —'global' environmental issues such as biodiversity, sustainability, etc. addressed through local action.

*Wider objectives:*

- public sector owners acting as a catalyst for demonstrating restoration and the opportunities for rural development, and attracting public funding to private owners;
- formation of the Sunart Oakwoods Research Group to undertake community-based survey and recording of archaeological features including past woodland management systems;



- innovative partnership approach between public and private owners to collectively manage grazing including deer control, now extending to wider management issues;
- a study completed by Professor George Peterken and Dr Rick Worrell identified the optimum conservation management of the SAC oak woods. The potential for this management to support rural development has established a new and more widely applicable benchmark for the integration of best practice conservation management and local socioeconomic benefits;
- long-term development of a forest habitat network based on the SAC core but linking other native and non-native woodlands in the area.

The provision of substantial EU funding has been crucial not in realising the oak wood restoration but also to unlock the rural development benefits that are provided by both public and private woodlands. The link between the designation of sites and EU financing has led to growing awareness of the practical benefits for communities. Later, the designated area was extended to include some additional woodlots where conifers have been removed and conservation-oriented management is underway.

*Direct contact:* *Jamie McIntyre,*
*Sunart Project Manager,*
*Forest Enterprise, Lochaber Forest District, Torlundy, Fort William*
*E-mail:*
*jamie.mcintyre@forestry.gsi.gov.uk*

*Natura 2000 coordinator at the Forestry Commission:*
*Mr Gordon Patterson,*
*Tel. (44-131) 314 64 64*
*E-mail:*
*gordon.patterson@forestry.gsi.gov.uk*

## 8.2. Examples from selected LIFE Nature and LIFE Environment projects



| *LIFE project data* | *Project description* |
|---|---|
| Country: Austria<br><br>Title: Ramsar management for March-Thaya floodlands (LIFE95 NAT/A/000768)<br><br>Beneficiary: Distelverein, Franz-Mair-Strasse 47, 2232 Deutsch-Wagram Österreich<br><br>Contact: Mr Michael Kaplan<br>Tel. 432 24 75 11 08<br>Fax 43 22 47 51 10 89<br><br>Duration: 1 April 1995 to 1 July 1998<br><br>Total budget: EUR 1 963 200<br><br>LIFE contribution: EUR 981 600 (50 %) | The March-Thaya floodplain landscape east of Vienna is unique in Austria. The lower March river, with its shallow gradient, is a typical meandering lowland river. Its peculiar hydrodynamic regime (slow currents, extensive spring flooding) and the effects of the continental climate combine with the traditional extensive farming practised here to generate a wide range of biotopes attractive to birds in particular.<br><br>The aim is to preserve this wetland of European significance, which simultaneously has cultural heritage value as an example of traditional farmland. Ecologically sustainable forms of land use and resource exploitation are to be fostered or taken up again (for example, grazing of periodically inundated meadows) without formalising this too excessively and thereby alienating the community. Farmers, hunters, fish farmers and forest owners will be approached as potential partners in joint actions for sustainability, and intensive public relations work will be carried out to gain local support.<br><br>Technical measures include initiating restoration of natural conditions in the rivers to improve the hydrological regime of the floodplains in collaboration with the river management authorities, as well as management actions for the meadows and alluvial forests. Trilateral cooperation with the Czech and Slovak Republics will be strengthened. |
| Country: Denmark<br><br>Title: Restoration of large areas of natural forest for the benefit of endangered birds, plants and biotopes (LIFE95 NAT/DK/000216) | The Danish government launched, in 1992, an ambitious 50-year national strategy for Denmark's natural forests. This LIFE project is destined to help implement that part of the programme relating specifically to the conservation of the 14 most strategically located and important candidate SAC forest sites. Thus, approximately 65 hectares of priority natural forest will be purchased, management agreements will be negotiated on 400 hectares of private land and urgent management work undertaken on 700 hectares of land within two State forests. |

| *LIFE project data* | *Project description* |
|---|---|
| Beneficiary: Ministry of the Environment, National Forest and Nature Agency, Haraldsgade 53 2100 Copenhagen Ø Danmark<br><br>Contact: Mr Mickeal Kirkebaek<br>Tel. (45) 39 27 20 00<br>Fax (45) 39 27 98 99<br><br>Duration: 1 April 1995 to 1 October 1999<br><br>Total budget:<br>EUR 2 430 800<br><br>LIFE contribution:<br>EUR 1 215 400 (50 %) | Finally, if the national strategy is to succeed, there must also be a change in perception amongst the foresters themselves. Thus, an essential component of the project will be the running of a nationwide conservation training course for foresters as well as other public-awareness initiatives.<br><br>As our knowledge of endangered fauna and flora improves, it is becoming increasingly clear that natural broad-leaved forests are tremendously important for safeguarding Europe's biological diversity. However, throughout Europe, and especially in Denmark, these natural forests have been disappearing at a constant and rapid rate over the centuries, originally, to make way for agricultural land but, more recently, to be replaced by highly productive commercial forest plantations. Today, only around 34 000 hectares of Denmark's natural forest remains, representing less than 1 % of its territory. Yet, despite their scattered and fragmented state, they are still of high conservation value. Amongst others, they hold eight priority habitat types under the habitats directive and numerous Annex I species under the birds directive. This importance is reflected in the number of candidate forest SAC sites put forward by Denmark. Their conservation is, however, far from easy, especially when they are in private ownership, as they are of considerable commercial value. Moreover, in State forests as well as in private forests, any change in management practices for conservation benefit, even with little or no economic impact, requires understanding and acceptance by the foresters themselves. |
| Country: Finland<br><br>Title: Quark Archipelago (LIFE97 NAT/FIN/004110)<br><br>Beneficiary: Länsi-suomen ympäristökeskus (West Finland Regional Environment Centre) Koulukatu 19a — PO Box 262 65101 Vaasa Finland<br><br>Contact: Ms Susanna Ollqvist<br>Tel. (358-61) 325 65 11<br>Fax (358-61) 325 65 96<br><br>Duration: 1 February 1997 to 1 January 2001<br><br>Total budget:<br>EUR 2 323 480.89<br><br>LIFE contribution:<br>EUR 1 161 740.45 (50 %) | The miracle is that Merenkurku is still so unspoilt. In order to properly integrate nature conservation, recreational use and local people's traditional use of land (hunting, berry-picking, firewood cutting, etc.), LIFE will complement other initiatives towards sustainability funded under the ERDF, Interreg and Regulation 2078/92, by drawing up a management plan in collaboration with landowners, tourism operators and other local interest groups for part of the archipelago. It will include land-use zoning and a tourism master plan so that recreational use and small-scale nature tourism dovetail with the aims of nature conservation.<br><br>Meanwhile, LIFE will also quadruple the size of the protected core areas, by financing land purchase and compensation for giving up rights to build holiday homes or exploit forests. Planted forestry monocultures will be removed while grazing by sheep and hay-making will be started up again in grove and meadow habitats.<br><br>Felling of forests, reforestation with pine, uncontrolled nature tourism and boating, building of holiday homes and the decline of traditional grazing are all looming over the internationally unique Merenkurku (also known as Kvarken or Quark) Archipelago. Geomorphologically unusual in being one of the best examples in the world of the long and narrow De Geer moraines, a rare formation shaped by the last Ice Age, Merenkurku's bizarre topography is a product of the withdrawal of the icecap, submergence by the Baltic Sea and rapid isostatic uplift (about 9 mm per year) of the land in reaction to the disappearance of the ice. This foundation in turn hosts an extraordinarily representative succession series (vegetation and geoformations): lagoons, fladas and glo-lakes; barren heaths, old spruce-dominated mixed forests, birch forest, shore meadows and park-like birch groves grazed by sheep. This is the northernmost place where the marine fauna and flora of the Baltic Sea occur. |
| Country: France<br><br>Title: Forests and linked habitats in Burgundy (LIFE99 NAT/F/006314)<br><br>Beneficiary: Direction Régionale de l'Office National des Forêts de Bourgogne 29 rue de Talant 21000 Dijon, France | The project aims to define and implement sustainable methods of managing woodland environments by striking a balance between the economic, social and environmental functions of the forests. It is based on a close partnership between the public authority responsible for managing public forests in France (the ONF) and a regional NGO (Conservatoire des sites naturels bourguignons). The work will be carried out in the public forests of the nine pSCI involved in the project, and will lead to the development of a sustainable forest management strategy which can also be used for private forests. Over 500 hectares of private forest habitats of special interest need to be included to facilitate this management strategy. Forest management plans and restoration work programmes will be drawn up for all these sites in order to apply the aforementioned strategy. Arrangements will be made to compensate private owners for any operating |

| *LIFE project data* | *Project description* |
|---|---|
| Contact: M. Jean-Pierre Perrot<br>Tel. (33-3) 80 76 98 35<br>Fax (33-3) 80 76 98 49<br><br>Duration: 1 May 1999 to 1 December 2002<br><br>Total budget:<br>EUR 2 048 599.22<br><br>LIFE contribution:<br>EUR 1 024 299.61 (50 %) | constraints. Limits on public use will be imposed. Finally, it is anticipated that regulations will be drawn up to protect those forests with the most outstanding features. The 11 000 hectares covered by the nine proposed sites of Community interest involved in the project include 7 500 hectares of public forests (beech, oak, maple, box and juniper pioneer vegetation, etc.) and associated open habitats (calcareous grasslands and meadows, scree, limestone pavements, etc.). The area contains 20 types of habitat of Community interest, six of which have priority status, and 17 of the species listed in Annex II to the habitats directive, including the plants *Cypripedium calceolus* and *Liguria sibirica* and the insect *Callimorpha quadripunctaria*.<br><br>These woodland environments are struggling against economic demands resulting from the intensification and standardisation of forestry production techniques or, conversely, suffer from neglect. In order, therefore, to conserve at least some of the natural habitat of these environments, changes must be made to the methods of forestry management employed, in order to nurture all the stages of plant growth, in both time span and area, through actions ranging from the maintenance of open habitats to the preservation of old trees. |
| Country: France<br><br>Title: Integrating biodiversity in the management of forest ecosystems<br>(LIFE95 ENV/F/000542)<br><br>Beneficiary: Institut pour le développement forestier<br><br>Contact: M. Gérard Dume<br>Tel. (33-1) 40 62 22 80<br>Fax (33-1) 45 55 98 54<br><br>E-mail: idf.paris@wanadoo.fr<br><br>Duration: 1 January 1996 to 1 January 1999<br><br>Total budget:<br>EUR 839 593.26<br><br>LIFE contribution:<br>EUR 406 007.69 (48.36 %) | The creation of the Natura 2000 network required by the habitats directive has deeply disturbed the French country actors, especially the forest owners and managers. In fact, they are not yet familiar with such environmental questions as forest biodiversity, though they officially appear on the forest policies in France, Wallonia and the Grand Duchy of Luxembourg.<br><br>Therefore it was necessary to initiate a broad programme of awareness-raising, information and training for the locally elected councillors and the forest professionals:<br><br>■ on the forest habitat types and species from Annexes I and II, including birds (Directive 79/409/EEC),<br><br>■ on the principles and good practices for the sustainable management of forest sites with ecological interests in the three member countries.<br><br>The first aim of the project is to search for representative field examples of various habitat types and species habitats on Directive 92/43/EEC whose past management operations are known. Some of these will make up a demonstration system of reference in the field.<br><br>A field-guide to recognition and sustainable management of the forest species and habitats of European interest within the Atlantic and continental biogeographic regions of France, Wallonia and Luxembourg, will be published. It will include a descriptive part and an operational part, stemming from previous field observations.<br>This book will be an educational aid for an awareness-raising, information and training programme for local elected councillors, professionals in charge of forest economic organisations and managers of public and private forests. In that respect, the demonstration system of reference will serve to assist the field trips. |
| Country: France<br><br>Title: Sustainable management of deciduous non-even-aged high forests. (LIFE99 ENV/F/000477)<br><br>Beneficiary: Société Forestière de Franche-Comté, 22bis, rue du Rond-Buisson, 25220 Thise, France | Some tools for a sustainable non-even-aged deciduous high forest management already exist. But there is a real need for complementary tools, and above all for ensuring the demonstration, development and diffusion of all these tools, in order for them to be largely and efficiently applied.<br><br>The project then contains four operations:<br><br>■ elaborating complementary tools, decision making, management and monitoring tools. They will be constructed by studying existing information (forest management plan, databases, etc) and by discussions between experts of various origins;<br><br>■ setting up a demonstration network of these tools in conjunction with forest-owners: a forest management plan on 1 000 pilot hectares and 50 demonstration sites;<br><br>■ carrying out development operations (training, sensitising, popularisation) aimed at forest owners and managers: involving some 1 100 persons; |

| LIFE project data | Project description |
|---|---|
| Contact: Ms Marie Cosar<br>Tel. (33-3) 81 47 47 37<br>Fax (33-3) 81 80 26 00<br><br>Duration: 1 September 1999 to 1 March 2003<br><br>Total budget: EUR 596 311.95<br><br>LIFE contribution: EUR 296 326.59 (49.69 %) | ■ ensuring a wide and efficient dissemination of the results through the diffusion of informative documents (sylviculture guide, decision-making document for the choice of the treatment, forest management plan scheme, monitoring tools document, videotape), publications (Bulletin de la Société Forestière de Franche-Comté, Revue Forestière Française, Bois National...) and international meetings.<br><br>Communes will be closely associated with the whole process as forest-owners.<br><br>Whereas even-aged high forest management has been used for a long time and is now well known, non-even-aged high forest management is innovative and remains badly mastered in deciduous forests: it is therefore handled in an intuitive and limited way. Now, in order to achieve sustainable forest management, it is necessary to have several well-mastered management methods at our disposal to adapt to the diversity of local situations. In particular, non-even-aged high forest management allows in some cases for a better integrated environment. Finally, the intuitive approach to non-even-aged management entails high risks of deviating from a sustainable management path.<br><br>In that context, the project aims to provide forest-owners (communes and private owners) and forest managers with reliable technical tools for developing sustainable non-even-aged deciduous high forest management. The project will be conducted in Franche-Comté, the most forested region in France where partners are used to working in a concerted way. Supported by the EU, the Regional Council of Franche-Comté, the Ministry of the Environment and the Ministry of Agriculture, it will involve partners of public and private forests (SFFC, ONF, CRPF and owners), experts and scientists.<br><br>At its completion (March 2003), the project will permit:<br><br>■ a sustainable non-even-aged high forest management of deciduous forests (regeneration, equilibrium, stability);<br><br>■ biodiversity enhanced through diversification of management methods;<br><br>■ in some contexts, better preservation of the ecosystem and sensitive landscapes;<br><br>■ economic advantages for owners;<br><br>■ gain in rural employment. |
| Country: Germany<br><br>Title: Integrated Habitat Protection for the Grouse in the Black Forest (LIFE98 NAT/D/005087)<br><br>Beneficiary: Forstliche Versuchs- und Forschungsanstalt Baden-Württemberg<br><br>Contact: Mr Rudolf Suchant<br>Tel. (49-761) 40 18-0<br>Fax (49-761) 40 18-333<br><br>E-mail: suchant@fva.lfv.bwllfv.bwl.dbp.de<br><br>Duration: 1 May 1998 to 1 May 2002<br><br>Total budget: EUR 228 651.21<br><br>LIFE contribution: EUR 114 325.61 (50 %) | The Feldberg in the southern Black Forest is, at 1 493 m., the highest mountain in Baden-Württemberg and a popular destination all the year round for tours and outdoor sports. To serve the two million visitors a year, a dense network of hiking tracks, cross-country skiing routes and downhill ski fields has been created, and it is planned to expand this further. Simultaneously the Feldberg area is, because of its altitude, one of the last refuges of sub-Alpine fauna and flora outside the Alps themselves. Typical species are two kinds of grouse, the capercaillie and the hazel grouse. Wherever they or their tracks are spotted in the forests, one can be sure that other characteristic species of the higher altitude forest habitats are not far off. However, the number of grouse have been declining radically for many years, and not only on the Feldberg — the Black Forest is, in fact, a last stronghold for grouse between populations in the Alps and small groups in the central European ranges such as the Vosges and Ardennes. The tourist infrastructure and its year-round use is certainly one of the contributing factors to the decline, but forestry, by fostering high-yield plantations unable to fulfill the birds' habitat requirements, must also bear part of the blame.<br><br>Baden-Württemberg's Forestry Research Institute is taking on the role of advocate for the grouse, and will try to involve all interested parties in establishing a forward-looking, landscape-oriented tourism and a more ecological kind of forestry. This will improve the habitat conditions for the grouse and other species. The Institute is drawing on a model already applied successfully in the central Black Forest and will be aided by experienced colleagues from a similar LIFE (Nature) project in the French Jura. The objective is to achieve and maintain grouse populations able to survive in the longer term and to augment the value of the unique forest habitats on the Feldberg. The project will prepare and implement an integrated resource management plan which |



| *LIFE project data* | *Project description* |
|---|---|
| | bears the interests of forestry, tourism and conservation in mind. The idea is that all concerned collaborate from the beginning. Instead of unilateral bans, clever visitor guidance and well-targeted alterations to forest structures should improve the prospects of survival for the grouse and act as a model for similar projects. |
| Country: Germany<br><br>Title: European Network of Natura 2000; management plan for the future nature reserve Hainich (LIFE95 NAT/D/000070)<br><br>Beneficiary: Thüringer Ministerium für Landwirtschaft Naturschutz und Umwelt<br><br>Contact: Mr Uwe Spangenberg<br>Tel. (49-361) 21 44 330<br>Fax (49-361) 21 44 750<br><br>Duration: 1 November 1995 to 1 January 1999<br><br>Total budget: EUR 1 151 200<br><br>LIFE contribution:<br>EUR 575 600 (50 %) | The planned establishment of a national park in the Hainich to preserve the beech forests and the succession zones, could at the same time offer the local communities promising opportunities and could function as a catalyst for economic development.<br><br>The LIFE project's principal task is therefore to draw up a management plan which, besides the usual planning aspects, will also grapple with social and economic issues, that is, how the planned national park can contribute to the local economy. To gain the support of the local inhabitants, the management planning work will be accompanied during the project by intensive public relations work, in particular through exchanges with mayors and other representatives of communities located in existing national parks elsewhere.<br><br>The Hainich zone covers 20 000 hectares of a mainly forested ridge in the Thuringian Basin, over which almost no roads run and which boasts the largest coherent deciduous wood in Thuringia. Two recently-abandoned Red Army military training areas have become a showcase for undisturbed ecological succession from bare ground to deciduous forest; with their total surface area of 8 000 hectares they are the most extensive sites in Germany where succession towards a beech forest can be observed. Other curiosities in the Hainich are the 4 000 hectares of 'Plenterwälder' (forests shaped by centuries of traditional selective logging) and 25 hectares of juniper heathland.<br>Because the area lay near the borders of the GDR, it remained relatively undisturbed, but since the Wall came down it has been under constant threat from infrastructure development plans. As in many other parts of eastern Germany, local unemployment is very high, so that decision-makers are putting all their efforts into working out concepts for the economic revival of the district. |
| Country: Greece<br><br>Conservation and management of Mainalo Mountain (LIFE99 NAT/GR/006481)<br><br>Conservation and management of Mainalo Mountain<br><br>Beneficiary: Arcadia SA — Development Agency of ArcPref<br>Eleftheriou Venizelou, 34<br>22100 Tripolis, Ellas<br><br>Contact: Mr Panayiotis Giannopoulos<br>Tel. (30-71) 23 41 24<br>Fax (30-71) 23 42 09<br><br>E-mail: plan@tri.forthnet.gr<br><br>Duration: 1 January 2000 to 1 January 2003<br><br>Total budget:<br>EUR 1 418 515.68<br><br>LIFE contribution:<br>EUR 709 257.84 (50 %) | The project aims to promote the legal protection, conservation and sustainable management of the region. One of the main measures is to design and implement a management plan that focuses on managing the black pine forests. The project also aims to reorganise the intensive silviculture by applying a forestry certification system (ISO 14000). Lastly, it plans to create an action plan for tourist access so as to help the local authorities succeed in drawing up a sustainable plan for their tourism activities. The specific protection and conservation measures include fencing off sensitive regions, managing vegetation and creating small lakes for the amphibian populations. It is also planned to limit access to some forest tracks, maintain forest footpaths and set up an information centre and two kiosks. The awareness-raising actions include producing information brochures, posters and slides and organising seminars for forest ecosystem users.<br><br>Mount Mainalo is in the centre of the Peloponnese and exemplifies a well-preserved natural and cultural heritage. It is composed of a vast natural forest area, Mediterranean-type thickets and alpine meadows, which are surrounded by a number of small villages of great historical and cultural interest. The geographic location of this region increases the mountain's ecological value, as Mount Mainalo forms a natural link between the massif of the northern Peloponnese and the mountains of the southern (Taigetos) and eastern (Parnonas) Peloponnese. Because of the value of the timber resources, the region is subject to major commercial silviculture and the construction of an extensive network of forest tracks. The habitats of the alpine meadows have the problem of overgrazing and are simultaneously threatened by the uncontrolled development of mountain tourism. These activities have the result of fragmenting and destroying the biotopes. Combined with the pressure caused by hunting and the illegal gathering of plants, this creates unfavourable conditions for the endemic plant species and fauna listed in Annex II to Directive 92/43/EEC. Despite the ecological importance of the region, no appropriate legal framework exists to protect its natural resources. |

| LIFE project data | Project description |
|---|---|
| Country: Italy<br><br>Title:<br><br>Integrated plan of action to protect two Natura 2000 sites (LIFE98 NAT/IT/005112)<br><br>Beneficiary: Università degli Studi di Udine, Dip. di Scienze della Produzione Animale Via S. Mauro, 2 33010 Pagnacco (UD) Italia<br><br>Contact: Mr Piero Susmel<br>Tel. (39-432) 65 01 10<br>Fax (39-432) 66 06 14<br><br>E-mail:<br>Piero.Susmel@dspa.uniud.it<br><br>WWW-Page:<br>http://www.uniud.it/dspa/<br><br>Duration: 1 January 1999 to 1 January 2002<br><br>Total budget: EUR 665 799.42<br><br>LIFE contribution:<br>EUR 332 899.71 (50 %) | The project intends to introduce an integrated system of wildlife management and forest grazing to the two pSCIs which is to allow conservation to be combined with social and economic objectives. One of the first targets is to have the Tarvisio Forest designated SPA under the birds directive. Elaboration of a management plan will be accompanied by a series of actions geared towards the preservation of the 7 habitats and 14 species of Community interest occurring there. Bringing some order to tourism, elaborating a management plan for hunting and involving local interest groups in forestry and livestock management will, together with PR work, aim at reducing human pressure. Actions in the forestry sector, besides improving the habitats, will aim at maintaining and expanding populations of *Rosalia alpina*, *Lynx lynx*, *Canis l*upus, *Ursus arctos* and various bird species listed on Annex I to the birds directive.<br><br>The Tarvisio forest, strategically located where the borders of Italy, Austria and Slovenia meet, is being used as a corridor by bears from these two countries to recolonise Italian habitats. Because the forest is also important for many bird species of Community interest, the site manager, the Ministry of Agricultural Policy, has launched the administrative procedure to have it designated SPA. The two pSCIs already present at the site display a very rich and heterogeneous vegetation: considerable tracts are covered in *Pinus nigra* forests, mixed beechwoods, Alpine calcareous grasslands, Alpine and subalpine heaths and Nardus grasslands. Besides the brown bear, other priority species such as the wolf and the *Rosalia alpina* beetle occur.<br><br>Summer and winter tourism is the main human impact, and it is often disorganised, taking no account of the forest's equilibria and the biological cycles of wildlife. As well as tourism, hunting is popular, and is directed with particular intensity at ungulates and at game birds. The abandonment or modification of traditional forest grazing means that the meadows are shrinking and the typical creatures of the forest environment are declining. |
| Country: Italy<br><br>Title: Valgrande Wilderness (LIFE95 NAT/IT/000764)<br><br>Beneficiary:<br><br>Ente Parco Nazionale Valgrande<br>Villa S. Remigo, Via S. Remigo<br>28922 Verbania Pallanza (VB)<br><br>Contact: Ms. Franca Olmi<br>Tel. (39-323) 55 79 60<br>Fax (39-323) 55 63 97<br><br>E-mail: parco.nazionale.valgrande@comunic.it<br><br>www: http://www.parks.it<br><br>Duration: 1 January 1995 to 1 January 1999<br><br>Total budget:<br>EUR 228 800<br><br>LIFE contribution:<br>EUR 114 400 (50 %) | Through LIFE, the EC will provide the necessary support to elaborate the management plans which follow from these strategic priorities. Specifically, plans will be drawn up for forest management, controlled access to the park, wildlife management, land use and the ecological management of the park..<br><br>The park will set up a geographic information system (GIS) in collaboration with the regional and national authorities, which will allow networking with the databases of these bodies, in order to keep tabs on the development of the plans and to promote their implementation. Public awareness campaigns will also be launched to inform and involve the local population in creating conditions for a sustainable development of the entire wilderness area.<br><br>The Valgrande in Piedmont is one of the most important wilderness areas left in the Alps, where there are only a few roads open to traffic, economic activity is very limited and tourist infrastructure is non-existent. Within the Valgrande is a 12 000 hectare national park which in turn encompasses a 3 400 hectare SPA boasting numerous habitats and species listed in the annexes to Directives 79/409/EEC and 92/43/EEC, including priority habitats such as species-rich Nardus grasslands and active raised bogs, as well as siliceous screes.<br><br>The Valgrande national park was established in 1993 and the two top priorities of its management board, appointed this year, are developing methods to prevent and fight the numerous fires which break out here and to tackle the negative impacts brought on by unregulated tourist access. |

| *LIFE project data* | *Project description* |
|---|---|
| Country: Sweden<br><br>Demonstration of methods to monitor sustainable forestry (LIFE98 ENV/S/000478)<br><br>Beneficiary: Skogsstyrelsen, 551 83 Jönköping, Sverige<br><br>Contact: Mr Erik Sollander<br>Tel. (46-36) 15 57 27<br>Fax (46-36) 16 61 70<br><br>E-mail: erik.sollander@svo.se<br><br>www: http://www.svo.se<br><br>Duration: 1 July 1998 to 1 January 2002<br><br>Total budget:<br>EUR 1 950 071.29<br><br>LIFE contribution:<br>EUR 968 337 79 (49.66 %) | The project will demonstrate and compare methods to monitor all aspects of sustainable forestry in Sweden, France, Denmark, Germany and Finland. Gap analyses relating to the pan-European process on the protection of forests will show the need to develop methods. New methods will be developed and existing methods adapted, and relevant methods will be tested in demonstration areas: the result will support the work on sustainable forestry of the European countries.<br><br>The project addresses the need for effective assessment of sustainability of forestry. Almost every European country has revised its forestry policy in recent years. The project will demonstrate means of monitoring the sustainability of forestry, which reflect new state-of-the-art methods.<br>The Swedish National Board of Forestry is the lead agency. The partners are the Danish Forest and Landscape Research Institute; the Forestry Development Centre TAPIO, Finland; the Institut pour le Développement Forestier and, CEMAGREF, France; the Niedersächsische Forstliche Versuchsanstalt, Germany; and the Swedish Environmental Protection Agency.<br><br>Six pan-European criteria and quantitative indicators for sustainable forestry form the basis for the work. Phase 1 includes national analyses of how existing monitoring methods fulfil the needs to assess the criteria. This exercise will also be used to identify the need for further indicators. In Phase 2, each country will assess the selected indicators in the demonstration areas. Appropriate organisations will be invited to participate in this process. Special emphasis will be put on validity, accuracy and cost-effectiveness of the methods. The national experiences will be continuously compared and exchanged.<br><br>Each partner will disseminate the results within its country. The dissemination to other countries will include workshops. The French partners will invite Belgium, Luxembourg and the Mediterranean countries. Niedersachsen will invite the other German states and Austria. The Danes will invite the UK, Ireland and the Netherlands. Finland and Sweden will invite the Baltic States and Norway. Sweden will arrange the initiation workshop and Finland will arrange the concluding workshop. The latter workshop includes an evaluation of the strengths and weaknesses of the methods. |
| Country: Sweden<br><br>Title:<br><br>Protection of western taiga in Svealand and Götaland (LIFE98 NAT/S/005369)<br><br>Beneficiary: Swedish Environmental Protection Agency (SEPA)<br><br>Contact: Ms. Christina Lindhal<br>Tel. (46-8) 698 14 09<br>Fax (46-8) 698 10 42<br><br>E-mail:<br>christina.lindhal@environ.se<br><br>Duration: 1 February 1998 to 1 July 2002<br><br>Total budget:<br>EUR 4 007 959.68<br><br>LIFE contribution:<br>EUR 2 003 979.84 (50 %) | Western taiga is a priority habitat that only exists in Sweden and Finland within the Community. Characterised by their complex composition of both young and old trees of deciduous and coniferous species, these virgin forests are extremely rich in biological terms, providing habitats for many threatened species of animals and plants. The dead wood, in particular, plays a central role in maintaining this high conservation value and its scarcity is one of the most serious threats to biodiversity. Much of this richness is due to the fact that the forests have had little or no intervention over hundreds of years, other than naturally occuring fires.<br><br>Today much of the original natural forest has been harvested and replaced with monocultures. It is estimated that only appoximately 3 % remains of the original western taiga and this is under constant threat from commercial forestry. It is for this reason that the habitat type is considered a priority for conservation under the habitats directive and why the Swedish Environment Protection Agency has initiated a nationwide programme for its conservation. The great biological resources represented in the remaining western taiga sites cannot be protected without extensive restrictions on commercial forestry. Thus, purchase of land or compensation to landowners is the only truly effective means of obtaining its long-term preservation. The project targets seven of the best remaining coniferous forest areas (69 to 992 hectares) in south and central Sweden. Once purchased, the areas will be left to develop naturally, but burning in order to restore conditions for species favoured by fire is planned for two sub-areas of forestry affected.<br><br>Together with the other two projects agreed for western taiga conservation in Sweden this year, the present project should make a significant contribution to the long-term conservation of the habitat type in the EU. |

| *LIFE project data* | *Project description* |
|---|---|
| Country: United Kingdom<br><br>Title: Securing Natura 2000 objectives in the New Forest (LIFE97 NAT/UK/004242)<br><br>Beneficiary: Hampshire County Council<br>The Castle, Winchester,<br>Hampshire SO23 8UE<br>United Kingdom<br><br>Contact: Mr Tim Greenwood<br>Tel. (44-1962) 84 18 41<br>Fax (44-1962) 84 67 76<br><br>E-mail: plantg@hants.gov.uk<br><br>Duration: 1 February 1997 to 1 October 2001<br><br>Total budget:<br>EUR 7 488 389.67<br><br>LIFE contribution:<br>EUR 3 744 911.76 (50.01 %) | A powerful consortium of organisations — from graziers and foresters to conservationists — has put together an ambitious programme to undertake a wide range of habitat management and restoration measures designed to tackle the key threats to the New Forest. The main targets are to produce a management plan to cover the entire pSCI; to increase the land owned and managed for nature conservation purposes; and to restore 4 000 hectares of the pSCI habitats to favourable conservation status. Much of the habitat restoration work will involve clearance of rhododendron, removal of planted and invasive conifers, introducing traditional broadleaved woodland management (like pollarding), and repairing/controlling erosion. One of the most innovative elements of the project is the action to secure the long-term viability of grazing animals in the New Forest. Since much of the nature conservation interest is bound up with traditional grazing practices — ponies, cattle and pigs — it is important that these should not decline. New Forest pony grazing is thought to be most at risk and project activities will focus on stock improvement through incentive payments linked to competitions and stock management by pony owners.<br><br>Originally created as a hunting forest by William the Conqueror in the 11th century (hence its name) the 'New' Forest is an extensive site covering nearly 300 $km^2$. It is probably best known as an area of ancient woodland and swathes of 'open forest' grazed by roaming herds of New Forest ponies. Its EU nature conservation interest lies in the nine habitat types (including three priority ones) and two species of the habitats directive and the five Annex I birds directive species it supports. Situated in the densely populated south of England, the New Forest is a magnet to visitors — estimated at 16 million annually. This popularity brings with it problems: recreational pressure causes erosion and disturbance. Afforestation with non-indigenous species leaves a legacy of conifer plantations that are out of keeping with the natural character of the area. Other invasive species like bracken and rhododendron all threaten its integrity. |

## 8.3. Leader + and Interreg III examples

LEADER + and Interreg are Community initiatives to enhance sustainable development in rural and cross-border areas. When combining nature conservation and economic objectives in the field of forestry, LEADER + projects could be used as one possibility for financing innovative approaches to management of Natura 2000 sites (See website reference in footnote in Section 8.3.4).

**The LEADER group of Garfagnana in the Tuscany region/Italy** has implemented a series of projects in the field of forest management with the aim of protecting the environment and creating jobs. In parallel with the introduction of, and experimentation with, ecological forest management in the zone, and based on training programmes, other 'eco-forestry' activities have been carried out: experimenting with new machines which are better adapted to forest exploitation in mountains and, above all, cultivating native plant species used to restore/reafforest a natural environment severely damaged by erosion and flooding.

**Key-elements:**

- accredited training for forest workers and the unemployed, in order to reinforce the role of a sector essential to local employment and in order to restore a damaged or fragile environment;
- spreading of good practice in the field of recovery of land and vegetation damaged by erosion and flooding;
- specialisation of a forest nursery in the culture of native forest species.

Several other Leader+ projects have worked on small-scale marketing and processing of forest products.

## 8.4. Rural development plans and forestry

Giving complete information about the forestry elements in the rural development plans for the present budgetary period has proven to be a task that surpasses the scope of this document because of the sheer magnitude of research needed, the complexity of the programmes and the fact that many of the first reports on projects that started from 2001 onwards still have to come in.

A very interesting attempt to present a synthesis of the current state of forest-related activities that are part of rural development programmes is currently being undertaken in the UK by the Universities of Gloucestershire and of Exeter in collaboration with the Institute for European Environmental Policy (IEEP). A team directed by Prof. H. Buller and Prof. M. Winter has presented a report that compares the RDPs of several Member States and presents an overview of their forestry components. This work was commissioned by the UK Forestry Commission and the Great Britain Countryside Agencies' Land Use Policy Group and will be available on www.forestry.gov.uk).

## 8.5. Pro Silva: practical close-to-nature forestry

Pro Silva is a European federation of foresters who advocate a type of forest management which has been called 'continuous cover forestry'.

Pro Silva supports the implementation of such management in the following ways:

- exchange of information within regional working groups;
- establishment of demonstration forests;
- meetings and excursions in demonstration forests;
- cooperation with educational and scientific institutions, and other bodies.

#### Pro Silva forestry principles

Pro Silva promotes forest management which optimises maintenance, conservation and use of forest ecosystems in such a way that the ecological and socioeconomic functions are sustainable and profitable while delivering four categories of benefits to society:

*1. Conservation of ecosystems*

However society may wish to use forests, the vitality and interrelation of lifeforms within the forest ecosystem is seen as the foundation for all the other forest functions. The preservation, and if necessary the restoration, of the ecosystem is therefore the main priority.

Pro Silva recommends the following methods to allow forest ecosystems to function:

- paying careful attention to (that is, maintaining or restoring) the natural forest vegetation pattern, while making use of the forest;
- maintenance of soil productivity, through continuous cover and through the maintenance of biomass in the forest (including dead wood);
- propagation of mixed forests with special attention to rare and endangered species;
- restricting the use of exotic tree species to cases where this is an economic necessity, and if they can be mixed with the indigenous vegetation pattern within certain limits;
- in special cases, forgo any harvest.

*2. Protection*

Pro Silva considers the following methods essential to achieve the benefits from the protective functions of forests:

- adopt a holistic approach involving perpetual forest cover;
- achieve specific biological protective functions by specific measures, for example, limits on exploitation, use of exotics, fertiliser, harvesting methods, drainage, etc.;
- establish a regional network of protected forest areas of various kinds, including some non-intervention areas.

*3. Production*

Pro Silva supports the management of forests and the use of renewable resources such as timber and other forest products.

As methods for achieving a functional production forest, PRO Silva recommends:

- continuous forest cover to protect soil productivity;
- adding value by selection felling and tending at all stages of development;
- maintaining growing stock at an optimal level;
- working towards a balance between increment and harvesting in each management unit;
- paying attention to the function of every single tree in tending and harvesting;
- avoidance of clearcuts and other methods which destroy forest continuity;
- abolition of rotation age as the instrument for determining when a tree should be cut;
- spontaneous forest renewal and forest development, through single tree harvesting and group harvesting with long regeneration periods;
- harvesting methods which do not harm the soil or the stand;
- minimising the use of additional materials (fertilisers, plant protection materials);
- limiting game density to levels which are in balance with the carrying capacity;

*4. Recreation, amenity, and cultural aspects*

Pro Silva recognises the increasing importance of forests for physical and mental health, especially in densely populated countries in Europe.

Pro Silva recommends the following methods for developing the recreational function of forests:

- giving priority to quiet forms of recreation, by providing appropriate trails and other facilities;
- in so far as is needed, the concentration of recreational facilities in specific zones;
- encouraging attractive trees, groves and other special features;
- maintenance and creation of attractive forests by varied forest structures;
- establishment of non-intervention areas where nature is left to follow its course;
- maintenance of forest meadows, valleys, rocky outcrops, water courses, views, etc.



In the light of the above, it is self explanatory that forest management according to Pro Silva principles and Natura 2000 designation can be quite compatible.

A considerable number of public and private forest owners have adopted Pro Silva principles as the basis for the management of their forest estate.

*Contact: Mr Thomas Harttung,*
*president of Pro Silva, Barritskov God,*
*7150 Barrit, Denmark*
*E-mail:Th@barritskov.com,*
*Tel. (45) 75 69 11 77.*

## 8.6. Conservation easements: the American way

A 'conservation easement' is a legal tool which is commonly used in the USA to maintain land in an undeveloped state by a voluntary agreement between a property owner and a qualified organisation, such as a land trust or a government department. The agreement limits the activities and uses that can take place on the property in exchange for compensations to the landowners. Property owners can give up rights to their property in a selective way and the easement may apply only to part of a property. Usually, a third party is responsible for monitoring the property to ensure that the terms of the agreement are being respected. In any case, the owner retains full entitlement to the land and can sell his property when and to whom he wishes, although the easements have a long-term or perpetual validity and are recorded in the land registry.

This system of compensation for income foregone and capital depreciation has proven to be an effective shield against 'urban sprawl' and has resulted in the preservation of 'working forests' in areas of high biodiversity in many states of the USA. Conservation easements can be purchased by government programmes, with the costs borne by nature protection budgets, or by private foundations with all types of co-financing between public and private funding. An instrument of this kind allows effective cooperation between the public sector and many foundations, corporations, NGOs and individual owner families, without disrupting social structures in rural areas.

*Information: Society of Amercan Foresters (SAF) — April/May and June/July 2002 issues of Journal of Forestry on http://www.safnet.org/pubs/periodicals.html*

## 8.7. A look down under: nature protection on private land in Tasmania

In order to establish a system of protected areas that is truly representative of the country's enormously diverse natural heritage, the Australian government has established a system of 'conservation covenants' with private landowners that complements public protected areas. Under these contractual agreements, which are established on a voluntary basis, the owners of sites that have a scientifically recognised conservation value can be financially rewarded for not developing their land further, accepting restrictions on economic use or carrying out biotope management work on it.

The regional administration of Tasmania submitted the following description of procedural steps for participation in its 'private forest reserve programme':

1. Contacts between landowners and the programme to initiate an assessment process.
2. A conservation officer visits the site(s), explains the programme's dues and rewards and draws up an assessment of the conservation resources.
3. Using the assessment information, an independent scientific advisory group makes a recommendation about the potential for inclusion of the property in the private forest reserve system.
4. In the case of a positive recommendation, a negotiator is appointed to work out an agreement that suits all parties.
5. An advisory committee considers proposals for agreements that have been negotiated and recommends them for a financing decision at ministerial level.

*Contact: Dr Steven Smith*
*(steven.smith@dpiwe.tas.gov.au)*
*www.privaterfa.tas.gov.au*

Silsombos Fraxinetum 032001 a/G. Raeymaekers

# 9. General conclusions about forestry on Natura 2000 sites

Pro-active involvement of forest owners and practitioners in discussions on all levels is a prerequisite to preserving the multi-functionality of forestry on Natura 2000 sites. While there is no intention to block all economic activities on Natura 2000 sites, the economic function of forests, usually the highest priority in forest management, will have to be adapted according to the requirements of the ecological function and the conservation of biodiversity on most Natura 2000 forest sites.

This may call for changes in current forest management practices, either by finding new and additional sources of income to continue a traditional form of management, whose profitability is in decline, or by increasing incentives to use forest products obtained by conservation-based management as a substitute for non-renewable, more polluting and more energy-intensive materials. Finding a balance between the potential for local development based on conservation of landscapes, nature, local cultures and global environmental objectives is not impossible. As most of the regions of great natural interest are catalogued as economically underprivileged it would be a mistake to insist that they should compete with intensive forms of land use. If such areas are to find a competitive advantage, it is necessary to look for a differentiating factor, such as 'quality'.

This quality exists, because Natura 2000 sites are areas where, thanks to the outstanding natural resources, goods and services of high environmental and cultural quality can (continue to) be produced, if possible by applying the integrative concept of SFM that does not consider ecological requirements in isolation from other forest functions but aims to unite economic, ecological and social benefits. This also entails increased efforts towards public relations work on the part of foresters and forest owners' associations, to show society that, if biodiversity conservation commitments are to be met, producing modern commodities with the sustainable methods of the past may sometimes be the most appropriate option for the future.

Silsombos Fraxinetum 032001 c/G. Raeymaekers

# 10. Bibliography


Ammer, C. and Stimm, B., 1995. *Biodiversität im und Waldbau im Bergwald- eine Fallstudie*. Ludwig-Maximilians-Unversität, München, Germany.

Barbier, J.-M., 2000. Proceedings of the International Conference on Natura 2000 in France and the EU, Metz, 5 to 6 December 2000.

Best, C., 2002. 'America's private forests: challenges for conservation', *Journal of Forestry*, April/May 2002.

BM VEL, 2002. *Report on the implementation of the strategy on forestry and biodiversity*. Federal Ministry of Consumer Protection, Food and Agriculture, Bonn, Germany.

Buchwald, E. and Søgaard, S., 2000. *Danske Naturtyper i det europæiske NATURA 2000 netværk*. Danish Forest and Nature Agency, Copenhagen.

CEPF — Confédération Européenne des Propriétaires Forestiers, 2001. *Europe's forests*. Brochure of CEPF, Brussels and Luxembourg.

Christophersen, T. and Weber, N. 2002. 'The influence of NGOs on the creation of Natura 2000 during the European policy process', *Journal of Forest Policy and Economics*, Elsevier Science, Amsterdam.

Cinotti, B. and Delage, V., 2001. 'Elaboration d'un document d'objectifs Natura 2000'. *Revue forestière française* LIII, special issue 2001, France.

Crochet, J., 2000. *Nachhaltige Forstwirtschaft in Europa —weltweit zukunftsweisendes Modell*. AFZ/DerWald, Nr. 22/2000; Pp. 1168-1170. BLV Verlag, München.

Janssen, G., 2000. 'Von Waldverwüstung zum naturnahen Wirtschaftswald — ein Gebot rationeller, ökonomisch sinnvoller Forstwirtschaft'. In: Proceedings of the third International ProSilva Congress, Fallingbostel, 2 to 7 June 2000, pp. 38–56. ProSilva Europe.

Jeanrenaud, S., 2001. *Communities and forest management in western Europe,* IUCN, Gland, Switzerland.

DFWR —Deutscher Forstwirtschaftsrat, 2001. *Nachhaltigkeit — Ein Generationenvertrag mit Zukunft*. 'Gesellschaftlicher Vertrag' unterzeichnet anlässlich des Ersten Deutschen Waldgipfels, 24 October 2001. DFWR, Rheinbach. URL: www.waldgipfel.de

EEA — Environment Agency, 1998. *Europe's environment: the second assessment*. A report on the changes in the pan-European environment as a follow-up to 'Europe's environment: the Dobris assessment' (1995). Office for Official Publications of the European Communities, Luxembourg.

EEA — European Environment Agency, 1999. *Environment in the European Union at the turn of the century. Summary*. EEA; Copenhagen. URL: http://eea.eu.int

EEA — European Environment Agency, 2001. *Environmental signals 2001. European Environment Agency regular indicator report*. Office for Official Publications of the European Communities, Luxembourg.

European Commission, Agriculture DG, 1998. *Communication of the Commission to the Council and Parliament on a forestry strategy for the European Union*. Agriculture DG, Brussels.

European Commission, Budget DG, 2001. *General budget of the European Union for the financial year 2001. The figures*. URL: http://europa.eu.int

European Commission, Environment DG, 1996. *INTERPRETATION MANUAL OF EUropean Union habitats: Version EUR 15/ compiled by Carlos Romão*. Scientific reference document adopted by the Habitats Committee on 25 April 1996. European Commission, Brussels.

European Commission, Environment DG, 1995. *Communication of the Commission to the Council and the European Parliament on the wise use and conservation of wetlands*. Office for Official Publications of the European Communities, Luxembourg.

European Commission, Environment DG, 2000. *Managing Natura 2000 sites —The provisions of Article 6 of the Habitats Directive 92/43 EEC*. Office for Official Publications of the European Communities, Luxembourg.

Falinski, J.-B. and Mortier, F., 1996. 'Biodiversité et gestion durable des forêts en Europe', *Revue forestière française* XLVIII, special issue 1996.

FAO — Food and Agricultural Organisation of the United Nations, 2001. *The state of the world's forests*. FAO, Rome. URL: http://www.fao.org/docrep/003/y0900e/y0900e00.htm

FAO — Food and Agricultural Organisation of the United Nations, 2001. *Unasylva,* No 209, Special issue on biodiversity.

FAO/ECE/ILO, 2000. *Working Paper No 163 on Public participation in forestry*. International Labour Office Sectoral Activities Department, Geneva, 2000.

Giesen, T., 2001. *Rechtsschutzmöglichkeiten in Natura-2000 Gebieten*. In: AFZ/DerWald, Nr. 24/2001; Pp 1282-1284. BLV Verlag, München.

Halkka, A. & Lappalainen, I., 2001. *Insight in Europe's forest protection*. WWF — Head Office, Gland, Switzerland.

Helms, John A., (Ed.), 1998. *The dictionary of forestry*, Society of American Foresters, Md. USA.

Hermeline, M. and Rey, G., 1994. *L'Europe et la Forêt, Tome 1 et 2*. European Parliament, General Direction of Studies, Luxembourg 1994.

IDF, Institut pour le développement forestier, 2001. Evaluation du système d'aide communautaire pour les mesures forestières en agriculture du Règlement 2080/92

Hossell, J.E., Briggs, B., and Hepburn, I.R., (2000). *Climate change and UK nature conservation: a review of the impact of climate change on UK species and habitat conservation policy*. Department of the Environment, Transport and the Regions, UK. 73pp.

Kapos, V. and Iremonger, S.F. (1998). 'Achieving global and regional perspectives on forest biodiversity and conservation'. In Bachmann, P., Köhl, M. and Päivinen, R. (eds.), 'Assessment of biodiversity for improved forest planning 7 to 9 October 1996, held in Monte Verita, Switzerland'. *European Forest Institute Proceedings* No 18. Kluwer Academic Publishers. pp 3–13.

Le groupe des 9, 1998. *Lettre d'information sur Natura 2000*. Association Nationale des Centres Régionaux de la Propriété Forestière.

Larsson, T.-B. (ed.), 2002. *Biodiversity evaluation tools for European forests*. SEPA, Sweden (EU FAIR Project CT 3375).

Lohmus, A. et.al., 2002. 'Loss of old growth and the minimum need for strictly protected forests in Estonia', *Ecological Bulletin*, No 51.

Loyd, S. (ed.), 1999. *The last of the last: the old-growth forests of boreal Europe,* Taiga Rescue Network, Jokkmokk, Sweden.

Marghescu, T. (ed.), 2001. *Nature conservation in private forests of selected EEC countries*. IUCN European Regional Office, Brussels.

MCPFE, 2000. *General declarations and resolutions adopted at the ministerial conferences on the protection of forests in Europe. Strasbourg 1990 — Helsinki 1993 — Lisbon 1998*. Ministerial Conference on the Protection of Forests in Europe. Liaison Unit Vienna. 88 pp.

Nabuurs, G.J., Päivinen, R. and Schanz, H., 2001. 'Sustainable management regimes for Europe's forests —a projection with EFISCEN until 2050', In: *Journal of Forest Policy and Economics*, Vol. 3 (2001), pp. 155–173. Elsevier Science, Amsterdam.

Naconex Project, 2001. *The tools for preserving woodland biodiversity,* (Textbook 1). ISBN 91-631-1331-7.

Noirfalise, A., 1984. *Forêts et stations forestières en Belgique,* Les presses agronomiques de Gembloux, 1984.

Parrot, J. and MACKENZIE, N., 2000. *Restoring and managing Riparian woodlands*. Scottish Native Woods, Aberfeldy, UK.

Puumalainen, J., 2001. 'Structural, compositional and functional aspects of forest biodiversity in Europe', UN/ECE, *FAO discussion paper* ECE/TIM/DP/22, UN, New York and Geneva.

Rameau, J.-C., Chevallier, H. e.a., 2001. *Cahiers d'habitats Natura 2000, Tome 1 Habitats forestiers (Vol. 1&2)*. La Documentation française, 2001.

Rosenblatt, A., 2002. 'Conservation easements, permanent shields against sprawl', *Journal of Forestry*, April/May 2002, USA.

Sunyer, C. and Monteiga, L., 1998. *Financial instruments for the NATURA 2000 network and nature conservation*. TERA, Environmental Policy Centre Madrid.

Stones, T. and Hurley, D., 1999. *The cost of managing the Natura 2000 network*. Royal Society for the Protection of Birds, UK.

Storrank, B., 1998. *Natural woodlands in the Nordic countries*. Nordic Council of Ministers, Copenhagen, 1998.

UNECE — United Nations Economic Commission for Europe, Timber Section, 2001. 'Structural, Compositional and Functional Aspects of Forest Biodiversity in Europe', *Geneva Timber and Forest Discussion Pa*pers, UNECE Timber Section, Geneva.

UNECE/European Commission, 2000. *Forest condition in Europe*. Executive Report 2000. URL: http://europa.eu.int/comm/agriculture/fore/conrep/2000/exec_en.pdf

UN-ECE/FAO (eds.), 2000. *Contribution to the Global Forest Resources Assessment 2000. main report, Forest Resources of Europe, CIS, North America, Australia, Japan and New Zealand (industrialised temperate/boreal countries)*. United Nations Publications, URL: http://www.unece.org.

Wollborn, P., 2001. *Ist weniger mehr? Gedanken zu Ergebnissen und betriebswirtschaftlichen Auswirkungen einer naturnahen Waldwirtschaft in der Niedersächsischen Landesforstverwaltung*. (pp. 202–207) Forst und Holz Nr. 7, 10. April 2000 (55. Jahrgang).

WWF — European Policy Office, 2000a. *Habitats directive WWF European Shadow List, June 2000*. WWF European Policy Office, Brussels.

WWF — European Policy Office, 2000b. *Into the millenium*. Broschüre, WWF European Policy Office, Brussels.

WWF — European Policy Office, 2000c. *MEP Briefing. Structural Funds 2000–06 and implementation of the habitats and birds directive. Oral questions to the Commission at the March plenary session*. Background information for Members of the European Parliament. Report, WWF European Policy Office, Brussels.

WWF — European Policy Office, 1999. *European forest scorecards 2000*. WWF European Policy Office, Brussels.

# 11.
# Useful Internet links

| *Topic* | *Institution/agency/NGO* | *Link* |
|---|---|---|
| Access to information on environmental issues | United Nations Economic Commission for Europe | http://www.unece.org/env/pp/ |
| Bern Convention | Council of Europe | http://www.nature.coe.int |
| Biodiversity — clearing house mechanism | European Environment Agency | http://biodiversity-chm.eea.eu.int |
| Birds directive — text | Directorate-General for the Environment | http://www.europa.eu.int/comm/environment/nature/legis.htm |
| Convention on Biological Diversity | CBD Secretariat | http://www.biodiv.org |
| Environmental protection in Europe | EEB — European Environmental Bureau | http://www.eeb.org/Index.htm |
| EU clearing house mechanism on biodiversity | European Environment Agency | http://biodiversity-chm.eea.eu.int |
| European nature conservation journals and publications | European Centre for Nature Conservation | http://www.ecnc.nl/ |
| Forest management certification | PEFC — Pan-European Forest Certification | http://www.pefc.org/ |
| Forest management certification | FSC — Forest Stewardship Council | http://www.fscoax.org/ |
| Forest management certification comparative matrix | CEPI — Confederation of European Paper Industries | http://www.cepi.org/htdocs/newsletters/ |
| Forest resources | European Forest Institute | http://www.efi.fi |
| Forest resources | United Nations Economic Committee for Europe — Timber Section | http://www.unece.org/trade/timber/Welcome.html |
| Forests and biodiversity — research on indicators | BEAR project | http://www.algonet.se/~bear |
| Funding nature conservation | Institute for European Environmental Policy | http://www.ieep.org.uk/eufunds.html |
| Glossary of international terms of natural forests and natural forest research | EFI — European Forest Institute (COST E4, 1999) | http://www.efi.fi/Database_Gateway/FRRN/howto/glossary.html.. |
| Habitats directive — text | Directorate-General for the Environment | http://www.europa.eu.int/comm/environment/nature/legis.htm |
| Indicators for forest biodiversity in Europe | BEAR project | http://www.algonet.se/~bear/ |
| International Conservation of Biodiversity | World Wide Fund for Nature | http://www.wwf.org/ |
| Legal texts of European nature conservation legislation | Directorate-General for the Environment | http://europa.eu.int/comm/environment/nature/natura.htm |



| *Topic* | *Institution/agency/NGO* | *Link* |
|---|---|---|
| LIFE programme | Directorate-General for the Environment | http://www.europa.eu.int/comm/life/home.htm |
| Managing the European natural heritage | Eurosite | http://www.eurosite-nature.org/ |
| Ministerial Conference on the Protection of Forests in Europe | MCPFE Liaison Unit Vienna | http://www.mcpfe.org/ |
| Monitoring the EU forest policy activities | Fern (NGO) | http://www.fern.org/ |
| National forest programmes | FAO | http://www.fao.org/forestry/foda/infonote/infont-e.stm |
| Nature conservation in Europe | WWF European Policy Office | http://www.panda.org/resources/programmes/epo/ |
| Nature conservation in Europe | IUCN — The World Conservation Union | http://www.iucn-ero.nl/eng_working_in_europe.htm |
| Regional policy in Europe and administration of Structural Funds | Regional Policy DG | http://europa.eu.int/comm/dgs/regional_policy/index_en.htm |
| Research | Joint Research Centre of the European Commission | http://www.jrc.org/ |
| Research on forestry and agriculture | Research DG | http://www.europa.eu.int/comm/research/quality-of-life/ka5/ |
| Research on forestry and agriculture | Research DG | http://www.europa.eu.int/comm/research/agro/fair/en/index.html |
| Rural development in Europe and LEADER II initiative | LEADER Community initiative | http://www.rural-europe.aeidl.be/ |
| State of the World's Forests Report 2001 | Food and Agricultural Organisation of the United Nations | http://www.fao.org/docrep/003/y0900e/y0900e00.htm |
| Studies on financing nature conservation and rural development | Institute for European Environmental Policy | http://www.ieep.org.uk/ |
| Text of the Convention on Biological Diversity | Earth Summit 2002 | http://www.earthsummit2002.org/toolkits/women/un-doku/otherun/biodivtext.htm |

# Annex I: General information about forests and forestry

## 1. Global forest condition

Forests cover about 3 870 million hectares, or 30 % of the earth's land area. Tropical and subtropical forests comprise 56 % of the world's forests, while temperate and boreal forests account for 44 % (FAO, 2001).

Together, tropical, temperate and boreal forests offer a multitude of habitats for plants, animals and micro-organisms, holding the vast majority of the world's terrestrial species. Forest organisms provide a wide array of goods and services, from timber and non-timber forest products to playing an important role in mitigating climate change as carbon sinks. At the same time, forests provide livelihoods and jobs for hundreds of millions of people worldwide. Forest biological diversity also has an important economic, social and cultural role in the lives of many indigenous and local communities. Forests are therefore essential for the protection of global biodiversity (Kapos and Iremonger, 1998).

In the last 8 000 years about 45 % of the Earth's original forest cover has disappeared, cleared mostly during the past century. This process of global deforestation continues at an unprecedented rate (FAO, 2001), so that numerous species of plants and animals have already vanished forever together with their forest habitats. Between 1990 and 2000, another estimated 5 % of the world's forest cover was lost, at a rate of around 14 million hectares per year. Deforestation is mainly taking place in tropical forests, which present the most valuable reservoir for biodiversity and have important functions for the world's climate, and in boreal forests, which regenerate very slowly.

The EU has been one of the dominant actors in the international discussion on forests. It is working to halt global deforestation and to reach sustainable forest management (SFM) through cooperation in all global policy processes, such as:

- the UNCED follow-up process (for example, the United Nations Forum on Forests and preceding fora IPF and IFF);
- the Convention on Biological Diversity (CBD) and its recently adopted 'expanded programme of work on forest biodiversity'

- development policies which take into account environmental constraints;
- integrating environmental protection in new procurement rules in favour of wood products from sustainable sources ('green procurement').

## 2. Forests in the European Union

The EU and its Member States have chosen to act responsibly with regard to one of the main ecological challenges of our time, the preservation and the sustainable management of forests, by approving ([31]) in 1998 a forest strategy for the European Union, proposed by the Commission ([32]).

The strong European influence on the international forest policy debate puts an increasing responsibility on EU countries to serve as a role model for forest protection and sustainable forest management. In this context, the successful establishment of Natura 2000 along with other initiatives, for example the national forest programmes and the application of the resolutions of the Ministerial Conference on the Protection of Forests in Europe (MCPFE), are important achievements for the EU at international level.

### Socioeconomic importance of European forests

Forests and forestry in the European Union are characterised by a wide variety of climatic, geographic, ecological as well as socioeconomic conditions. About 70 % of the forest area is located in four countries: Finland, France, Germany and Sweden. Nevertheless, the largest potential for preserving and restoring forest biodiversity lies in the south of Europe. The Mediterrenean biogeographical region has an amazing number of 30 000 vascular plants, of which over 10 000 are exclusively regional, making it one of richest areas concerning endemism.

Forestry is an important economic factor in Europe: forestry and forest industries employ about 2.2 million people. The total amount of industrial roundwood produced in the EU per year was 226 million cubic metres in 1998 (FAO, 2001). Sweden, Finland, Germany, France and Austria are among the world's top 10 exporters of forest products. Nevertheless, an increasing part of European exploitable forests tend to be underutilised and a general phenomenon of forest biomass build-up has been noticed. Actually, annual growth exceeds harvests, and thus very densely stocked forest stands are prevailing in many EU countries (e.g. DFWR, 2001). The sustainable use of European forest resources, taking into account economic, social and ecological objectives like biodiversity protection, should therefore be maintained and even strengthened and the consequences in terms of management considered on a site-specific basis if Natura 2000 areas are affected.

There are approximately 12 million forest owners in the EU today, with an average ownership of less than five hectares of forest. Ownership, however, varies widely within the Community. In Greece and Ireland, the State owns about two thirds of forest lands, while in Belgium, Spain, Italy, Luxembourg, France and Germany, local communities play an important role as forest owners. The forest area per capita is 0.3 hectares on EU average, but again varying widely between Member States.

Forest cover in the EU is actually rising, *not only* through afforestation programmes co-financed by the EU (1 million hectares since 1991) but even more as a result of natural succession on abandoned land that was mostly grazed in the past (IDF, 2001), and it has reached over one third of EU land cover (FAO, 2001). Although this trend is generally viewed as positive, there are some issues that give rise to concern. The fact that afforestation, often with exotic species, tends to be restricted to poor soils and marginal areas endangers some key habitats of open landscapes, while it goes along with a trend of intensification and further specialisation on the remaining agricultural land (EEA, 2001). Partly for this reason, significant new afforestation projects which may impact on existing (semi-)natural open landscapes should generally undergo an environmental impact assessment before they can be approved.

([31]) Council resolution of 15 December 1998, OJ C 56/1, 26.9.1999.
([32]) COM(1998) 649 final of 3 November 1998, transmitted to Council, not published.



The rise in forest area also conceals the fact that some of the last pristine forests in Europe, usually rich in biodiversity and endangered species, are still threatened to be replaced by intensively managed semi-natural forests or plantations (EEA, 1998). Moreover, preference for conifers over deciduous trees and of exotic species over the original species can have a negative impact on biodiversity even though the total forest area is increasing. Therefore it is the quality of the forest rather than the quantity that recent initiatives for nature conservation are focusing on.

## Europe's recent forest history

Historical research shows that forests have had a fundamental importance as a basic resource for the progress of human settlement and for the creation of a civilised and prosperous Europe. Until the late 18th century, European forests were mainly seen as wild and uninviting realms of nature, and at the same time as inexhaustible sources of materials, fodder and energy at the ready disposal of the growing human population.

Many central European countries faced a sharp decline in their forest area starting in the 17th century, with devastating effects on forest resources reaching far into the 19th century. Only when wood as the main source of energy could be substituted by coal and later by oil, did the depletion of many of Europe's once heavily forested regions come to a halt. For various needs such as shipbuilding, mining, firewood and building material, salt production and production of charcoal and potash for glass, many forest areas had been logged completely, often without basic regards for sustainable yield. To make matters even worse, the same forests were often subject to poorly regulated and little supervised forms of primitive multi-functional use by rural populations enshrined in local 'user rights'. This led to the open landscapes consisting of forests degraded and impoverished by extensive grazing and diffuse gathering of forest products that appear on the first accurate landcover maps of the late 18th century as heaths or inland dune areas. The lack of clear forest ownership structures and extended periods of warfare spurred this development of general forest decline.

The turnaround for the diminished forest resources in many European countries came when the imminent threat of a timber shortage was recognised and forestry became a scientific profession, with higher education of foresters spreading across Europe. During the early 19th century, this led to the extension of the concept of foresters as 'guardians of the woods', which was originally restricted to the estates of Europe's high nobility, to a double function of managing and policing the national forest patrimonium as a whole, entrusted to self-standing forest administrations. As a result, the decline in forest resources was slowly reversed and vast regions were allowed to regenerate or were actively reforested. This trend further accelerated after 1850, when ever more abandoned agricultural land and disused pasture continued to be converted to forests. However, the main objectives of this forest recovery were the fast and efficient production of timber to supply growing markets and protection against erosion. This mostly led to the establishment of monocultures of conifers. Managed as even-aged plantations, these 'new forests' offered only little value for biodiversity, although some of them have become more diverse as a result of natural decay or human intervention.



Wood shortages occurred again in parts of Europe, on a smaller scale, after the first and the second world wars. Many areas that were devastated or had been logged during or shortly after the war years were replanted for timber production, to serve the demands of society at the time. Thus, in many parts of Europe, forests are characterised by relatively young, even-aged stands of few tree species, offering habitats only to a rather limited number of organisms.

These problems did not occur, or at least not to the same extent, in the vast forests of northern Europe nor in the inaccessible alpine areas and mountain regions of southern Europe, where relatively untouched forests and open multi-functional woodlands can still be found today. These areas represent the last remains of natural forests and traditional woodland use in Europe, and thus they are of extremely high scientific and ecological value. As the economic value of the old-growth timber is often equally high and as pressure for agricultural intensification continues to build up, commercial exploitation often collides with the interests of nature conservation in these areas.

## Naturalness of European forests

The actual appearance of forests in Europe is the combined reflection of two fundamentally different phenomena (Falinski and Mortier, 1996) ([33]):

- a primary differentiation that occurred during the postglacial recovery by forest building species, starting during the Holocene geological period approximately 10 000 years ago, a process conditioned by climatic and soil factors;
- a secondary differentiation under the influence of human settlement which has modified forest cover and structure from the Neoliticum, starting 5 000 years ago.

**A.** The glaciations have left a considerable footprint on northern Europe, central Europe and the mountain regions, leading to a floristic north–south gradient that is still very characteristic today.

- Northern Europe's boreal forests are of most recent origin and have less plant species. Their establishment followed the regression of the ice-cap and the youngest formations, such as the oak-beech and beech-spruce forests of central Europe, only took shape some 5 000 years ago. Pioneer formations, such as the pine-birch forests already appeared much earlier.
- Southern Europe's forests are much older. Some of these formations have already existed for over 15 000 years and as they have been much less influenced by the glaciations, their number of species and the diversity of their floristic associations is much higher.

To this has to be added that the climatic west–east gradient from oceanic to continental influence also implies a decrease in richness of species and vegetation types.

**B.** The history of human settlement and its impact on forests also reflects a north–south gradient, with the oldest colonisation taking place in the south, starting from the Middle East towards Greece about 8 000 years ago and reaching Fennoscandia as recent as 2 500 years ago.

Human influence first produced fragmentation of forest cover in the plains and has further reduced it categorically to conquer space for agriculture, to open pastures and to meet energy needs. The older the colonisation process, the more its consequences are visible in the present-day landscape. As a result, the high forest cover in Fennoscandia and the large forest complexes in central Europe that exist today are in stark contrast with the situation down in the south-west. In France, forest cover was estimated at around 80 % at the dawn of the Roman conquest, whereas it was down to 15 % by 1800 and has risen again to over 30 % today. In Fennoscandia, slash and burn cultivation had an important impact until the 19th century, but considerably more closed forest cover developed after its abandonment.

The most important impacts of human activities on forest biodiversity are the following:

- harvesting of trees before they reach physiological maturity and potential age, resulting in a decrease of species associated with old and decaying specimens;
- clearing of alluvial forests for pasture, change in composition of alluvial forests after alteration of hydrological conditions in swamp forests;
- modification of tree species composition and vertical structure by silvicultural interventions;
- establishment of formations that do not occur naturally, such as fruit-bearing stands of selected species, coppice, coppice and standards, wicker cultivation, agro-forestry systems, etc., often leading to the development of associated biodiversity linked to continued human interference in natural succession processes;
- drainage of peat soils and humid forests to accelerate tree growth;
- construction of timber road networks in wilderness areas;
- reforestation of abandoned agricultural lands and formerly grazed environments.

It has to be understood that these individual factors

([33]) This section is largely based on a publication by the authors mentioned in a special edition of *Revue forestière française* (XLVIII); which itself refers to ample literature on the subject. To a lesser extent, the work of Noirfalise on the Corine vegetation cover definitions was also taken into account.



did not necessarily occur side by side but that they may have had simultaneous or subsequent influences, which have also produced synergetic effects on specific locations.

From the above, it can be concluded that biological diversity and the naturalness of European forests have been influenced to a varying degree by human activities for a very long time and that natural or 'virgin' forests have become absolutely rare throughout Europe and even more so in the EU. Indeed, if the primary and secondary differentiation influencing forest composition and structure were put together in a matrix-like grid of crossing influences, this would result in an infinite number of possible situations, whereby in general it can be concluded that those sites with the highest biodiversity, especially on fertile soils, are probably the ones that have undergone the most intense change, as they proved to be most interesting for human settlement. Very little untouched forest is left, totally artificial forest is not really abundant and the largest part of Europe's forest can be called semi-natural (for example, Anglo-Saxon literature) or subnatural (for example, French-Swiss literature). Thereby the distinction between natural and semi-natural forests is often difficult to establish because past human influence can lead to many combinations of natural and human influences. Among those forests which are considered to be semi-natural today, one can find plantations with and natural regeneration of indigenous species on agricultural land that was abandoned over 100 years ago, natural forests of which the authentic herbaceous layer was nearly completely degraded by grazing and export of litter, natural forests which have been 'enriched' with exotic species that have regenerated spontaneously, etc.

There also exists confusion between naturalness, meaning absence of human influence, and biodiversity, meaning species and structural richness. Indiscriminate mixing of such concepts has led to mythical visions of what could or should be the aspect of the 'original', 'ancient' or 'primeval' forest, which are sometimes put forward as a management objective for protected areas.

Keeping this in mind the habitats that are listed for their community importance in Annex I to the habitats directive can be divided into three functional groups (Barbier, 2000):

- habitats which occur in environments that have always been marginal in economic terms and were never colonised by man, such as riverine formations, dune areas, wet pockets in forests and active bogs;
- little anthropised climax habitats, such as certain oak forests, beech forests and natural spruce forests, which have been exploited for timber and kept in a stable condition by management of the indigenous species;
- habitats which are mainly man-made landscapes or their transition to the climax vegetation, such as heaths, wooded bogs, open (grazed) woodlands, natural grasslands or pastures.

This leads to the conclusion that there is too little conclusive evidence to determine, with a reasonable degree of confidence, what would have been the exact composition of potential natural vegetation cover on any given spot in Europe and that, in many cases, the continuation of human intervention is absolutely essential to habitat conservation.



ENV-Medittерenean forest2 P. sylvestris nevadensis/A. Gutierrez

# Annex II: The framework for biodiversity protection in Europe

## 1. The birds directive

Directive 79/409/EC, known as 'the birds directive', was adopted in 1979 and its main provision is the obligation for EU Member States to designate special protection areas ('SPAs') for a series of listed birds whose conservation status is threatened and for migratory birds in general. A second important feature of this directive is that it sets common baseline rules for hunting and trading of birds in all Member States.

## 2. The Bern Convention

The Convention on the Conservation of European Wildlife and Natural Habitats, often referred to as the 'Bern Convention', was agreed at the Council of Europe in 1979 and entered into force in the EU in June 1982. It is one of the oldest international agreements on biodiversity protection but its signatory parties are not tied by mandatory implementation provisions.

The Bern Convention aims to ensure conservation of wild flora and fauna species and their habitats. Special attention is given to endangered and vulnerable species, including endangered and vulnerable migratory species specified in appendices. Altogether 44 States have ratified the Convention, ranging from Turkey to Iceland and from Ukraine to Morocco.

## 3. The habitats directive

Directive 92/43/EEC, known as the 'habitats directive' or the 'fauna, flora and habitats (FFH) directive', was adopted in 1992 as an implementation instrument of the Bern Convention for EU Member States. The aim of this directive is to contribute to the conservation of natural habitats and species of wild fauna and flora in the European territory of the Member States, taking account of economic, social and cultural requirements and regional and local characteristics. The protection of natural habitats and species listed in its annexes is ensured through the adoption and implementation of specific mea-

sures, such as the designation special areas of conservation (SACs) or the establishment of systems of strict protection for species of Community interest. This directive creates the Natura 2000 network and lays down rules for its establishment and operation.

## 4. The EU enlargement and the emerald network

The emerald network is the common tool for the protection of habitats under the Bern Convention in non-EU States that have ratified this convention. At the same time, the emerald network is an effective preparatory tool for EU candidate countries, as its areas of special conservation interest (ASCIs) will be used as a basis for the later adoption of special areas of conservation (SACs) as required by the habitats directive. As there will be no transition periods for the implementation of the habitats directive, those countries which have undertaken all necessary efforts to set up the emerald network will be in a good starting position for EU accession.

Many candidate countries can be proud of an exceptionally rich natural heritage. Eastern Europe is still rich in untouched river valley and forest complexes with complete food chains thanks to the presence of large carnivores. In Romania alone, an estimated 6 000 bears are still living in the wild — more than twice as many as in all other European Union Member States put together. At the same time, the fast rate of economic development in many of these countries is threatening this rich natural heritage, and it has to be ensured that economic development is carried out in a sustainable way.

As a part of the EU enlargement preparations, technical consultations to adapt the annexes of the birds directive and of the habitats directive to the specific situation of habitats and species of conservation value in CEECs were concluded in 2001.

## 5. The Convention on Biological Diversity (CBD)

One of the key agreements adopted at the 1992 Earth Summit in Rio de Janeiro is the Convention on Biological Diversity (CBD). This pact among the majority of the world's governments sets out commitments for maintaining the world's natural heritage along with sustainable economic development. The Convention establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources.

Some of the many issues dealt with under the CBD include:

- measures and incentives for the conservation and sustainable use of biological diversity;
- regulated access to genetic resources;
- access to and transfer of technology, including biotechnology;
- technical and scientific cooperation;
- impact assessment rules;
- education and public awareness raising.

The CBD has 186 parties, and 168 signatures at present. The European Community, as well as all individual Member States, has signed the Convention. The European Environment Agency in Copenhagen has set up a 'clearing-house mechanism for biodiversity' ([34]) to ensure optimal flow of information between European signatories.

At the sixth Conference of the Parties of the CBD in The Hague in April 2002, an 'expanded programme of work on forest biodiversity' was adopted. This programme sets out an ambitious series of objectives and activities which the contracting parties have committed themselves to reach, according to their own priorities. They include applying an ecosystem approach to the management of all types of forests and measures to improve protection, recovery and

([34]) A 'clearing-house' originally referred to a financial establishment where checks and bills are exchanged among member banks so that only the net balances need to be settled in cash. Today, its meaning has been extended to include any agency that brings together seekers and providers of goods, services or information, thus matching demand with supply. The EEA clearing-house website is: http://biodiversity-chm.eea.eu.int/



restoration of forest biodiversity by its sustainable use and important monitoring efforts.

## 6. The EU biodiversity action plans

To ensure that the protection of biodiversity plays a role in other important policy fields, Commission services have recently developed 'biodiversity action plans' for agriculture, fisheries conservation of natural resources and development and economic cooperation (COM/2001/0162 final). These plans set targets to be reached for the improvement of biodiversity protection and are to be adopted by the co-decision procedure of the European Parliament and the Council of the European Union.

The establishment of Natura 2000 is an important element of these action plans. Concerning forests, the biodiversity action plan for the conservation of natural resources sets the target that all forest types from Annex I to the habitats directive should be assessed as 'sufficiently represented' by 2002. This action plan calls also for a further integration of biodiversity supporting measures into programming documents under the Rural, Structural and Cohesion Funds and programmes relevant for third countries.

The adoption at the sixth COP of the CBD of the abovementioned 'expanded programme of work on forest biodiversity' may lead to more attention for forest-related elements in the existing EU biodiversity action plans.

## 7. National forest programmes

The purpose of national forest programmes (NFPs) is to establish a workable social and political framework for the conservation, management and sustainable development of all types of forests, which in turn will increase the effectiveness and efficiency of public and private operational commitments. They are an outcome of the follow-up process of the Rio Earth Summit in 1992 (UNCED) regarding forests.

- National forest programmes are guided by the elements and principles that were endorsed as proposals for action by the Ad hoc Intergovernmental Panel on Forests (IPF, 1997), established by the United Nations Commission on Sustainable Development.

More than 120 countries have developed or updated their national forest programmes during the past 15 years. The tangible results of these processes include new forestry policies and improved legislation, institutional reforms, redefinition of the role of the State in forestry development, decentralisation of forest management responsibilities, transfer of power to communities and local groups, greater transparency and participation in decision-making processes.

Biodiversity plays an important role in many national forest programmes, in accordance with the abovementioned international commitments. The funding of some of the Community support mechanisms is tied to a successful establishment of NFPs (that is, the support within the framework of Regulation (EC) No 1257/99 for the support of rural development).

## 8. The Ministerial Conference on the Protection of Forests in Europe (MCPFE)

The Ministerial Conference on the Protection of Forests in Europe (MCPFE) ([35]) is a major initiative of cooperation amongst European countries to contribute to the protection and sustainable management of their forests. It is shared by the more than 40 member countries of the Council of Europe and numerous observers to address threats and opportunities related to forests and forestry. This process is constituted by a chain of political-level conferences and seconded expert meetings for the follow-up work and brainstorming. The participating States are responsible for the national and regional implemen-

([35]) More information on the work of the MCPFE is available in the Internet at http://www.mcpfe.org or at the MCPFE Liaison Unit in Vienna, Marxergasse 2, A-1030 Vienna, Austria; Tel. (43-1) 710 77 02, Fax (43-1) 710 77 02 13, E-mail: liaison.unit@lu-vienna.at

tation of the recommendations made at the conferences. The discussions and exchanges between the conferences are called the 'MCPFE process', which is characterised by a joint approach of national forest administrations and civil society representatives.

The results of the MCPFE process are recommendations in the form of resolutions which are adopted at the ministerial conferences. So far, these have been held in Strasbourg (1990), Helsinki (1993) and Lisbon (1998) and have produced the following resolutions:

S1: European network of permanent sample plots for the monitoring of forest ecosystems

S2: Conservation of forest genetic resources

S3: Decentralised European databank on forest fires

S4: Adapting the management of mountainous forests to new environmental conditions

S5: Expansion of the Eurosilva network of research on tree physiology

S6: European network for research into forest ecosystems.

H1: General guidelines for the sustainable management of forests in Europe

H2: General guidelines for the conservation of the biodiversity of European forests

H3: Forestry cooperation with countries with economies in transition

H4: Strategies for a process of long-term adaptation of forests in Europe to climate change.

L1: People, forests and forestry: enhancement of the socioeconomic aspects of sustainable forest management

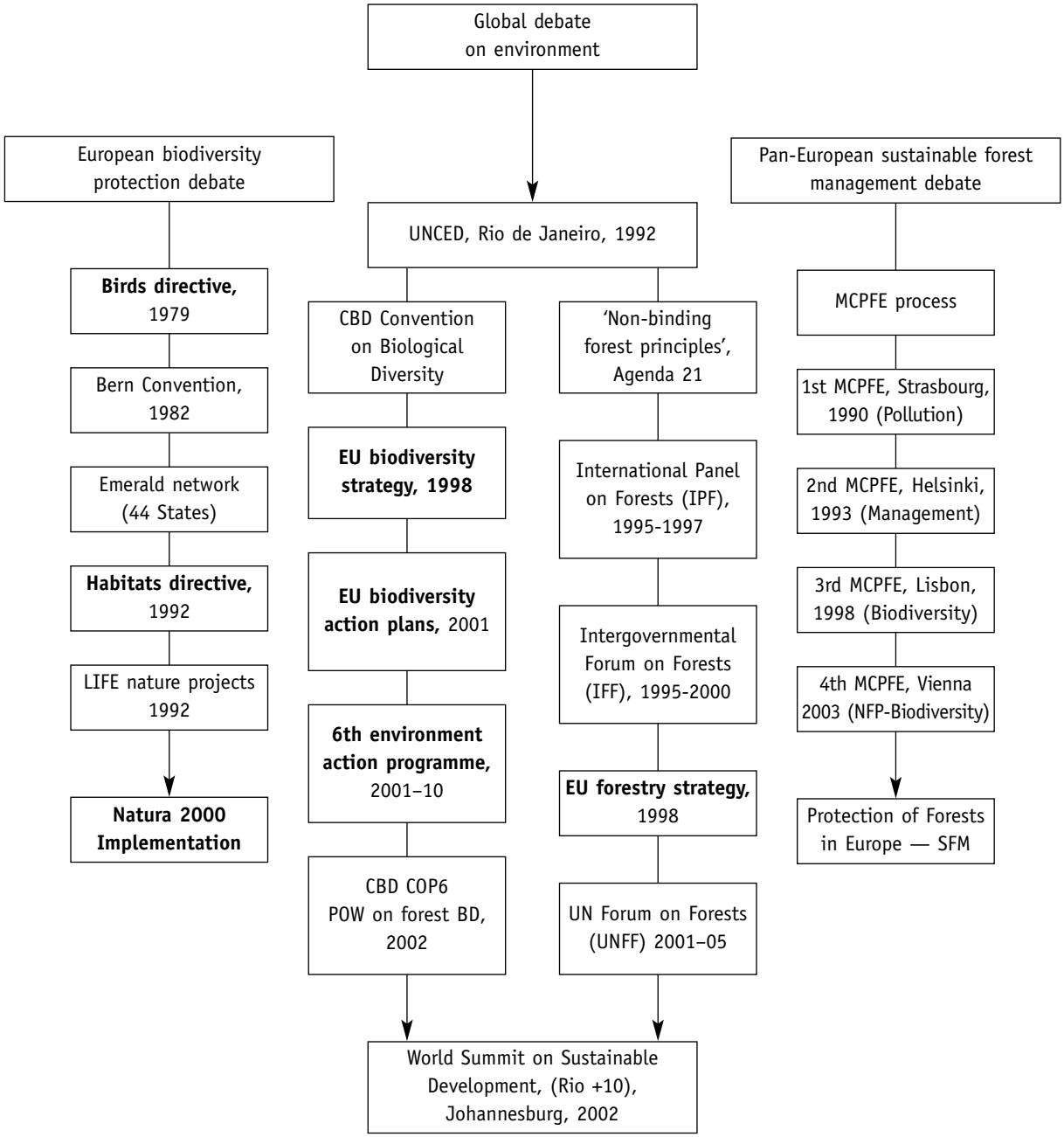
L2: Pan-European criteria, indicators and operational level guidelines for sustainable forest management.

The resolutions cover protection, conservation and sustainable development of Europe's forests and lay down guidelines for achieving those three objectives, including the implementation of objectives from the Convention on Biological Diversity. Because of the comprehensive nature of the resolutions, the European Parliament has emphasised the importance of this pan-European process in relation to the EU forestry strategy ([36]).

([36]) Cf. http://europa.eu.int/comm/agriculture/fore/comm/649_en.pdf

# 9. Overview of discussions on biodiversity protection and forest issues, 1992–2002

(EU instruments are in **BOLD** text)



European Commission

**Natura 2000 and forests 'Challenges and opportunities' — Interpretation guide**

Luxembourg: Office for Official Publications of the European Communities, 2003

2003 — 101 pp. — 21 x 29.7 cm

ISBN 92-894-6069-5

# Venta • Salg • Verkauf • Πωλήσεις • Sales • Vente • Vendita • Verkoop • Venda • Myynti • Försäljning
# http://eur-op.eu.int/general/en/s-ad.htm

## BELGIQUE/BELGIË

**Jean De Lannoy**
Avenue du Roi 202/Koningslaan 202
B-1190 Bruxelles/Brussel
Tél. (32-2) 538 43 08
Fax (32-2) 538 08 41
E-mail: jean.de.lannoy@infoboard.be
URL: http://www.jean-de-lannoy.be

**La librairie européenne/
De Europese Boekhandel**
Rue de la Loi 244/Wetstraat 244
B-1040 Bruxelles/Brussel
Tél. (32-2) 295 26 39
Fax (32-2) 735 08 60
E-mail: mail@libeurop.be
URL: http://www.libeurop.be

**Moniteur belge/Belgisch Staatsblad**
Rue de Louvain 40-42/Leuvenseweg 40-42
B-1000 Bruxelles/Brussel
Tél. (32-2) 552 22 11
Fax (32-2) 511 01 84
E-mail: eusales@just.fgov.be

## DANMARK

**J. H. Schultz Information A/S**
Herstedvang 4
DK-2620 Albertslund
Tlf. (45) 43 63 23 00
Fax (45) 43 63 19 69
E-mail: schultz@schultz.dk
URL: http://www.schultz.dk

## DEUTSCHLAND

**Bundesanzeiger Verlag GmbH**
Vertriebsabteilung
Amsterdamer Straße 192
D-50735 Köln
Tel. (49-221) 97 66 80
Fax (49-221) 97 66 82 78
E-Mail: vertrieb@bundesanzeiger.de
URL: http://www.bundesanzeiger.de

## ΕΛΛΑΔΑ/GREECE

**G. C. Eleftheroudakis SA**
International Bookstore
Panepistimiou 17
GR-10564 Athina
Tel. (30) 21 03 25 84 40
Fax (30) 21 03 25 84 99
E-mail: elebooks@books.gr
URL: www.books.gr

## ESPAÑA

**Boletín Oficial del Estado**
Trafalgar, 27
E-28071 Madrid
Tel. (34) 915 38 21 11 (libros), 913 84 17 15 (suscripción)
Fax (34) 915 38 21 21 (libros), 913 84 17 14 (suscripción)
E-mail: clientes@com.boe.es
URL: http://www.boe.es

**Mundi Prensa Libros, SA**
Castelló, 37
E-28001 Madrid
Tel. (34) 914 36 37 00
Fax (34) 915 75 39 98
E-mail: libreria@mundiprensa.es
URL: http://www.mundiprensa.com

## FRANCE

**Journal officiel**
Service des publications des CE
26, rue Desaix
F-75727 Paris Cedex 15
Tél. (33) 140 58 77 31
Fax (33) 140 58 77 00
E-mail: europublications@journal-officiel.gouv.fr
URL: http://www.journal-officiel.gouv.fr

## IRELAND

**Alan Hanna's Bookshop**
270 Lower Rathmines Road
Dublin 6
Tel. (353-1) 496 73 98
Fax (353-1) 496 02 28
E-mail: hannas@iol.ie

## ITALIA

**Licosa SpA**
Via Duca di Calabria, 1/1
Casella postale 552
I-50125 Firenze
Tel. (39) 05 56 48 31
Fax (39) 055 64 12 57
E-mail: licosa@licosa.com
URL: http://www.licosa.com

## LUXEMBOURG

**Messageries du livre SARL**
5, rue Raiffeisen
L-2411 Luxembourg
Tél. (352) 40 10 20
Fax (352) 49 06 61
E-mail: mail@mdl.lu
URL: http://www.mdl.lu

## NEDERLAND

**SDU Servicecentrum Uitgevers**
Christoffel Plantijnstraat 2
Postbus 20014
2500 EA Den Haag
Tel. (31-70) 378 98 80
Fax (31-70) 378 97 83
E-mail: sdu@sdu.nl
URL: http://www.sdu.nl

## PORTUGAL

**Distribuidora de Livros Bertrand Ld.ª**
Grupo Bertrand, SA
Rua das Terras dos Vales, 4-A
Apartado 60037
P-2700 Amadora
Tel. (351) 214 95 87 87
Fax (351) 214 96 02 55
E-mail: dlb@ip.pt

**Imprensa Nacional-Casa da Moeda, SA**
Sector de Publicações Oficiais
Rua da Escola Politécnica, 135
P-1250 -100 Lisboa Codex
Tel. (351) 213 94 57 00
Fax (351) 213 94 57 50
E-mail: spoce@incm.pt
URL: http://www.incm.pt

## SUOMI/FINLAND

**Akateeminen Kirjakauppa/
Akademiska Bokhandeln**
Keskuskatu 1/Centralgatan 1
PL/PB 128
FIN-00101 Helsinki/Helsingfors
P./tfn (358-9) 121 44 18
F./fax (358-9) 121 44 35
Sähköposti: akatilaus@akateeminen.com
URL: http://www.akateeminen.com

## SVERIGE

**BTJ AB**
Traktorvägen 11-13
S-221 82 Lund
Tfn (46-46) 18 00 00
Fax (46-46) 30 79 47
E-post: btjeu-pub@btj.se
URL: http://www.btj.se

## UNITED KINGDOM

**The Stationery Office Ltd**
Customer Services
PO Box 29
Norwich NR3 1GN
Tel. (44-870) 60 05-522
Fax (44-870) 60 05-533
E-mail: book.orders@theso.co.uk
URL: http://www.tso.co.uk

## ÍSLAND

**Bokabud Larusar Blöndal**
Engjateigi 17-19
IS-105 Reykjavik
Tel. (354) 552 55 40
Fax (354) 552 55 60
E-mail: bokabud@simnet.is

## NORGE

**Swets Blackwell AS**
Hans Nielsen Hauges gt. 39
Boks 4901 Nydalen
N-0423 Oslo
Tel. (47) 23 40 00 00
Fax (47) 23 40 00 01
E-mail: info@no.swetsblackwell.com

## SCHWEIZ/SUISSE/SVIZZERA

**Euro Info Center Schweiz**
c/o OSEC Business Network Switzerland
Stampfenbachstraße 85
PF 492
CH-8035 Zürich
Tel. (41-1) 365 53 15
Fax (41-1) 365 54 11
E-mail: eics@osec.ch
URL: http://www.osec.ch/eics

## BĂLGARIJA

**Europress Euromedia Ltd**
59, blvd Vitosha
BG-1000 Sofia
Tel. (359-2) 980 37 66
Fax (359-2) 980 42 30
E-mail: Milena@mbox.cit.bg
URL: http://www.europress.bg

## CYPRUS

**Cyprus Chamber of Commerce
and Industry**
PO Box 21455
CY-1509 Nicosia
Tel. (357-22) 88 97 52
Fax (357-22) 66 10 44
E-mail: stalo@ccci.org.cy

## EESTI

**Eesti Kaubandus-Tööstuskoda**
(Estonian Chamber of Commerce and Industry)
Toom-Kooli 17
EE-10130 Tallinn
Tel. (372) 646 02 44
Fax (372) 646 02 45
E-mail: einfo@koda.ee
URL: http://www.koda.ee

## HRVATSKA

**Mediatrade Ltd**
Strohalov Prilaz 27
HR-10000 Zagreb
Tel. (385-1) 660 08 40
Fax (385-1) 660 21 65
E-mail: mediatrade@hi.hinet.hr

## MAGYARORSZÁG

**Euro Info Service**
Szt. István krt.12
III emelet 1/A
PO Box 1039
H-1137 Budapest
Tel. (36-1) 329 21 70
Fax (36-1) 349 20 53
E-mail: euroinfo@euroinfo.hu
URL: http://www.euroinfo.hu

## MALTA

**Miller Distributors Ltd**
Malta International Airport
PO Box 25
Luqa LQA 05
Tel. (356) 21 66 44 88
Fax (356) 21 67 67 99
E-mail: info@millermalta.com

## POLSKA

**Ars Polona**
Krakowskie Przedmiescie 7
Skr. pocztowa 1001
PL-00-950 Warszawa
Tel. (48-22) 826 12 01
Fax (48-22) 826 62 40
E-mail: books119@arspolona.com.pl

## ROMÂNIA

**Euromedia**
Str.Dionisie Lupu nr. 65, sector 1
RO-70184 Bucuresti
Tel. (40-21) 260 28 82
Fax (40-21) 260 27 88
E-mail: euromedia@mailcity.com

## SLOVAKIA

**Centrum VTI SR**
Námestie Slobody 19
SK-81223 Bratislava 1
Tel. (421-2) 54 41 83 64
Fax (421-2) 54 41 83 64
E-mail: europ@tbb1.cvtisr.sk
URL: http://www.cvtisr.sk

## SLOVENIJA

**GV Zalozba d.o.o.**
Dunajska cesta 5
SI-1000 Ljubljana
Tel. (386) 13 09 1800
Fax (386) 13 09 1805
E-mail: europ@gvzalozba.si
URL: http://www.gvzalozba.si

## TÜRKIYE

**Dünya Aktüel A.S**
Globus Dünya Basinevi
100, Yil Mahallessi 34440
TR-80050 Bagcilar-Istanbul
Tel. (90-212) 440 22 27
Fax (90-212) 440 23 67
E-mail: aktuel.info@dunya.com

## ARGENTINA

**World Publications SA**
Av. Córdoba 1877
C1120 AAA Buenos Aires
Tel. (54-11) 48 15 81 56
Fax (54-11) 48 15 81 56
E-mail: wpbooks@infovia.com.ar
URL: http://www.wpbooks.com.ar

## AUSTRALIA

**Hunter Publications**
PO Box 404
Abbotsford, Victoria 3067
Tel. (61-3) 94 17 53 61
Fax (61-3) 94 19 71 54
E-mail: admin@tekimaging.com.au

## BRASIL

**Livraria Camões**
Rua Bittencourt da Silva, 12 C
CEP
20043-900 Rio de Janeiro
Tel. (55-21) 262 47 76
Fax (55-21) 262 47 76
E-mail: livraria.camoes@incm.com.br
URL: http://www.incm.com.br

## CANADA

**Les éditions La Liberté Inc.**
3020, chemin Sainte-Foy
Sainte-Foy, Québec G1X 3V6
Tél. (1-418) 658 37 63
Fax (1-800) 567 54 49
E-mail: liberte@mediom.qc.ca

**Renouf Publishing Co. Ltd**
5369 Chemin Canotek Road Unit 1
Ottawa, Ontario K1J 9J3
Tel. (1-613) 745 26 65
Fax (1-613) 745 76 60
E-mail: order.dept@renoufbooks.com
URL: http://www.renoufbooks.com

## EGYPT

**The Middle East Observer**
41 Sherif Street
11111 Cairo
Tel. (20-2) 392 69 19
Fax (20-2) 393 97 32
E-mail: meo@soficom.com.eg
URL: http://www.meobserver.com.eg

## MALAYSIA

**EBIC Malaysia**
Suite 47.01, Level 47
Bangunan AmFinance (letter box 47)
8 Jalan Yap Kwan Seng
50450 Kuala Lumpur
Tel. (60-3) 21 62 62 98
Fax (60-3) 21 62 61 98
E-mail: ebic@tm.net.my

## MÉXICO

**Mundi Prensa México, SA de CV**
Río Pánuco, 141
Colonia Cuauhtémoc
MX-06500 México, DF
Tel. (52-5) 533 56 58
Fax (52-5) 514 67 99
E-mail: 101545.2361@compuserve.com

## SOUTH KOREA

**The European Union Chamber of
Commerce in Korea**
Suite 2004, Kyobo Bldg.
1 Chongro 1-Ga, Chongro-Gu
Seoul 110-714
Tel. (82-2) 725-9880/5
Fax (82-2) 725-9886
E-mail: eucck@eucck.org
URL: http://www.eucck.org

## SRI LANKA

**EBIC Sri Lanka**
Trans Asia Hotel
115 Sir Chittampalam
A. Gardiner Mawatha
Colombo 2
Tel. (94-1) 074 71 50 78
Fax (94-1) 44 87 79
E-mail: ebicsl@sltnet.lk

## T'AI-WAN

**Tycoon Information Inc**
PO Box 81-466
105 Taipei
Tel. (886-2) 87 12 88 86
Fax (886-2) 87 12 47 47
E-mail: eiutpe@ms21.hinet.net

## UNITED STATES OF AMERICA

**Bernan Associates**
4611-F Assembly Drive
Lanham MD 20706-4391
Tel. (1-800) 274 44 47 (toll free telephone)
Fax (1-800) 865 34 50 (toll free fax)
E-mail: query@bernan.com
URL: http://www.bernan.com

## ANDERE LÄNDER/OTHER COUNTRIES/
## AUTRES PAYS

**Bitte wenden Sie sich an ein Büro Ihrer Wahl/Please contact the sales office of your choice/Veuillez vous adresser au bureau de vente de votre choix**

**Office for Official Publications
of the European Communities**
2, rue Mercier
L-2985 Luxembourg
Tel. (352) 29 29-42001
Fax (352) 29 29-42700
E-mail: info-info-opoce@cec.eu.int
URL: http://publications.eu.int

7/2003

KH-54-03-348-EN-C



Publications Office
*Publications.eu.int*

ISBN 92-894-6069-5

KH-39-01-029-EN-C

OFFICE FOR OFFICIAL PUBLICATIONS
OF THE EUROPEAN COMMUNITIES

L-2985 Luxembourg

ISBN 92-894-1443-X




*See our publications catalogue at:*
http://europa.eu.int/comm/environment/pubs/home.htm

European Commission

# Sustainable tourism and Natura 2000

## Guidelines, initiatives and good practices in Europe





A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server (http://europa.eu.int).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2001

ISBN 92-894-1443-X

© European Communities, 2001
Reproduction is authorised provided the source is acknowledged.

*Printed in Belgium*

PRINTED ON WHITE CHLORINE-FREE PAPER

**Environment DG – European Commission**

# Sustainable tourism and Natura 2000

Guidelines, initiatives and good practices in Europe

**Final Publication**
**Vol. I**

based on the Lisbon seminar, December 1999

28/10/00

**SECA**
Société d'Eco-Aménagement

# Contents

**CONTENTS** ..... **2**

**INTRODUCTION** ..... **4**

WHO IS THE DOCUMENT FOR? ..... 4
WHAT KIND OF AREA DOES IT CONCERN? ..... 4
WHAT IS IT BASED ON? ..... 4
IN WHAT CONTEXT WAS THIS DOCUMENT PRODUCED? ..... 4
WHAT DOES IT COVER? ..... 5

**PART 1. NATURA 2000, CHARACTERISTICS AND REQUIREMENTS** ..... **6**

INTRODUCTION AU RÉSEAU NATURA 2000 ..... 6
*.le Réseau Natura 2000 : comment et pourquoi ?* ..... *6*
*.Quelles sont les qualitités d'un réseau ?* ..... *6*
*.La spécificité du Réseau Natura 2000* ..... *7*
*.Comment sera constitué le Réseau Natura 2000?* ..... *8*
*.Entretenir le Réseau NATURA 2000* ..... *10*
TOURISME DURABLE AU REGARD DE LA DIRECTIVE HABITATS ..... 11
*.L'article 6 de la Directive Habitats* ..... *11*
*.Zoom sur le tourisme durable dans l'article 6 de la Directive Habitats* ..... *12*
LES SPÉCIFICITÉS ET CARACTÉRISITIQUES DES SITES NATURA 2000 ..... 20
*.Quels types d'espaces sont concernés?* ..... *20*
*.Quelle est la diversité des sites?* ..... *21*
*.Les sites Natura 2000 ont –ils tous une vocation touristique?* ..... *21*
L'INFORMATION DISPONIBLE SUR NATURA 2000 ..... 22

**PART 2. THE DESCRIPTION AND ANALYSIS OF EXISTING INITIATIVES (CODES, CHARTERS, RECOMMENDATIONS…)** ..... **23**

WHY PROMOTE EXISTING INITIATIVES? ..... 23
WHAT DOES THE TERM " INITIATIVE " MEAN? ..... 23
WHICH CRITERIA HAVE BEEN USED TO SELECT THESE INITIATIVES? ..... 24
WHAT WERE THE RESULTS OF THE INTERVIEWS? ..... 24
WHY ARE THESE INITIATIVES SO DIVERSE? ..... 25
WHICH INITIATIVES WERE SELECTED? ..... 26
SUMMARY TABLE OF 17 SELECTED INITIATIVES RELEVANT TO NATURA 2000 STAKEHOLDERS ..... 29
A DETAILED PRESENTATION OF THE TWO MOST RELEVANT INITIATIVES ..... 34
*The European charter for sustainable tourism in protected areas* ..... *34*
*.The Pan Parks Principles and Criteria* ..... *39*
A COMPARATIVE ANALYSIS OF THE EUROPEAN CHARTER FOR SUSTAINABLE TOURISM AND PAN PARKS ..... 43
*.Two initiatives supported and promoted by the same organisations* ..... *43*
*.Similarities, differences and complementarities* ..... *43*
THE NEED FOR COLLABORATION AND CO-OPERATION BETWEEN THE 2 INITIATIVES ..... 45

**PART 3. SUGGESTED GENERAL PRINCIPLES FOR NATURA 2000** ..... **46**

PRINCIPLES BASED ON EXISTING EXPERIENCE ..... 46
PRIORITIES FOR SUSTAINABLE TOURISM IN PROTECTED NATURAL AREAS ..... 47
*.STRATEGY – POLICY – PLANNING* ..... *47*
*OFFER – MARKET – PRODUCT* ..... *50*
*COMMUNICATION – PROMOTION – AWARENESS* ..... *53*

*.ASSESSING AND MANAGING IMPACTS – IQM – TRANSBORDER CO-OPERATION ..... 55*

**PART 4. SUMMARY OF ADVICE AND RECOMMENDATIONS TO NATURA 2000 STAKEHOLDERS 59**

SEEKING A LEVEL OF INVOLVEMENT APPROPRIATE TO THE SITE ..... 59
SPECIFIC RECOMMENDATIONS ..... 60
*.Strategy, policy, planning ..... 60*
*.Offer, Product, Market ..... 61*
*.Communication, Promotion, Awareness ..... 62*
*.Evaluate and manage impacts, develop an integrated approach, encourage co-operation ..... 64*

# Introduction

## Who is the document for?

This document is for all stakeholders concerned with the development of sustainable tourism within a Natura 2000 site and, by extension, in protected areas in general. These include managers of Natura 2000 sites or protected areas, suppliers of local tourism services, tour operators and local authorities. It should help inspire local politicians, and be of interest at the national and regional government level.

## What kind of area does it concern?

It is relevant to all Natura 2000 designated sites in Europe. These areas are incredibly diverse and include a wide range of ecosystem, from wetlands to mountain areas, and including rural areas. It can be extended to Eastern European areas. It is also relevant to all types of protected area in general.

## What is it based on?

The document is the result of the organisation of a European seminar held in Lisbon in December 1999 carried out by the contractor SECA, Société d'Eco-Aménagement (France) in association with ECOTRANS (Germany), THE TOURISM COMPANY (United Kingdom), and the FRENCH FEDERATION OF REGIONAL NATURE PARKS (France). Examples of good practice, existing initiatives and general principles selected and presented at the conference, are analysed here.

In the preparation of the conference, 866 people were contacted from all over Europe, including Eastern European countries, and 70 projects were analysed, of which 47 examples of good practice were selected and presented. The final short list of 47 was chosen to reflect a wide spread of types of area, geographical location, tourism context, organisations, and initiatives. 129 participants attended two plenary sessions and four workshop sessions over three days. The 15 Member States were well represented, and there was a good balance between both the tourism and the environment sectors.

The document is the result of active participation throughout the seminar and in its follow-up, of the many comments gathered in an evaluation form completed by the participants, and of the constant review of the publication in its draft form.

## In what context was this document produced?

The EU has established a legislative framework for protecting and conserving Europe's wildlife and habitats in order to encourage its Member States to take nature conservation further.

At the centre of this policy is the creation of a coherent ecological network of protected areas across the EU, known as Natura 2000. This is based on two European directives: *Birds* (1979) and *Habitats* (1992). Each Member State is responsible for the choice of sites and management tools in line with European requirements.

Recently, sustainable tourism has been promoted and supported though several European initiatives: studies, publications, workshops, funding programmes. These initiatives address rural and coastal areas and protected areas in general.

As these initiatives have evolved, it has become increasingly important to address tourism in Natura 2000 sites. These sites are notably more sensitive and vulnerable than traditional protected areas because of their characteristics (size, status, management…).

In order to promote sustainable tourism, the European Commission prepared a seminar in Lisbon in December 1999 which was due to be followed by the publication of a new set of guidelines. Contrary to the original aim of the seminar, **the participants all agreed it was not necessary to draw up new specific guidelines for sustainable tourism in Natura 2000, and on the need to adapt and promote existing initiatives.**

In consequences, this document aims to reinforce previous initiatives and focus on the Natura 2000 network. It aims to introduce the concept of sustainable tourism in the network, to encourage managers and stakeholders to follow and adopt certain guidelines and to promote existing initiatives and good practice from all over Europe.

# What does it cover?

This document is in four Parts:

Part 1. Describes the Natura 2000 network, its requirements, the benefits of being designated Natura 2000 and belonging to the network. It analyses the Habitats Directive from a sustainable tourism perspective and gives advice on how to translate it into guidelines and general principles for Natura 2000 stakeholders.

Part 2. Provides a brief description of 17 initiatives relevant to protected areas, which have developed specific recommendations, charters, codes and guidelines for sustainable tourism. A detailed analysis and comparison of two important European initiatives (WWF PAN Parks and the EUROPARC Charter) provides further information for the reader.

Part 3. Presents a list of priorities and general principles for sustainable tourism which are relevant to the characteristics of Natura 2000 sites. These principles are based on the examples of good practice presented at the Lisbon seminar.

Part 4. Provides a summary of specific recommendations and advice addressed to Natura 2000 stakeholders in the light of the Habitats Directive described in Part 1 and based on the general principles in Part 3.

A second volume (annex) gives a description of 21 selected examples of good practices, which illustrate some of the main principles and provide insight into the application of sustainable tourism in practice.

# Part 1. Natura 2000, Characteristics and requirements

## Introduction au réseau Natura 2000

### . LE RÉSEAU NATURA 2000 : COMMENT ET POURQUOI ?

La conservation de la nature est une préoccupation majeure de la politique environnementale de l'Union Européenne depuis les années 1970. Depuis plus de trente ans, les textes législatifs et réglementaires pour la protection de la nature se sont développés également dans les pays de l'Union Européenne. D'autres mesures réglementaires concourent indirectement à la protection de la nature aujourd'hui : lois pour l'aménagement du territoire et sur les études d'impact, planification sectorielle ou territoriale du développement économique et des transports, programmes contractuels, notamment entre les Etats et le niveau local, en faveur du développement économique durable. La mise en place de ces mesures est cependant très variable d'un pays à l'autre et n'a pas permis de voir disparaître les menaces sur certains habitats et espèces.

Au regard de ces menaces persistantes, la Commission Européenne a créé un outil novateur à l'échelle européenne, qu'elle a voulu le plus performant possible en faveur de la protection d'un patrimoine commun à l'ensemble des pays de l'Union : le **Réseau NATURA 2000**. Ce réseau est le symbole de la conservation des ressources naturelles de l'an 2000 et au delà. La protection et la gestion efficace des sites qui constituent ce réseau auront une importance vitale pour la survie à terme de nombreuses espèces ou habitats. Mais plus encore, NATURA 2000 donne l'occasion unique de démontrer que les préoccupations environnementales peuvent être intégrées à d'autres politiques. La conservation de la nature fait partie intégrante de la politique d'aménagement du territoire et peut être compatible avec l'agriculture et les autres activités économiques. Elle peut aussi stimuler la création d'emplois.

Assurer le futur du riche patrimoine naturel de l'Europe suppose la pleine participation de tous les partenaires impliqués et des groupes d'intérêts locaux. Une saine gestion patrimoniale n'est pas du seul ressort des administrations nationales et européenne. Le succès du réseau NATURA 2000 devra s'appuyer sur une large adhésion et sur l'engagement de tous ceux qui sont propriétaires ou gestionnaires ou qui apprécient notre patrimoine naturel.

### . QUELLES SONT LES QUALITITÉS D'UN RÉSEAU ?

Si jusqu'ici, il a surtout été appliqué dans les fédérations de sites ou d'acteurs de la conservation de la nature, le concept de réseau de sites naturels, apparaît ou est sous-entendu dans les directives européennes et les traités internationaux en faveur de la conservation de la nature. Le principe du réseau est aussi très développé dans certains pays où la conservation de la nature est déjà ancienne, par les organismes publics ou des associations (Grande-Bretagne, Pays-Bas, France).

Dans la conservation de la nature, **le réseau est d'abord une réalité biologique** : protéger des espèces et des habitats, c'est connaître l'ensemble des sites présentant les mêmes habitats ou des habitats similaires, et accueillant les mêmes espèces (voire les mêmes individus) à tout moment de leur cycle biologique. **Le réseau, est un lien entre les acteurs pour améliorer la cohérence des actions** dans un secteur qui se professionnalise progressivement. La bonne conservation du patrimoine naturel repose sur **l'harmonisation des méthodes (de la gestion et de sa planification) et des suivis essentiels à la bonne évaluation des mesures mises en place**.

Il est reconnu, que localement, les différents groupes d'intérêts s'entendent généralement pour mettre en place des projets concertés. La Commission Européenne a d'ailleurs permis de mener à bien des expérimentations ponctuelles au travers des financements ACE et ACNAT, puis grâce aux LIFE Environnement mais surtout aux LIFE Nature. **Pour que ces expériences localisées, servent à l'intérêt général, les réseaux sont essentiels à la valorisation et à l'extension des bonnes pratiques**.

## . *LA SPÉCIFICITÉ DU RÉSEAU NATURA 2000*

Constitués sur la base volontariste de ses membres, les réseaux nationaux ou internationaux de sites protégés ne sont pas représentatifs des enjeux de conservation du patrimoine naturel de l'Union Européenne.

La politique de l'Union Européenne en faveur de la conservation de la nature sur le territoire communautaire repose essentiellement sur deux textes législatifs : la Directive 79/409/CEE du Conseil, adoptée en avril 1979 et qui concerne la conservation des oiseaux sauvages (aussi appelée "Directive Oiseaux") et la Directive 92/43/CEE du Conseil, adoptée en mai 1992 et qui concerne la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (aussi appelée "Directive Habitats"). Ces deux Directives constituent le cadre législatif de la protection et de la conservation des habitats et des espèces sauvages d'Europe. Le réseau écologique cohérent d'espaces protégés NATURA 2000 comprendra :

- des Zones de Protection Spéciale (ZPS) visant la conservation des 182 espèces et sous-espèces d'oiseaux figurant à l'Annexe I de la Directive Oiseaux ainsi que des espèces migratrices

- des Zones Spéciales de Conservation (ZSC) visant la conservation des 253 types d'habitats, des 200 espèces animales et des 434 espèces végétales figurant aux Annexes de la Directive Habitats.

Son objectif est d'assurer le maintien ou le rétablissement des habitats et des espèces dans un état de conservation favorable au sein de leur aire de répartition naturelle.

Le réseau NATURA 2000 fonctionnera sur tout le territoire européen et permettra d'inclure des espaces naturels qui ne sont pas pris en compte par les réseaux actuels de la conservation. Ainsi, le réseau NATURA 2000, tous types de site confondus, et constitué sur la base de critères européens, est une première.

Un site NATURA 2000, bénéficiera d'un gestion planifiée et de mesures en faveur de la préservation des espèces et des habitats pour lesquels il a été désigné. Les actions de gestion

seront mises en place au regard des moyens techniques et financiers à disposition et en fonction des exigences socio-économiques et culturelles.

La cohérence du Réseau NATURA 2000 reposera sur la bonne application des directives dont la responsabilité revient aux Etats. Il est d'ailleurs préconisé dans la Directive Habitats, de traduire cette directive en droit national afin de permettre le cas échéant, de compléter les règlements nationaux en faveur de la protection de la biodiversité. De nombreux pays disposent déjà de textes réglementaires et législatifs dans l'esprit des Directives Habitats et Oiseaux. La Directive tend ainsi à harmoniser ou à renforcer des mesures déjà prises ou à prendre.

## . *COMMENT SERA CONSTITUÉ LE RÉSEAU NATURA 2000?*

La constitution du Réseau NATURA 2000, s'effectue en constante collaboration entre la Commission Européenne et les Etats. Sa mise en place, telle qu'elle est définie dans la Directive Habitats se fait en trois étapes:

**Etape 1 : Sélection au niveau national**
Elle est effectuée sur la base d'**inventaires complets** ou **des connaissances acquises**. Chaque Etat fait l'évaluation de l'état de "santé" de chaque espèce ou habitat visé en fonction des éléments d'information dont on dispose.

Les habitats et les espèces figurant aux Annexes I et II de la Directive Habitats sont reconnus comme étant menacés à l'échelle européenne. Cependant, le niveau de connaissance sur leur répartition et leur état de conservation dans chaque Etat Membre est assez disparate. C'est pourquoi, la première étape du processus de désignation a consisté, pour chaque Etat Membre, en une évaluation précise à l'échelle nationale de chaque habitat ou espèce visé, présent sur leur territoire. Sur cette base, les sites importants pour leur conservation ont été identifiés et soumis sous la forme d'une liste nationale à la Commission.

Le choix des sites est effectué sur la base de critères de sélection standards (définis à l'Annexe III de la Directive). Cela signifie que les décideurs doivent tenir compte de la *représentativité* du type d'habitat sur le site considéré, de la *superficie qu'il y occupe* au regard de la superficie nationale de l'habitat considéré et de la *qualité écologique* de ce type d'habitat sur le site (en intégrant les possibilités de restauration).

De même, pour les espèces, ces critères doivent prendre en compte *la taille et la densité* de la population de l'espèce sur le site considéré en comparaison de la population nationale, la *qualité* du site pour l'espèce visée (en intégrant les possibilités de restauration) et son degré d'isolement sur le site par rapport à l'aire de répartition naturelle de la population.

**Dès lors que le Réseau NATURA 2000 vise la conservation des habitats et des espèces sur l'ensemble de leur aire de répartition, il est essentiel que les informations fournies par les Etats Membres soient standardisées. C'est pourquoi, un formulaire NATURA 2000 a été conçu; il doit être complété pour chaque site et transmis en accompagnement de la liste nationale. La précision des informations demandées est importante. Elle est un élément essentiel non seulement pour l'aboutissement du Réseau NATURA 2000 mais aussi pour tout futur débat sur la conservation d'un site dans le cadre d'autres initiatives d'aménagement du territoire (ex: création d'une nouvelle route, ou projet d'écotourisme).**

**Etape 2 : Sélection au niveau européen : Les Sites d'Importance Communautaire**

Les **Sites d'Intérêt Communautaire** *, sont sélectionnés au travers d'une analyse commune aux Etats et à la Commission au sein de 6 grandes régions biogéographiques : alpine, atlantique, boréale, continentale, macaronésienne et méditerranéenne.

Carte des régions biogéographiques

Les sites proposés par les Etats sont retenus au niveau européen lorsqu'ils contribuent de manière significative au maintien ou au rétablissement dans un état de conservation favorable des types d'habitats et des espèces visés, à la cohérence du réseau Natura 2000 et/ou au maintien de la diversité biologique des zones biogéographiques concernées. La liste n'est pas fermée. En novembre 1999, près de 10 000 sites ont été proposés par les Etats membres pour une superficie d'environ 350 000 km². Le Natura 2000 Barometer donne des informations régulières sur le nombre de sites proposés par les Etats (site web de la Commission Européenne et la revue Natura 2000 Informations).

La Communauté abrite six régions biogéographiques distinctes. Chacune possède ses propres caractéristiques et sa propre originalité en matière d'habitats et d'espèces, même si certaines sont communes à plusieurs régions. Du point de vue écologique, il est cependant important de considérer les objectifs de conservation de l'Union Européenne dans leur contexte biogéographique.

La sélection des Sites d'Importance Communautaire est menée sur la base des critères définis à l'Annexe III de la Directive. Ces critères évaluent les sites selon leur *valeur* relative à l'échelle nationale, leur *importance* en tant que voie de migration ou de site transfrontalier, leur *surface* totale, la *coexistence* des divers types d'habitats et d'espèces visés et leur valeur en terme d'unicité pour les régions biogéographiques ou pour l'Union.

Les sites des listes nationales identifiés comme abritant des espèces ou des types d'habitats prioritaires du fait de leur risque imminent de disparition ou d'extinction (signalés par un astérisque dans l'Annexe de la Directive) seront automatiquement sélectionnés en tant que Sites d'Importance Communautaire (sauf si ces sites "prioritaires" représentent plus de 5% du territoire national). De même, la Commission pourra dans des cas exceptionnels proposer d'ajouter un site à la liste, s'il peut être démontré sur des bases scientifiques que ce site est essentiel à la préservation du type d'habitat ou de l'espèce concerné.

**Etape 3 : Les Zones Spéciales de Conservation**
Une fois retenu comme SIC par le Comité Habitats, un site doit être **désigné Zone Spéciale de Conservation** par l'Etat d'ici à 2004. Cela signifie que l'Etat s'engage à mettre en place, si besoin est, les mesures nécessaires pour sa conservation (plan de gestion, actions de restauration, mesures réglementaire ou contractuelle, etc.). De nombreux sites proposés par le Etats bénéficient déjà de telles mesures.

Les Etats Membres devront traiter prioritairement les sites les plus menacés ou les plus importants en terme de conservation. Cette période préalable à la désignation sera mise à profit par les Etats Membres pour préparer les plans de gestion et de restauration de ces sites afin de leur assurer un état de conservation favorable.

## . *ENTRETENIR LE RÉSEAU NATURA 2000*

La plupart des sites constituant le Réseau NATURA 2000 devraient être protégés de fait. Cependant, cela ne signifie pas que le processus s'arrête là ou que le Réseau NATURA 2000 sera figé une fois pour toutes. Il sera essentiel de maintenir une démarche dynamique qui devra être ajustée en fonction des réussites ou échecs relatifs des mesures de protection entreprises. Par conséquent, à l'instar de la Directive Oiseaux, il sera hautement recommandé que des sites continuent à être intégrés au Réseau NATURA 2000 dans l'éventualité où une espèce ou un habitat continuerait de décliner du fait de la dégradation des habitats.

Il est de la responsabilité partagée de la Commission et des Etats Membres de contrôler la réussite du Réseau NATURA 2000 en matière de réalisation des objectifs de conservation de la Directive.

La constitution du réseau NATURA 2000 est un travail ambitieux et progressif. La difficulté technique principale pour proposer des Sites d'Intérêt Communautaire représentatifs au niveau européen et de surface pertinente est de disposer des connaissances nécessaires à l'analyse par les experts du Comité Habitats. Le manque le plus important étant des bonnes cartographies, les données socio-économiques, voire les données naturalistes pour certains sites. Il existe néanmoins nombre de cas où l'on " a fait du NATURA 2000 avant l'heure et sans le savoir" et pour lesquels la désignation en ZSC ne soulèvera aucune contestation. Valoriser ces expériences acquises est aussi l'un des moyens d'illustrer au mieux les implications de l'application de la Directive Habitats. Les promoteurs et les partenaires de ces expériences sont souvent les meilleurs ambassadeurs et constituent les premières éléments de la chaîne de compétences qui va se constituer au sein du Réseau NATURA 2000.

**Voir un territoire devenir site NATURA 2000 est plus qu'un label. C'est d'abord la reconnaissance de l'importance d'un site pour le patrimoine européen. C'est ensuite, pouvoir mettre en place des actions concertées de préservation et de développement économique durable avec le soutien de la Commission Européenne et de l'Etat. C'est aussi participer à une œuvre commune avec le volonté affirmée de travailler en concertation avec le plus grand nombre des acteurs (services publics, exploitants, gestionnaires, aménageurs). C'est prendre conscience qu'on a à rendre des comptes aux générations futures par le biais d'une autorité commune. C'est enfin, faire partie d'un groupe, donc ne plus être isolé.**

# Tourisme durable au regard de la Directive Habitats

**Les sites du réseau NATURA 2000 seront des sites protégés pour lesquels les mesures seront prises par les Etats membres (outils réglementaires, financiers, en fonction des contextes locaux, des stratégies nationales…). Le poids réglementaire du réseau Natura 2000 repose sur la responsabilité des Etats. Il est donc nécessaire de pouvoir opposer un règlement ou des obligations à tout promoteur de projet. La Directive Habitats donne les grandes lignes et les régles pour une planification efficace de projet de développement durable sur un site protégé.**

Les directives Oiseaux et Habitats servent de base à l'élaboration du réseau NATURA 2000. La Directive Habitats, plus récente, comporte les préconisations faites aux Etats pour la mise en place de ce réseau. Ce sont les articles 2 et 6 qui clarifient le lien entre la conservation et les usages possibles sur les sites NATURA 2000. C'est donc dans ces articles que nous trouvons le cadre possible du développement d'un projet touristique sur les sites Natura 2000 qui constituera un exemple de tourisme durable.

| | |
|---|---|
| Article 2.3 Les mesures prises en vertu de la présente directive tiennent compte des exigences économiques, sociales et culturelles, ainsi que des particularités régionales et locales.<br><br>L'homme ou ses activités n'est pas exclu aujourd'hui ou demain.<br><br>La directive Habitats cherche à promouvoir le développement durable. | On favorisera donc la **concertation** et le **partenariat** en<br><br>- Développant et en mettant en place des projets répondant à une stratégie de tourisme durable<br><br>- Tenant compte de la culture locale<br><br>- Soutenant les productions traditionnelles et l'activité économique locale<br><br>- Créant ou développant des écolabels, de nouveaux produits, des modes d'hébergement adaptés |

## . *L'ARTICLE 6 DE LA DIRECTIVE HABITATS*

**L'article 6 de la Directive Habitats crée le cadre de la conservation et de la protection des sites**. Il s'applique aux Zones de Protection Spéciale (ZPS) classées en vertu de la Directive Oiseaux (sauf article 6.1) et aux sites visées dans la Directive Habitats (ZSC).

**L'article 6.1 prévoit le régime de conservation général** que les Etats membres doivent instaurer **pour les Zones Spéciales de Conservation (ZSC) désignées**. Il s'agit de mesures dites positives (établissement de plans de gestion, mise en place de mesures réglementaires, administratives ou contractuelles) à prendre en faveur des espèces et des habitats présents sur le site en cause, sauf ceux dont la présence n'est pas significative.
**Le régime de conservation des Zones de Protection Spéciale (ZPS) classées est prévu dans les articles 4.1 et 4.2 de la Directive Oiseaux**. Les articles 6.2, 6.3 et 6.4 de la Directive

Habitats, comprenant les mesures préventives et les procédures dans le cas de projets d'envergure, s'appliquent au ZPS comme aux ZSC.

**L'article 6 de la Directive Habitats incite les Etats à gérer les espaces protégés d'une manière durable et fixe des limites aux activités susceptibles d'avoir un impact négatif, tout en permettant des dérogations dans certains cas. Il constitue l'un des principaux moyens de concrétiser le principe d'intégration environnementale et d'instaurer, à terme le développement durable.**

## . *ZOOM SUR LE TOURISME DURABLE DANS L'ARTICLE 6 DE LA DIRECTIVE HABITATS*

### A. Les mesures actives

| | |
|---|---|
| *Article 6.1 Pour les zones spéciales de conservation, les États membres établissent **les mesures de conservation** nécessaires impliquant, le cas échéant, des **plans de gestion** appropriés spécifiques aux sites ou intégrés dans d'autres plans d'aménagement et les **mesures réglementaires, administratives ou contractuelles** appropriées, qui répondent aux **exigences écologiques** des types d'habitats naturels de l'annexe I et des espèces de l'annexe II présents sur les sites.* | Les projets touristiques sont possibles sur les sites Natura 2000 dès lors qu'ils respectent la biodiversité et les objectifs de la Directive Habitats et de la Directive Oiseaux.<br><br>**Tout projet touristique devra tenir compte des mesures nécessaires mises en place pour la conservation.**<br><br>**Il devra s'intégrer dans une démarche de planification existante ou à mettre en place.**<br><br>**Il devra s'inscrire dans une stratégie de tourisme durable.** |

| | |
|---|---|
| *Le plan de gestion* n'a rien d'obligatoire et peut prendre toute forme selon le choix des Etats membres. Le plus important étant qu'il prenne en compte les exigences environnementales. Il doit au mieux s'intégrer dans les cadres de planification existants.<br><br>Un plan de développement touristique sur un site Natura 2000 peut être développé par un groupe privé, une collectivité publique, l'organisme gestionnaire du site. Si la méthodologie d'élaboration de plan de gestion du site existe, elle peut intégrer une partie spécifique au tourisme durable pour aider le concepteur du projet. Le caractère durable d'un projet de tourisme durable repose sur la bonne méthode de sa planification, de son évaluation et de son actualisation. | Il existe une grande diversité de types de planification au niveau territorial ou sectoriel, au niveau local ou national, voire transfontraliers, qui peuvent concerner un projet touristique quelque soit son importance :<br><br>- plan de développement des infrastructures de transport<br>- plan territorial de développement économique<br>- plan de gestion de l'urbanisation, de l'occupation de l'espace<br>- plan de gestion et d'exploitation des ressources naturelles<br>- programme de préservation du patrimoine naturel, historique, culturel<br>- plan de gestion de sites naturels protégés de tout type.<br><br>Un projet touristique durable tiendra compte de ces plans. On peut d'ailleurs y trouver des données socio-économiques, écologiques, historiques nécessaires à analyser ou à intégrer dans le projet. Dans l'idéal, le projet touristique s'inscrit dans la procédure d'élaboration de l'un de ces plans et bénéficie du cadre de concertation que cela peut offrir.<br><br>La planification d'un projet n'est efficace que dans une démarche partenariale et de concertation. Elle devra être suivie par une approche d'évaluation régulière du projet et par son actualisation avec l'ensemble des partenaires et acteurs concernés. |

*Les exigences écologiques* : définissent tous les besoins écologiques nécessaires pour assurer un état de conservation favorable des habitats et espèces concernés. Cela implique une bonne connaissance scientifique, au travers de critères que l'Etat est appelé à identifier avec l'aide de la Commission si nécessaire.

Un projet de développement touristique sera d'autant mieux appréhendé qu'on aura une bonne connaissance du site et de ses exigences écologiques. En l'absence de bonnes connaissances, le principe de précaution peut amener à limiter fortement les projets. L'élaboration d'un projet de tourisme peut comprendre l'amélioration des connaissances.

Pour tout projet, on doit mettre l'accent sur la recherche de tous les éléments d'information, et garder en mémoire la vulnérabilité des espèces et des habitats qui sont à l'origine de la désignation en site Natura 2000.

Pour cela on doit :

- connaître les limites du site, même si le projet est en dehors du site

- s'informer sur la teneur des mesures réglementaires (lois nationales, réglementations sur le sites qui bénéficient d'un statut de protection) ou contractuelles (dans le cadre de conventions visant la gestion des milieux naturels) qui s'y appliquent.

- se procurer ou à défaut, faire réaliser les cartographies aux échelles adaptées au projet, les études sur les exigences écologiques des espèces et des milieux concernés et leur degré de vulnérabilité, dans le site ou en dehors.

- identifier et évaluer les menaces et les enjeux sur la conservation durable des espèces et des habitats.

| | |
|---|---|
| *Les mesures réglementaires, administratives et contractuelles* sont très variables selon les pays et les sites et sont laissées à la discrétion des Etats, de par le principe de subsidiarité. Elles doivent être positives, comme signifier la non intervention, la définition de zones interdites d'accès, etc.<br><br>Le tourisme, même s'il est durable, ne se développera pas dans tous les sites Natura 2000. Tout site Natura 2000 n'est pas un site potentiel pour le développement touristique, ou de n'importe qu'elle activité économique, même considérée comme durable par ailleurs. | Un site Natura 2000 peut être un espace nécessitant une protection stricte ou destiné à des actions minimales de gestion pour le maintenir dans un état de conservation favorable.<br><br>S'il est envisageable, un projet touristique devra tenir compte des mesures réglementaires mises en place au niveau national et local. Elles sont parfois nombreuses et d'origines diverses : conditions d'accès aux sites, d'exploitation des ressources naturelles, nécessité d'autorisation spéciale pour l'aménagement ou l'exploitation, etc.<br><br>Tout promoteur de projet se doit de les connaître, que ce soit les mesures de protection de site, ou les mesures contractuelles dont pourra bénéficier le projet s'il répond aux critères des contrats mis en place.<br><br>Le projet pourra avoir pour objectif de participer à la conservation et pourra éventuellement faire appel au soutien financier des Etats ou de la Commission Européenne lorsqu'ils existent. |

## B. Les mesures préventives

| | |
|---|---|
| *Article 6.2 Les États membres prennent les mesures appropriées pour éviter, dans les zones spéciales de conservation, la **détérioration** des habitats naturels et des habitats d'espèces ainsi que les **perturbations** touchant les espèces pour lesquelles les zones ont été désignées, pour autant que ces perturbations soient susceptibles d'avoir un effet significatif eu égard aux objectifs de la présente directive.* | C'est le principe de prévention qui s'applique à tout type d'activités humaines, comme à des accidents dus à des phénomènes naturels ou non. Cela peut donc concerner des activités en dehors des sites, dont les effets peuvent se faire ressentir à l'intérieur du site.<br>Cet aspect est primordial pour l'élaboration d'un projet économique qui nécessite une bonne connaissance de la fonctionnalité des milieux, de la sensibilité des espaces et des espèces, et des mesures de conservation mises en place. L'information est à diffuser au plus grand nombre.<br><br>**Développer au mieux les outils d'évaluation, de communication, de valorisation et sensibiliser. Avoir une image vraie de la nature et pas une représentation.** |

*Indicateurs de détérioration*
L'aire de répartition naturelle de l'espèce" diminue ou risque de diminuer ou remet en cause l'existence et la probabilité d'existence d'un habitat suffisamment étendu pour que ses populations se maintiennent à long terme".

Pour le tourisme, cela concerne tous les projets d'infrastructures, de modes de transport, d'augmentation de la densité de la fréquentation, d'aménagements pour l'accueil du public… qui doivent être envisagés selon leurs conséquences au long terme, donc suivis et maîtrisés.

Un projet de tourisme durable peut comporter des aménagements, voire la création d'infrastructures nouvelles qui auront une incidence paysagère, au minimum.

Pour éviter de conduire à une détérioration, il faut avoir une très bonne connaissance des habitats et des espèces autant dans le site, qu'à l'extérieur. Il existe des organismes et des personnes ressources dans ce domaine qu'il peut être nécessaire d'intégrer dès l'élaboration du projet afin d'évaluer au mieux l'impact potentiel du projet.

Si les aménagements et les infrastructures nouvelles impliquent la création de nouvelles activités, une fréquentation plus élevée, on doit en évaluer également l'impact au préalable.

Un projet de tourisme durable doit également promouvoir autant que possible la réduction des pollutions, l'utilisation minimale d'énergie et l'exploitation raisonnée des ressources naturelles, qui sont par ailleurs préconisées pour favoriser le développement durable.

| | |
|---|---|
| *Indicateur de perturbation*<br>Sur un site, la perturbation est relative au statut de conservation des espèces au regard de la contribution du site au réseau Natura 2000. Tout événement contribuant à la diminution de la taille de l'habitat des espèces à l'intérieur du site peut être considéré comme une perturbation significative.<br><br>Cela peut concerner des projets de parcours sur des milieux sensibles, de visites régulières de l'avifaune en particulier. L'absence de limitation de certaines activités (tout genre confondu) est le cas le plus courant de perturbation. | La fréquentation humaine est parfois la source de perturbation la plus importante. Elle repose souvent sur une méconnaisse des espèces et des habitats. On doit donc évaluer les capacités de charge des sites, maîtriser les flux de visiteurs, à l'intérieur ou à l'extérieur des sites.<br><br>Le promoteur du projet doit aussi envisager une démarche active de sensibilisation, voire d'éducation à l'environnement, qui ne soit pas qu'un outil de promotion ou un slogan.<br><br>On peut ainsi favoriser les programmes d'éducation à l'environnement, des codes de bonne conduite, les nouvelles technologies, et les modes d'appréhension de la nature par l'interprétation.<br><br>Le discours "naturaliste" ou "environnemental" est l'une des spécialités en plein développement dans les espaces protégés, le monde de l'éducation. Des organismes et des personnes ressources existent donc et peuvent être étroitement associés à l'élaboration du projet comme à la mise en place de programmes de sensibilisation. Il existe des fonds spécifiques pour ces objectifs à différents niveaux. |

## C. Les procédures d'évaluation d'un projet

| | |
|---|---|
| *Article 6.3 Tout **plan** ou **projet** non directement lié ou nécessaire à la **gestion** du site mais susceptible d'affecter ce site de manière significative, individuellement ou en conjugaison avec d'autres plans et projets, fait l'objet d'une évaluation appropriée de ses incidences sur le site eu égard aux objectifs de conservation de ce site. Compte tenu des conclusions de l'évaluation des incidences sur le site et sous réserve des dispositions du paragraphe 4, les autorités nationales compétentes ne marquent leur accord sur ce plan ou projet qu'après s'être assurées qu'il ne portera pas atteinte à l'intégrité du site concerné et après avoir pris, le cas échéant, l'avis du public.*<br><br>Cet article met l'accent sur l'avis officiel à | Un projet d'écotourisme peut comprendre partiellement ou totalement des infrastructures ou des travaux importants. Il importe dans ce cas de prévoir parallèlement des mesures d'atténuation et les solutions alternatives qui pourraient assurer l'absence d'effets négatifs sur le site.<br><br>L'étude préalable ou évaluation du projet est alors indispensable et doit être réalisées au regard des objectifs de conservation du site qui sont définis dans le formulaire descriptif du site voire détaillés dans un plan de conservation préétabli (plan de gestion, plan d'action, document d'objectif de conservation) et généralement consultable auprès de l'autorité compétente. |

| | |
|---|---|
| délivrer par une autorité compétente sur tout projet (travaux de construction ou interventions sur l'environnement naturel par exemple) ou sur tout plan (aménagement du territoire, programmes sectoriels par exemple) afin d'évaluer leur compatibilité avec les objectifs des deux directives.<br><br>La procédure décrite est déclenchée par la seule probabilité d'effets négatifs de plans ou projets situés à l'extérieur ou à l'intérieur du site. On doit également considérer des projets ou plans au regard des éventuels effets conjugués de plusieurs plans ou projets, qui sont proposés effectivement et pas seulement prévus.<br><br>Si un projet est susceptible d'avoir une incidence négative au regard des directives, il doit comporté des solutions alternatives que l'autorité compétente pourra évaluer à leur tour. | L'évaluation du projet peut suivre la procédure envisagée dans le cas d'étude d'impact environnemental de projets publics ou privés. La Directive européenne 85/337/CEE modifiée par le directive 97/11/CE définit la notion de projet et la forme de l'évaluation à envisager. Elle est un référent incontestable. Les lois nationales sur l'étude d'impact environnemental peuvent également être utilisées dans certains pays qui en disposent.<br><br>Plus l'étude est détaillée et motivée plus la décision de l'autorité compétente sera facilitée.<br><br>Cette étude a l'avantage de rendre l'avis émis non critiquable sur un projet, et éventuellement de favoriser le débat, voire la concertation locale.<br><br>En l'absence de plan de gestion de site on suggère ici au meneur de projet d'avoir une méthode stricte, rigoureuse. Ce qui peut être le cas d'un site Natura 2000 ne bénéficiant d'aucune mesure de protection avant sa désignation. |
| *Article 6.4 Si, en dépit de conclusions négatives de l'évaluation des incidences sur le site et en l'absence de solutions alternatives, un **plan** ou **projet** doit néanmoins être réalisé pour des raisons impératives d'intérêt public majeur, y compris de nature sociale ou économique, l'État membre prend toute mesure compensatoire nécessaire pour assurer que la cohérence globale de Natura 2000 est protégée. L'État membre informe la Commission des mesures compensatoires adoptées. Lorsque le site concerné est un site abritant un type d'habitat naturel et/ou une espèce prioritaires, seules peuvent être évoquées des considérations liées à la santé de l'homme et à la sécurité publique ou à des conséquences bénéfiques primordiales pour l'environnement ou,* | Les mesures compensatoires doivent être nouvelles (la désignation supplémentaire de site n'en est pas une en soit mais peut l'être exceptionnellement) et vraiment compenser les dommages en allant au delà de la simple application des directives.<br><br>Elles doivent être mises en place avant et prouver qu'elles fonctionnent quand les atteintes au site visés par le projet sont effectives. Elles peuvent prendre les formes suivantes :<br>- recréation d'habitats sur un site nouveau ou agrandi et incorporation dans le Réseau Natura 2000<br>- amélioration d'un habitat sur une partie du site ou sur un autre site Natura 2000 dans une mesure proportionnelle aux |

| | |
|---|---|
| *après avis de la Commission, à d'autres raisons impératives d'intérêt public majeur*<br><br>Un projet pourra être justifié pour **raison impérative d'intérêt public majeur**, dans le cas d'initiatives ou de politiques visant des valeurs fondamentales pour la population (santé, sécurité, environnement), dans le cas de politiques fondamentales pour l'Etat et pour la société, dans le cas de réalisation d'activités économique ou sociale visant à accomplir des obligations spécifiques de service public.<br>Les mesures compensatoires qui visent à contrebalancer les effets négatifs sur l'espèce ou l'habitat en cause ne sont que le dernier recours. | pertes provoquées par le projet<br><br>De nombreuses expériences de recréation d'habitats ont été menés par les organismes porteurs de projets de conservation de la nature et constituent des références techniques et scientifiques reconnues.<br><br>Le principe pollueur payeur signifie que le concepteur ou responsable du projet prend en charge les frais des mesures compensatoires.<br><br>Le promoteur du projet doit prendre en compte l'appartenance du site qu'il vise à un réseau de sites protégés dont la cohérence doit être maintenue, soit par l'atténuation des effets négatifs de son projet, soit par les compensation envisagées si son projet est reconnu d'utilité publique.<br><br>Un formulaire d'information pouvant aider à préparer l'évaluation est disponible au auprès des services compétents (Etat ou Commission Européenne). |

# Les spécificités et caractérisitiques des sites Natura 2000

**L'objet de la directive Habitats est d'assurer la protection de la biodiversité dans l'Union au travers de la conservation des habitats et des espèces sauvages présentes dans les pays où s'applique la Directive. Elle propose la mise en place de mesures pour le maintien et la restauration d'habitats dans une état de conservation favorable, en tenant compte des exigences économiques, sociales et culturelles, ainsi que des particularités régionales et locales.**

Si les critères de désignation dépendent d'espèces et d'habitats considérés comme prioritaires à protéger, les facteurs anthropiques sont également pris en compte. Les sites Natura 2000 sont des espaces protégés qui n'excluent pas l'homme ou les activités socio-économiques dès lors que cela ne porte pas atteinte aux espèces ou aux habitats pour lesquels le site sera désigné. Il est d'ailleurs reconnu que certaines activités humaines concourent directement à la bonne conservation d'espèces ou d'habitats. De même, le réseau Natura 2000 peut participer au maintien d'activités socio-économiques voire au développement de nouvelles, par le biais de mesures réglementaires ou contractuelles mises en place par les Etats ou leurs déclinaisons locales. Le tourisme durable est l'une des activités qui peut trouver sa place.

## . *QUELS TYPES D'ESPACES SONT CONCERNÉS?*

La réseau Natura 2000 est en cours de constitution. Il s'agit principalement d'espaces ruraux, forestiers ou naturels (montagne, littoral, zones humides). A noter qu'au regard de la directive Oiseaux, des sites urbains en particulier portuaires ont été désignés en ZPS et seront intégrés au réseau Natura 2000.

**Espaces protégés partiellement ou complètement**

En premier lieu, sont proposés par les Etats les sites ou parties de sites bénéficiant de mesures nationales en faveur de la préservation de la nature.

- Les plus communs sont les parcs nationaux, les réserves nationales (réserves naturelle, de chasse, de pêche).
- Les parcs régionaux (ou parcs naturels) constituent des territoires où le développement des activités économiques dépend de mesures contractuelles en faveur de la protection de l'environnement dans son sens le plus large.
- Certaines grandes forêts bénéficient parfois de règlements nationaux spécifiques imposant une forme stricte d'exploitation (publique ou privée).
- Enfin des sites d'intérêt patrimonial international bénéficient de protection par la maîtrise foncière en vue de leur protection, opérée par des organismes publics comme privés.

La majorité de ces sites disposent de plans de gestion formels ou en auront à moyen terme. Tout projet de tourisme durable peut donc s'y intégrer en tenant compte des critères exposés dans le chapitre précédent. Par ailleurs des expérimentations ou des principes ont été élaborés pour de nombreux types de sites, comme détaillé dans le reste de ce rapport.

**Espaces non protégés**
Les SIC aujourd'hui proposés par des Etats ne bénéficient pas tous d'un statut national de protection réglementaire.
On trouve pour certains pays, des zones désignées par les Etats comme pilotes pour le développement d'une agriculture raisonnée, soutenue par les Etats et la Commission Européenne, accompagnés parfois d'écolabel offrant des produits à valoriser dans le cadre de projets de tourisme durable assez aisément.
Enfin, la plupart des sites désignés par les Etats ont un label au travers d'un traité ou d'une convention international : site Ramsar, réserve Man and Biosphère, etc. Il apparaît évident que ces zones doivent concourir à la constitution du Réseau Natura 2000. Les différents guidelines proposés dans ce rapport présentent un panel de planification de projet adaptable à chaque type de site.

## . *QUELLE EST LA DIVERSITÉ DES SITES?*

Les réalités socio-économiques sont très diverses d'un pays à l'autre de l'Union. Il en est de même des politiques publiques et des initiatives privées ou associatives en faveur de la conservation. Le niveau de préservation des habitats/espèces et les connaissances que l'on en a sont aussi divers.

On peut citer schématiquement deux extrêmes qui participent à la richesse du patrimoine naturel européen :

. Les unités nationales ou régionales ayant bénéficié d'un développement économique favorable qui n'aura pas toujours tenu compte de l'environnement et ayant une densité de population élevée, où l'on aura des espaces de nature réduits ou des sites nécessitant une gestion constante pour être maintenus en un état de conservation favorable. C'est d'ailleurs dans ces pays ou ces régions qu'on trouvera les initiatives les plus anciennes de conservation de la nature, un haut niveau de professionnalisation de cette branche et des budgets important privés comme publics sont consacrés à la gestion de sites protégés.

. Les unités nationales ou régionales qui ont un développement économique limité ou qui accusent une déprise dans certains secteurs (industrie, agriculture) et qui laissent des espaces de nature vastes, presque intouchés au côté d'espaces entièrement dégradés. Certains de ces espaces très dégradés étant la conséquence d'un développement touristique non raisonné parfois.

## . *LES SITES NATURA 2000 ONT –ILS TOUS UNE VOCATION TOURISTIQUE?*

Les projets de développement de tourisme durable devront tenir compte de cette typologie, aussi schématique soit-elle. Le tourisme durable, en plus du développement économique qu'il peut permettre, peut pourvoir aux besoins financiers de la gestion écologique, sous la forme de taxes professionnelles, de séjour, de location, d'écotaxes à destination de la gestion des sites Natura 2000.

Le tourisme durable à différentes déclinaisons, selon les situations locales.
La pédagogie est primordiale sur des sites très fréquentés. L'éco-citoyenneté peut participer à reréveler la citoyenneté à proximité des zones urbaines en crise. Le tourisme peut être une activité économique de substitution dans les régions ou pays en déprise. Il revient au Etats ou

aux collectivités locales de dresser en premier les objectifs prioritaires d'activités touristiques ou de loisirs durables qui pourront servir de critères de sélection au projets proposés.

Les destinations touristiques littorales restent les plus importantes pour le loisir ou les congés, pour les activités terrestres et maritimes qu'elles proposent. Elles sont par ailleurs très peuplées (60 % de la population mondiale vit sur une bande de 100 à 150 km des côtes). Il est nécessaire d'envisager dès maintenant des projets de tourisme durable sur les zones côtières selon une un mode de gestion intégrée qui englobe un espace plus large que la stricte bande littorale. Dans une moindre mesure, il en est de même pour les zones de montagne.

Des espaces de nature moins connus ou moins prisés, peuvent cependant bénéficier de la création d'activités touristiques. Pour déterminer au mieux la vocation touristique d'un site, il est conseiller de se reporter aux principes généraux déclinés dans le fin de ce rapport.

En tout état de cause, un projet de tourisme durable sur un site Natura 2000 ou à proximité, doit s'intégrer dans une démarche planifiée dans l'espace et dans le temps, qu'elle soit spécifique au projet ou qu'elle soit préexistante. Le projet doit éviter les incidences négatives sur le site, voire concourir à la conservation du site dans la mesure du possible. La planification de la conservation est en cours ou existe sur les sites Natura 2000, il appartient dont au promoteur de projet de s'y intégrer le mieux et le plus tôt possible. Les principes de planification et d'évaluation de projet dans le cas de l'Ecotourisme sont le garant de l'appropriation locale des projets et d'une concertation efficace entre l'ensemble des acteurs et des responsables de la conservation des sites.

# L'information disponible sur Natura 2000

La Lettre d'information Nature de la Commission Européenne DG XI "Natura 2000" avec en particulier le baromètre
La brochure "Natura 2000, gérons notre patrimoine"
La brochure "Natura 2000 : protection via le partenariat"
Le site web : http://europa.eu.int/en/comm/dg11/

# Part 2. The description and analysis of existing initiatives (codes, charters, recommendations…)

## Why promote existing initiatives?

The participants of the Lisbon seminar came to the conclusion that it was better to promote existing initiatives than develop new ones specifically for the Natura 2000 network.

Out of the twenty-five initiatives collected for the purpose of the seminar, seventeen have been selected and analysed. Two initiatives, considered to be of the most relevance to Natura 2000, are analysed in more detail. These are EUROPARC's European Charter for Sustainable Tourism in Protected Areas and WWF's PAN Parks Principles and Criteria. A comparison of the two initiatives provides insight into their use and application in practice. Complete lists of the criteria and principles developed by these initiatives are provided in annex. Similarly, more detailed information on all the seventeen selected initiatives is to be found in annex.

The seventeen initiatives do not target Natura 2000 sites specifically, but are relevant to stakeholders of Natura 2000 sites. They have been selected because they are relevant to the development of sustainable tourism in sensitive areas in general.

The purpose of this chapter is to help Natura 2000 stakeholders make better use of existing documents in the development of a sustainable tourism strategy.

It should be used in conjunction with the following chapter (part 3) which is the result of this compilation of existing initiatives and contains the suggested principles and guidelines presented at the Lisbon seminar and illustrated by examples of good practice (cf. Annex).

It is clear that co-ordination and collaboration for improved coherence between the promoters of the following initiatives is necessary in Europe and would be useful to the Natura 2000 network.

## What does the term " initiative " mean?

The term " initiative " is used here to describe a vast range of documents, which are available to the public. These documents are principles, codes, charters, recommendations, declarations, and statements of commitment... They have been developed by diverse promoters, for different interest groups, and disseminated in different forms (publications, leaflets, kits, and conference proceedings…). Their common objective is the promotion of sustainable tourism in sensitive environment.

# Which criteria have been used to select these initiatives?

These seventeen initiatives have been selected according to various criteria. The main selection criteria were the relevance of the initiatives to Natura 2000 in particular, and to protected areas and sustainable tourism in general. The initiatives were analysed and described with the help and verification of the promoters. Promoters were interviewed with the following questions as a basis for discussion.

**Context:** What type of initiative? Why was it prepared? With what objective? By whom? For whom? Under what circumstances?

**Content:** What does the initiative refer to? What is the key issues? What are the implications? What are the main requirements?

**Impact:** What impact has the initiative had in practice? What did the initiative generate? Are there examples of the practical application of the initiative? Will it be developed further in the future?

**Diffusion:** How widely was it diffused? How wide an audience was reached?

**Relevance to Natura 2000:** In what ways is the initiative relevant to managers of Natura 2000 sites? How could the initiative be applied to Natura 2000 sites?

# What were the results of the interviews?

***Impact and influence***
Some of the selected initiatives are particularly significant because of their impact and subsequent influence. These are the initiatives which, when placed in context, were especially innovative or generated other initiatives. The World Charter for Sustainable Tourism (1995), for example, had a large media impact internationally and conveyed a message about sustainable tourism that has served as a base-line reference for other initiatives. The charter has been widely distributed in a form of a booklet and is now available on the WTO and UNEP Internet site.

***Content***
In other cases, it is the content of the initiative that stands out. Several initiatives provide guidelines for a specific type of ecosystem (mountain, coastal, rural…) or protected area (national park, nature park…) such as those mentioned from the Council of Europe which provide recommendations for protected areas (1995) and coastal areas (1997). In contrast, other initiatives refer to sustainable tourism in more global terms or present wide general principles.

***Format and intended audience***
The format of each initiative depends on the purpose of the document and the audience it intends to reach. Selected initiatives, which are widely read and easy to use, are highlighted as being especially accessible. "Loving them to death?" (1993) and "Integrated Quality

Management in Rural Destinations" (1999) are examples of documents which are easy to use, are well laid out and include case studies illustrating good practice in action.

***Relevance to Natura 2000***
The initiatives selected are of relevance to Natura 2000 to a greater or lesser extent. The EUROPARC Charter and the PAN Parks Principles and Criteria are the most relevant initiatives today, because they are aimed at protected areas and they promote a conservation and tourism strategy. They constantly refer to the protection of endangered habitats and species. However, some other initiatives will be of importance as well when contracting with the tourism industry. For instance, the Tour Operators' Initiative (1999) supported by UNEP, is very likely to be of relevance to Natura 2000 sites as it envisages supporting conservation projects in natural sites.

# Why are these initiatives so diverse?

The selected initiatives illustrate the diversity of existing initiatives concerning sustainable tourism. This diversity does not facilitate the use of these initiatives by those in the field. Moreover, many of the initiatives do not specify who they are aimed at, and why exactly they were developed. This analysis is an initial attempt to clarify their status and facilitate their use.

***They address protected areas in different ways.*** According to their different objectives, they focus on areas ranging from specific destinations and types of protected area or ecosystems to more global issues.

***They address different interest groups.*** They are often aimed at several players: The tourism industry, managers of protected areas, Member States, tourists, host populations, administrations...

***They have different spheres of influence*:** Member States of the European Union (4 of the selected initiatives), Europe extended to the EEC (2 ), the Mediterranean (2) International (8),

***They are named after different types of document****:* Six recommendations; one charter (a kit with methodology, action plan, strategy, statement of commitment), one conference report, one statement of commitment, one set of guiding principles, two sets of guidelines, two codes of conduct or ethics, one certification process (criteria for developing a strategy and action plan for the certification process), one declaration (consensus at the end of a conference)

***They are promoted and supported by different types of organisation***: International organisations (UNEP, Council of Europe, INSULA, UNESCO, and WTO), NGOs (WWF, IUCN), Institutions (Secretariat Convention on Biodiversity, European Commission), Intergovernmental organisations, Tourist industry associations (on a local, regional or international scale), Consultative bodies (MCSD)

***They are disseminated according to their format:*** Official document or report for Member States, publications, conference declarations, contractual commitment, working document, examples of good practice.

***They are disseminated in different ways:*** Printed and disseminated on request, available on an Internet site, or are not for public distribution.

# Which initiatives were selected?

The following initiatives have been selected and summarised in a table. More comprehensive details and practical information about each initiative can also be found in annex where each initiative is presented individually in a common framework.

***1. LOVING THEM TO DEATH? 1993***

(EUROPARC Federation, Kröllstrasse 2, D-8352 Grafenau, Germany, Tel. +49 8552 2839).
The result of a study of the management of tourism in protected areas by a working group to provide guidelines for managers of protected areas. The publication includes special guidance for developing tourism in particularly sensitive areas (mountains, coasts, Mediterranean regions, wetlands) and makes recommendations for action by international organisations, national governments and the tourism sector.

***2. THE EUROPEAN CHARTER FOR SUSTAINABLE TOURISM IN PROTECTED AREAS, 1999***

*(FFPNR, 4, rue de Stockholm, 75008 Paris, France, Tel. +33 1 44 90 86 20)*
An initiative which emerged from the report "Loving them to death?", the Charter addresses protected areas, providers of tourism services and tour operators. It contains principles for sustainable tourism, and a detailed methodology for the preparation and implementation of a sustainable tourism strategy. Those who sign the Charter commit themselves to defining a strategy and action plan.

***3. PAN PARKS, 1999***

*(WWF International, Avenue du Mont Blanc, 1196 Gland, Switzerland, Tel. +41 22 364 9426, Internet site: http://www.panparks.org)*
A follow-up to the World Conservation Union's (IUCN) recommendations in 'Parks for Life' (1992), this initiative aims to create a pan-European network of large-scale, well-managed protected areas awarded the PAN Parks quality mark. It includes principles and criteria to be met for the development of a sustainable tourism strategy and for the award of the logo.

***4. TOWARDS QUALITY RURAL TOURISM - INTEGRATED QUALITY MANAGEMENT (IQM) OF RURAL TOURIST DESTINATIONS, 1999***

*(European Commission Enterprise Directorate, 200 re de la Loi, B-1049 Brussels, Belgium, Tel. +32 2 296 9700)*
The result of a study into how the concept of IQM can be applied to the management of sustainable tourism in Europe's rural tourist destinations. Aimed at all those concerned with the management of rural areas, it sets out recommendations based on the analysis of 15 case studies of good practice.

***5. PARKS FOR LIFE: ACTION FOR PROTECTED AREAS IN EUROPE, 1994***

*(IUCN Publications Services Unit, 219c Huntingdon Road, Cambridge, CB3 0DL, UK)*
A well-detailed publication intended as an action plan for protected areas in Europe. It sets outs the policies and actions which each country should make to ensure an adequate, effective, well-managed network of protected areas. Important initiatives are endorsed, recommendations are made to governments and 30 priority projects are highlighted. This action plan was updated in 1997.

### *6. TOUR OPERATORS' INITIATIVE, 1999*

*(Secretariat Tour Operators' Initiative for Sustainable Tourism Development, UNEP, division of Technology, Industry and Economics, 39-43, Quai André Citroën, 75739 Paris Cedex 15, France, Tel. +33 1 44 37 14 50, Internet site: http://www.toinitiative.org)*

A voluntary, non-profit-making initiative open to all tour operators regardless of their size or geographical location. Tour operators sign a statement of commitment committing themselves to putting into practice the various principles of sustainable development.

### *7. ECOTOURISM DIAGNOSTIC AND PLANNING GUIDELINES FOR PROTECTED AREAS MANAGERS, 1992*

*(WWF US, 1250 24th Street N.W., Washington D.C. 20037, USA, Tel. +1 202 778 9624)*

A concise method for creating an ecotourism strategy developed by WWF in the USA for managers of protected areas in the form of a technical paper. This document has been widely used in the Southern Hemisphere by protected area managers.

### *8. TOURISM, ECOTOURISM AND PROTECTED AREAS, 1996*

*(IUCN, IUCN Publications Services Unit, 219, Huntingdon Road, Cambridge CB3 0DL, UK/ IUCN Communications Division, rue Mauverney 28, CH-1196 Gland, Switzerland)*

A comprehensive publication, which reviews the state of nature-based tourism internationally and provides guidelines and case study examples targeted at protected area planners and managers for its development.

### *9. GUIDELINES: DEVELOPMENT OF NATIONAL PARKS AND PROTECTED AREAS FOR TOURISM, 1992*

*(IUCN, WTO, c/Capitan Haya, 42, 28020 Madrid, Spain, Tel. +34 1 571 0628/ UNEP, Tour Mirabeau, 39-43 Quai André Citroën, 75739 Paris, France, Tel. +33 1 40 58 88 50)*

Guidelines, which aim to encourage appropriate tourism development, targeted at those concerned with the management of national parks and protected areas, particularly in less economically developed countries.

### *10. COUNCIL OF EUROPE RECOMMENDATIONS, 1993/1999*

*(Council of Europe, F-67075 Strasbourg Cedex, France, Tel. +33 3 88 41 22 64)*

The Council of Europe has produced two official documents, which concern environmentally friendly tourism development in protected areas directly. It has provided recommendations for sustainable development in protected areas (1995) and in coastal areas (1997). Both are aimed at the 41 Member States, EEC included and are approved by the Committee of Ministers.

### *11. WORLD CHARTER FOR SUSTAINABLE TOURISM 1995*

*(INSULA, Internet site: http://www.insula.org)*

The declaration made at the World Conference for Sustainable Tourism in Lanzarote (27-28 April 1995) comprising principles and criteria for sustainable tourism. With 1000 participants and significant media coverage, the conference declaration aimed to contribute to the implementation of sustainable tourism initiatives and policies, by raising awareness among international, national and local authorities.

### *12. CONVENTION ON BIOLOGICAL DIVERSITY 1992*

*(Convention on Biological Diversity Internet site: http://www.biodiv.org)*

An international legal instrument for the conservation and sustainable use of biological diversity opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio "Earth Summit") and ratified in 1993 with 168 signatures.

### *13. DRAFT PRINCIPLES FOR (THE) IMPLEMENTATION OF SUSTAINABLE TOURISM, 1998*

*(UNEP Division of Technology, Industry and Economics, Internet site: http://www.uneptie.org/tourism/new.html)*

An official report that consolidates existing guidelines into a set of key principles aimed at guiding governments, intergovernmental, private sector and other organisations in the integration of sustainable tourism into their overall policies for sustainable development.

### *14. BLUE PLAN, 1999*

*(Blue Plan, 15, rue L. Van Beethoven, Sophia-Antipolis, 06560 Valbonne, France, and Tel. +33 4 92 38 71 30)*

A document produced by the Blue Plan, one of the regional centres of the Mediterranean Action Plan (MAP), which presents recommendations and proposed action for tourism and sustainable development in the Mediterranean adopted by the Contracting Parties to the Barcelona Convention.

### *15. INTERNATIONAL CONFERENCE ON SUSTAINABLE TOURISM IN SMALL ISLAND DEVELOPING STATES (SIDS) AND OTHER ISLANDS, 1998*

*(WTO, UNEP Division of Technology Industry and Economics, Internet site: http://www.uneptie.org/tourism/confer.html)*

A report produced following the conference held in Lanzarote (25-28 Oct. 1998). It includes recommendations to the United Nations Commission on Sustainable Development (CSD) which focus on the specific requirements of small islands and in particular of small island developing states (SIDS).

### *16. GLOBAL CODE OF ETHICS FOR TOURISM 1999*

*(WTO, Internet site: http://www.world-tourism.org)*

A 10 point code of ethics aimed at tourist destinations, governments, tour operators, travel agents, workers and travellers. It includes the creation of a World Committee on Tourism Ethics to act as a conciliation mechanism to ensure the implementation of the Code.

### *17. RESPONSIBLE TOURISM IN THE MEDITERRANEAN, 1999*

*(WWF Mediterranean Programme, Via Po 25c, 00198 Rome, Italy)*

A set of general principles and a code of conduct developed to address specific issues related to tourism in the Mediterranean, which target tourists, the tourist industry and government authorities.

# Summary table of 17 selected initiatives relevant to Natura 2000 stakeholders

| Name of the initiative | Promoter | Type of promoter | Focus area | Type of initiative | Aimed at | Date | Sphere of influence | Format | Place of distribution | Langs. |
|---|---|---|---|---|---|---|---|---|---|---|
| **1. Loving them to death?** | **EUROPARC Federation** | European voluntary organisation | National Parks Nature parks | • Guidelines for the development of tourism in protected areas<br>• Recommendations for developing tourism in particularly sensitive areas<br>• Recommendations to international organisations, national governments and the tourism sector | • Managers of protected areas<br>• Governments<br>• International organisations<br>• Tourism professionals | 1993 | European Union countries | • Publication<br>• Recommendations<br>• 15 case studies of good practice | FFNPE<br>Kröllstrasse 5<br>8352 Grafenau<br>Germany<br>Tel +49 8552 2839<br>Fax +49 8552 3242 | Eng.<br>Fr.<br>Ger.<br>Sp. |
| **2. European Charter for Sustainable Tourism in Protected Areas** | **EUROPARC Federation, French Federation of Regional and Nature Parks (FFPNR)** | European voluntary organisation | National parks Nature parks | • Charter<br>• Principles<br>• Methodology for the preparation of a strategy and action plan<br>• Checklist for evaluation<br>• Case studies | • Managers of protected areas<br>• Tourism businesses<br>• Tour operators and transport companies | 1999 | European Union countries | 3 reports:<br>• Brochure of official text<br>• Principles and methodology<br>• Brochure of case studies | Fédération des Parcs Naturels Régionaux de France<br>4, rue de Stockholm<br>75008 Paris<br>France<br>Tel +33 1 44 90 86 20<br>Fax 33 1 45 22 70 78 | Eng.<br>Fr.<br>Ger.<br>Sp.<br>Catalan<br>It. |
| **3. PAN Parks** | **WWF** | Independent conservation organisation | Protected areas | Principles and Criteria (final draft in process) | • Managers of protected areas<br>• Tourism businesses<br>• Other private sector organisations | 1997 | European | Draft document | WWF International<br>Avenue du Mont Blanc<br>1196 Gland Switzerland<br>Tel +41 22 364 9426<br>Fax +41 22 364 3239<br>Internet site:<br>http://www.panparks.org | Eng. |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **4. Towards quality rural tourism : Integrated Quality Management (IQM) of Rural Tourist Destinations** | **European Commission DG Enterprise** | Institution | Rural tourist destinations | • Recommendations<br>• Code of practice<br>• 15 case studies | Organisations responsible for tourism in rural destinations:<br>• Local authorities<br>• Governments<br>• Politicians<br>• Managers in related sectors | 1999 | European Economic Area Countries | Publication | Enterprise Directorate General (Tourism Unit)<br>200 Rue de la Loi<br>1049 Brussels<br>Belgium<br>Tel +32 2 296 9700<br>Fax +32 2 295 6969 | Eng.<br>Fr.<br>Ger. |
| **5. Parks for Life : action for protected areas in Europe** | **IUCN** | Non-governmental organisation | Protected areas | An action plan for Europe's protected areas made up of:<br>• The endorsement of existing initiatives<br>• Recommendations<br>• 30 priority projects | • Decision-making governmental and non-governmental organisations<br>• Managers of PA<br>• Local communities<br>• Businesses<br>• Land owners<br>• The general public | 1994 | All Europe, EEC countries included | Publication | IUCN Publications Services Unit<br>219,Huntingdon Road<br>Cambridge CB3 0DL<br>UK | Eng.<br>Fr.<br>Sp.<br>Ger. |
| **6. Tour Operators' Initiative for Sustainable Tourism Development** | **UNEP** | International organisation | Global | • Statement of commitment<br>• Principles for sustainable tourism<br>• Programme of activities | Tour operators | 2000 | International | Statement of commitment<br>Constitution<br>Questionnaire | Secretariat The Tour Operators' Initiative for Sustainable Tourism Development<br>UNEP DTIE<br>39-43, Quai André Citroën<br>75739 Paris Cedex 15<br>France<br>Tel +33 1 44 37 14 50<br>Fax +33 1 44 37 14 74<br>E-mail uneptie@unep.fr<br>Internet site:<br>http://www.toinitiative.org | Eng. |
| **7. Ecotourism Diagnostic and Planning Guidelines for Protected Areas Managers** | **WWF US (Author: E. Boo)** | Independent conservation organisation | Protected areas | • Guidelines<br>• Methodology for the creation of an ecotourism strategy | Managers of protected areas | 1992 | International | Technical paper | World Wildlife Fund<br>1250 24th Street N.W.<br>Washington D.C. 20037<br>Tel +1 202 778 9624<br>Fax +1 202 293 9211 | Eng.<br>Fr.<br>Sp. |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **8. Tourism, Ecotourism, and Protected Areas** | **IUCN (Author: H. Ceballos-Lascurain)** | Non-governmental organisation | National parks Protected areas | Essential guidance on:<br>• Tourism and the Environment<br>• Negative tourism impacts<br>• Government policy<br>• Creating and managing tourism in protected areas<br>• Assessing, monitoring and management techniques<br>• Preparing protected areas for tourism | Protected area planners and managers | 1996 | International | Publication | IUCN Publications Services Unit<br>219, Huntingdon Road<br>Cambridge CB3 0DL<br>UK<br><br>IUCN Communications Division<br>Rue Mauverney 28,<br>1196 Gland<br>Switzerland | Eng. |
| **9. Guidelines : Development of National Parks and Protected Areas for Tourism** | **WTO, UNEP, IUCN (Authors: H. Ceballos-Lascurain, J.A. McNeely, J.W. Thorsell)** | International organisations | National parks and protected areas in less economically developed countries | Guidelines on:<br>• Costs and benefits of tourism<br>• Tourism considerations in the selection of areas for National Parks<br>• Capacity limits<br>• Planning<br>• Guidelines for the development of facilities<br>• Hunting in protected areas<br>• Guidelines for providing education and interpretation programmes | Organisations responsible for the management of national parks and protected areas:<br>• Managers of protected areas<br>• Administrations<br>• Local communities | 1992 | International | Publication | WTO<br>C/ Capitan Haya, 42<br>28020 Madrid<br>Spain<br>Tel +34 1 571 0628<br>Fax +34 1 571 3733<br><br>UNEP<br>Tour Mirabeau<br>39-43, Quai André Citroën<br>75739 Paris<br>France<br>Tel +33 1 40 58 88 50<br>Fax +33 1 40 58 88 74 | Eng.<br>Fr.<br>Russ.<br>Sp. |
| **10. Council of Europe Recommendations** | **Council of Europe** | Intergovernmental Organisation | Protected areas<br>Coastal areas | • Recommendations<br>• Principles and guidelines | 41 Member States | 1993 /99 | Europe, EEC countries included, 41 Member States | Official document approved by the Committee of Ministers | Mme Bouguessa<br>Council of Europe<br>67075 Strasbourg<br>France | Eng.<br>Fr. |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **11. World Charter for Sustainable Tourism** | **WTO, Insula, UNESCO, UNEP, UN, European Commission, Spanish authorities** | Intergovernmental organisations | Tourist destinations world-wide | • Declaration<br>• Set of principles and criteria | • The international community<br>• Governments<br>• Public authorities<br>• Decision makers<br>• Tourism professionals | 1995 | International | Booklet | Insula internet site: http://www.insula.org | Eng.<br>Fr.<br>Sp. |
| **12. Convention on Biodiversity and Tourism** | **Secretariat of the Convention on Biological Diversity** | Institution | Global | • International agreement on biological diversity and tourism<br>• Principles<br>• Recommendations | Contracting States | 1997 | International | Official report | Internet site: http://www.biodiv.org | Arabic<br>Chinese<br>Eng.<br>Fr.<br>Russian<br>Sp. |
| **13. Draft principles for the implementation of sustainable tourism** | **UNEP** | International organisation | Global | Set of proposed principles (the consolidation of existing guidelines) | • Governments<br>• Intergovernmental organisations<br>• Private sector organisations | 1998 | International | Draft | Not for public distribution<br>UNEP Division of Technology, Industry and Economics<br>Internet site: http://www.uneptie.org/tourism/new.html | Eng. |
| **14. Blue Plan** | **Mediterranean Commission on Sustainable Development (MCSD)** | Consultative body | Mediterranean | • Recommendations on tourism and sustainable development in the Mediterranean<br>• Proposed actions | 21 Contracting Parties to the Barcelona Convention | 1999 | Mediterranean regions, EU plus all Mediterranean countries | Official document | Blue Plan<br>15 rue L. van Beethoven<br>06560 Valbonne<br>France<br>Tel +33 4 9238 7130<br>Fax +33 4 9238 7131<br>E-mail planbleu@planbleu.org<br>Internet site: http://www.planbleu.org | Fr.<br>Eng. |
| **15. Conference on Sustainable Tourism in small island developing states (SIDS) and other islands** | **WTO, UNEP** | International organisations | Small islands and in particular Small Island Developing States (SIDS) | • Recommendations<br>• Key issues<br>• Case studies | • Governments in small island (and in particular SIDS)<br>• Private sector organisations<br>• The international community | 1998 | International | Report | UNEP Division of Technology, Industry and Economics<br>Internet site: http://www.uneptie.org/tourism/confer.html | Eng.<br>Fr.<br>Sp. |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **16. Global Code of Ethics** | **WTO** | Intergovernmental organisation | Tourist destinations world-wide | 10 point code of ethics:<br>• 9 articles outlining 'rules of the game' for tourism<br>• 10th article for the creation of a World Committee on Tourism Ethics | • Destinations<br>• Governments<br>• Tour operators<br>• Travel agents<br>• Workers<br>• Travellers | 1999 | International | Code | WTO internet site: http://www.world-tourism.org | Eng.<br>Fr.<br>Sp. |
| **17. Responsible Tourism in the Mediterranean** | **WWF** | Independent conservation organisation | Mediterranean destination | • Principles<br>• Code of conduct | • Tourists<br>• Tourism industry<br>• Government authorities | 1999 | Mediterranean | Short publication | WWF Mediterranean Programme<br>Via Po 25c<br>00198 Rome<br>Italy | Eng. |

# A detailed presentation of the two most relevant initiatives

Two initiatives have been identified as the most relevant to characteristics of Natura 2000. They address protected areas specifically on a European level. They have been developed through a wide consultation process with the help of a steering committee and tested throughout several pilot parks. They are widely disseminated in Europe.

They are:

- ☞ The European Charter for Sustainable Tourism in Protected Areas (EUROPARC / FFPNR) resulting from the recommendations of "Loving them to death?",

- ☞ The W.W.F. PAN Parks Principles and Criteria,

The guidelines for implementation of the European Charter for Sustainable Tourism and the PAN Parks Criteria and Principles (3rd draft), are provided in annex.

## *THE EUROPEAN CHARTER FOR SUSTAINABLE TOURISM IN PROTECTED AREAS*

The EUROPARC Federation (the Federation of National and Nature Parks of Europe), founded in 1973, is a politically independent pan-European organisation that works to support and enhance the full range of European protected areas.

Since the 1990s, the question has been raised of the compatibility of nature conservation and tourism in Europe's protected areas. Europe's protected areas are becoming increasingly popular tourist destinations, although most of these fragile regions are ill prepared to receive crowds of visitors.

In 1991, the EUROPARC Federation, aware of this threat, launched an initial study of protected areas and the tourist trade involving more than fifteen European representatives. The project aimed to define guidelines for developing sustainable tourism within and around protected areas and to identify case studies illustrating how sustainable tourism was being developed.

### *The publication "Loving them to death"*

Their work culminated in the publication of the report "*Loving them to death?"* in 1993, a highly practical guide dealing with the appropriate control of tourism in protected areas

The publication reviews tourism and protected areas, and provides:

- **General guidelines** for the development of sustainable tourism in and around protected areas
- **Special guidance** for developing tourism in special areas (mountain areas, coastal areas, Mediterranean regions, wetlands)
- **Recommendations** for action by international organisations, national governments and the tourism sector

One of the publication's recommendations was for the creation of a '**European Charter for Sustainable Tourism**' which would regulate relations between the Parks, providers of tourism services and tour operators. The Federation of National and Nature Parks of Europe had taken part in the report, and was asked to put this into practice.

### ***The European Charter for Sustainable Tourism***

In 1995 the European Commission DG Environment financed a LIFE project led by the FFPNR, on behalf of EUROPARC, to establish the Charter.

The preparation of the Charter was based on two ideas:

- bringing together tourism professionals and managers of Protected Areas to form a working group
- basing their work on pilot projects in several Member States of the EU

The Charter was drafted by a Steering Committee made up of representatives of protected areas, the tourism industry and international organisations. Ten pilot parks from six European Union countries took part in the trial phase of the Charter over a period of three years. The text of the Charter was officially presented in April 1999 in Lilles, France.

**The Charter consists of three documents:**

- ☞ **The official text of the Charter**
- ☞ **A guide to the implementation of the Charter which includes an extensive evaluation checklist**
- ☞ **A brochure outlining the experiences of pilot parks**

### ***Using the Charter***

The Charter seeks to be a practical tool in the hands of protected areas, tourist service providers and tour operators. It is presented in kit form:

- The **main principles** and a **detailed methodology** for the preparation and implementation of a sustainable tourism strategy

- An **evaluation process** for the definition of the strategy and the action plan. This is based on a table of criteria aimed to help form an accurate diagnosis of the strengths, weaknesses and potential of the area, and to evaluate how efficient the measures taken have been at the end of the period. Points from 1 to 5 are allocated for various criteria, based on the judgement of their initial state, their level of relevance and level of improvement.

It is aimed at the authorities responsible for the protected areas, the tourism industry and the local community.

Its purpose is to act both as a standard and guidelines, helping each signatory develop high-quality, sustainable tourism, defined as:
"*any form of development or management of tourism activities ensuring the long-term protection and preservation of natural, cultural and social resources and contributing in a positive and*

*equitable manner to the economic growth and well-being of individuals living in, working in or visiting the protected areas*".

Participation in the Charter is both voluntary and contractual. Protected areas who sign the Charter commit themselves to respecting the principles of sustainable tourism, and defining a strategy and an action plan.

- ***The protected area*** is committed to a strategy and a 5 year action plan, defined in partnership with local tourist businesses and local residents. This intervention ensures consistency between policies and actions in the area.

- ***Tourism service-providers*** define a strategy and a 1-year action plan contributing to the achievement of the area's objectives. In particular, they undertake to adopt management methods, which respect the environment, to value the natural and cultural heritage and to make customers environmentally aware.

- ***Tour operators and transport companies*** are not generally present in the area. Their responsibility is to inform visitors and make them aware, select suppliers who are signatories to the Charter, and support the areas in the marketing of tourist products.

***10 principles for sustainable tourism as set out in the Charter***

✓*Respect the limits of carrying capacity*
✓*Contribute to heritage conservation and enhancement*
✓*Preserve natural resources*
✓*Support the local economy*
✓*Promote the involvement of local residents*
✓*Develop appropriate high-quality tourism*
✓*Make protected areas accessible to everyone*
✓*Develop new forms of employment*
✓*Encourage behaviour that respects the environment*
✓*Serve as a model for other economic sectors and influence their practices.*

***The definition of a strategy and an action plan***

The definition of a strategy takes these principles into account, and follows a standard pattern set out in the Charter:

| |
|---|
| **1. Diagnosis** |
| Complete diagnosis of the needs and constraints of the area (environmental, social, economic) |
| **2. Consultation and involvement of all partners** |
| Involvement of local authorities, the local community and providers of local tourist services |
| **3. Definition and implementation of an action plan** |
| The action plan must include a description of the current situation, the main development objectives, and improved criteria and tools for evaluation |
| **4. Evaluation** |
| In theory, the Charter comprises an evaluation process whereby a technical committee evaluates the results of the strategy and the five year action plan and recognises the area as an "area of excellence in the development of sustainable tourism in protected areas". |

The key issues surrounding the Charter at present are:

- the actual make-up of the technical committee and the evaluation process
- the form that the final product will take (label, quality mark…)
- sources of funding

As it stands, the Charter has developed a process aimed at improving quality in protected areas. The structure of the Evaluation Committee is still to be defined, and the question of what is to be awarded to the successful protected areas remains as yet unresolved.

### ***The practical application of the Charter***

In 1995, 10 European parks became involved in the Charter as pilot parks and made possible the testing of the criteria, which were being developed. During this trial phase, the Charter was tested in different kinds of protected area (national and regional nature parks) and in different situations.

In 2000, 18 parks have signed the Charter, out of which two parks (Zona Volcanica de la Garrotxa Nature Park and Alpi Marittime Nature Park) have reached the final stages of the definition of their strategy and action plan and are ready to undergo evaluation. 10 of these Park are French. Other than in France, parks in Austria, Germany, Italy, UK, Portugal and Spain have become signatory parks.

**The Charter's Pilot Parks**

| | |
|---|---|
| Austria | Hohe Tauern National Park |
| Belgium | The Hautes Fagnes-Eifel Nature Park |
| France | Cévennes National Park |
| | Vosges du Nord Regional Nature Park |
| Italy | Abruzzes National Park |
| | Alpi Marittime Nature Park |
| Spain | Sierra de Cazorla Segura y las Vilas nature Park |
| | Zona Volcanica de la Garrotxa Nature Park |
| UK | Broads national Park |
| | Exmoor National Park |

**The signatory parks today**

| | |
|---|---|
| Austria | Hohe Tauern National Park |
| Germany | Naturpark Frankenwald |
| | Naturpark Steinhudermeer |
| | Naturpark Insel Usedom |
| France | Avesnois Regional Nature Park |
| | Cévennes National Park |
| | Lubéron Regional Nature Park |
| | Marais du Cotentin et du Bessin Regional Nature Park |
| | Martinique Regional Nature Park |
| | Scarpe Escaut Regional Nature Park |
| | Vercors Regional Nature Park |
| | Verdon Regional Nature Park |
| | Vexin français Regional Nature Park |
| | Vosges du Nord Regional Nature Park |

| | |
|---|---|
| Italy | Abruzzes National Park |
| | Alpi Marittime Nature Park |
| | Monti Sibillini National Park |
| Portugal | Peneda Gerês National Park |
| | Serra de S. Mamede Nature Park |
| Spain | Zona Volcanica de la Garrotxa Nature Park |
| UK | Exmoor National Park |

### ***The future of the Charter***

The Charter is listed among the priority projects adopted by the World Conservation Union (IUCN) in its action programme for European Protected areas 'Parks for Life. It also pursues the principles for sustainable tourism as formulated by the 1995 World Conference on Sustainable Tourism held in Lanzarote.

**The successful application of the Charter depends to a great extent on the protected area itself. The protected area must decide how to translate the Charter in practice, adapting it to the characteristics of their site.**

Some parks, such as the Zona Volcanica de la Garrotxa Nature Park in Catalonia, have developed the Charter further than others. The case study of La Garrotxa Nature Park is described in chapter 5, good practice in action.

**The FFPNR is currently working on the definition of a mechanism for labelling and evaluating the work of the signatory parks. The next step will be to ensure funding and supporting funds for signatory parks.**

**Once these are resolved, the FFPNR plans to help implement strategies by means of training programmes and assistance and publicise the Charter to encourage its implementation in other protected areas. A Leonardo training programme and manual is under way to help implement the charter.**

**Key principles of the Charter:**

- Starting from the needs of the area (environmental, economic, social and tourism needs)
- Carrying out a complete survey of the strengths, opportunities, needs and weaknesses
- Working in partnership with all stakeholders, establishing ways of working together
- Designing and implementing a strategy and an action plan
- Setting up criteria to follow up the strategy and monitor results regularly.

## . THE PAN PARKS PRINCIPLES AND CRITERIA

Initiated by the WWF and the Molecanten Group (a Dutch leisure company), **PAN (Protected Area Network) Parks** is an initiative which aims to establish a recognisable pan-European network of unique and well-managed protected areas which welcome visitors while giving priority to nature conservation.

The PAN Parks project began as an idea in 1997, and has generated a lot of enthusiasm. As a result, the PAN Parks process is now well underway.

The central idea of the concept is that nature can become the driving force for healthy economic development in the rural areas of Europe. PAN Parks aims to change tourism in Europe's protected areas from a threat into an opportunity by building partnerships with nature conservation groups, travel agencies, the business community and other interest groups on a local, national and international level.

The initiative aims to provide a nature based response to the growing market of nature-oriented tourism by creating a quality mark standing for:

- an expanding network of well-managed protected areas with high conservation value,
- sustainable tourism development of regions and local communities surrounding protected areas,
- responsible high quality nature-based experiences for visitors and tourists,
- the creation of public awareness, appreciation and support for nature conservation,
- the generation of wide political and financial support at all levels for nature conservation.

Once created, the network of highly protected areas will be co-ordinated by a PAN Parks managing body. As well as being a tool for joint marketing and communication, PAN Parks will create economic incentives for nature conservation through the building of partnerships with the private sector.

This quality mark will be awarded to protected areas and companies that fulfil the PAN Parks Verification Principles and Criteria. When finalised, these principles and criteria will form the basis of PAN Parks.

In 1998, seven pilot parks signed a letter of intent to co-operate as pilot areas. Since then, a PAN Parks logo has been developed. The third draft of the Principles and Criteria (October 1999) has been tested in 17 protected areas and is currently being finalised. The network of PAN Parks is expected to be in place by mid 2001.

### *Principles and Criteria*

The Principles and Criteria (P&C) for the award of the PAN Parks logo form the core of the PAN Parks programme. The process of developing this document began in autumn 1998 and has been prepared on the basis of literature and experts' interviews and comments, and on the basis of best practices found in Europe's protected areas. Currently in its third draft, the final document is due to be finalised by July 2000.

PAN Parks Principles and Criteria consists of five principles (cf the complete list of principles and criteria in the annex)

**Principles 1-3** cover criteria and indicators for the protected areas and management body (it is the protected area which becomes the actual PAN Park)

**Principle 4** sets criteria for a sustainable tourism development strategy to be developed by park managers and relevant interest groups in the region, which will be evaluated

**Principle 5** covers criteria and indicators for commercial partners (including tourism accommodation etc.)

The guiding principle in the P&C drafting process has been to elaborate strict quality standards, applicable to different types of nature and administration of protected areas in Europe. The PAN Parks label must prove that endangered flora and fauna of a protected area are protected, and that tourists can visit the park without causing any harm to nature conservation.

***Principles 1-3:***
These cover detailed criteria necessary for a protected area to become a PAN Park. **PAN Parks will be large areas; strictly protected core areas must be at least 10,000 hectares.** This is important because large protected areas are necessary for the long term conservation of ecological processes and threatened species. There are 2 levels of PAN Parks:

| | |
|---|---|
| ***Candidate PAN Park*** | Areas, which, according to independent verification, meet all essential criteria, but have some minor shortcomings. These parks can get Candidate PAN Parks status, provided they are commited to overcoming all of these shortcomings in 5 years, after which time, they will be reviewed. |
| ***PAN park*** | Areas that, following independent verification meet all PAN Parks P&C. |

The PAN Parks logo will only be awarded to parks with high-standards of nature protection, which offer a variety of nature-based activities and facilities, and where visitors can observe and experience wildlife and other natural based features without causing disturbance to nature.

The implementation of a management plan for nature protection will be necessary and must be supported by relevant research and monitoring. Similarly, a visitor management plan is required, including, for example, an inventory of the number and type of visitors, and an estimate of the future trends.

***Principle 4:***
PAN Parks require the preparation of **a strategy for conservation and sustainable tourism development** for the area concerned. Park managers and relevant interest groups set out numerous criteria and indicators for the development of this strategy. Commercial partners wishing to use the PAN Parks trademark and logo must follow the strategy.

The aim is to ensure that tourism supports nature conservation in the protected area. This means, for example, that a certain share of the profits that tourism brings to the region must return to the "green magnet", for investment in the protected area and its management.

***Principle 5:***
In order to ensure that nature-oriented tourism brings long-term benefits and jobs to local communities surrounding the protected area, criteria are set out concerning local businesses.

Between December 1999 and March 2000, the Principles and Criteria (third draft) were tested on a large scale. Results of the consultation process and field-testing will be analysed and from that basis, the final version will be prepared. The ultimate responsibility to approve the final document lies with the PAN Parks Supervisory Board. These are vital steps towards the implementation of a full scale PAN Parks system across Europe.

## ***The Practical application of the Principles and Criteria***

**Pilot areas**
WWF is working closely with seven pilot areas on the concept of PAN parks. The areas have signed a letter of intent stating their willingness to work on the initiative.

| | |
|---|---|
| April 1998: | Bialowieza (Poland) Slovensky raj (Slovakia) Dadia Forest Reserve (Greece) |
| September 1998: | Duna-Drava (Hungary) Sumava (Czech Republic) Abruzzo (Italy) |
| April 1999: | Biebrza (Poland) |

These will not necessarily be among the first PAN Parks. However, in return for their valuable input, the PAN Parks Organisation provides the pilot areas with support, promotion and funding for small scale projects.

***Self-assessment participants***
17 protected areas, most of them National Parks, from 14 European countries participated in a self-assessment process between December 1999 and March 2000. The aim of self-assessment was to test the third draft of the Principles and Criteria.
The participating protected areas range from well-established national parks, to newly established nature reserves. The geographic make-up of these protected areas is diverse and includes such ecosystems as deciduous forests, river valley systems, coastal island groups and wetland habitats.

These areas were selected on an ad hoc basis and will not necessarily become the first PAN Parks.

- Bulgaria — Strandzsa National Park
- Czech Republic — Sumava National Park
- Finland — Oulanka National Park
  The Southern Archipelago National Park
- France — Mercantour National Park
- Greece — Dadia Forest Reserve
- Hungary — Duna-Drava National Park
- Latvia — Kemeri National Park
- Poland — Bialowieza National Park

| | |
|---|---|
| | Bieszcady National Park |
| | Biebrza National Park |
| ☞ Portugal | Guadiana National Park |
| ☞ Romania | Retezat National Park |
| ☞ Slovakia | Slovensky raj National Park |
| ☞ Sweden | Fullfjallet Nature Reserve |
| ☞ The Netherlands | Terschelling National Park |
| ☞ Turkey | Dilek Peninsula National Park |

**The self-assessment participants completed a comprehensive self-assessment questionnaire focusing on management policy, visitor management and sustainable tourism development. This questionnaire was based directly on the third draft of the PAN Parks Principles and Criteria. It was evaluated by the PAN Parks European Management Organisation.**

The self-assessment process highlighted the following issues:

- ✓ Out of the 17 protected areas, about 4 or 5 already meet most of the necessary criteria to become PAN Parks
- ✓ Although the areas have found the PAN Parks criteria strict, they do not think that the standard should be lowered

The self-assessment process has been a way of turning the initiative into an operational programme by testing the Principles and Criteria on the ground. The results have provided feedback necessary for the finalisation of the PAN Parks Principles and Criteria document.

### ***Steps to becoming a PAN Park:***

| | |
|---|---|
| Step 1 | Complete the PAN Parks Self-assessment Questionnaire |
| Step 2 | Compile a working report on the results of self-assessment |
| Step 3 | Carry on an evaluation of the site by an independent certification body |
| Step 4 | Submit the evaluation report to the PAN Parks Principles and Criteria Standard Committee |
| Step 5 | The PAN Parks European Management Organisation will review the result of self-assessment and check whether the PAN Parks label can be awarded |

Once a protected area has been certified as a PAN Park, commercial partners in the region of the park can also apply for the PAN parks logo. They too have to meet special conditions and undergo an independent certification process.

### ***The future of PAN Parks***

The Principles and Criteria are due to be updated and finalised by July 2000. Once a network of PAN Parks is in place (expected in mid 2001), the PAN Parks product will be launched and a promotional and communication strategy put into action.

**Key principles of PAN Parks:**

- A basis for partnership between relevant stakeholders
- Raising awareness, pride and a sense of ownership
- Action on a pan-European scale
- Incentive to allow external verification
- Providing economic support for conservation

# A comparative analysis of the European Charter for Sustainable Tourism and PAN Parks

## . TWO INITIATIVES SUPPORTED AND PROMOTED BY THE SAME ORGANISATIONS

The EUROPARC Charter and the PAN Parks initiative are in line with ”Parks for Life: Action for Protected Areas in Europe“, the first ever action plan for protected areas in Europe. The plan was prepared by the IUCN, together with the EUROPARC Federation, WWF, BirdLife International and WCMC, in co-operation with around 200 contributors from all around Europe. The aim of the Parks for Life programme was simple: ”An adequate, effective and well-managed network of protected areas in Europe“.

This short comparison and analysis of two initiatives on sustainable tourism and protected areas in Europe, supported and promoted by the ”Parks for Life“ is an extract from a paper presented at the Lisbon conference by Andrej Sovinc, "Parks for Life" co-ordinator at IUCN. The presentation is based on summarising the main points of the two initiatives and the points raised might sometimes be simplified.

The preparation of the Charter was listed as one of the ”Parks for Life“ Priority Projects. The IUCN/World Commission on Protected Areas (WCPA) was represented at the Steering Group for this project. ”Parks for Life“ was also involved in the process of setting up the PAN Parks process (an ongoing co-operation) from its early stages as the PAN Parks concept is foreseen as a ”recognisable network of well-managed protected natural areas which welcomes visitors and avoids potentially conflicting activities“. This viewpoint clearly indicates the links with the above-mentioned overall aim of ”Parks for Life“.

## . SIMILARITIES, DIFFERENCES AND COMPLEMENTARITIES

### Some of the similar or indentical principles of both intiatives

Both the Charter and PAN Parks initiatives:

1) provide concepts for encouraging and managing tourism in protected areas in harmony with the suitable management of natural resources and for the socio-economic benefits of stakeholders.
2) are built on the concepts on partnerships between protected areas, tourism and other businesses and the local population, and of supporting conservation and socio-economic development through tourism.
3) Aim to develop a 'quality brand' for partners involved in the process (protected areas and businesses) which must undergo an independent certification process. (It should be noted that several ”labels“ for tourism industry already exist such as the Council of Europe's ”European Diploma“ for well-managed protected areas).
4) Require the preparation of a strategy for conservation and sustainable tourism development in the area concerned.
5) Involve a ”testing phase“ in evidence in the Charter's ”10 Pilot Parks“ and PAN Parks's self-assessment process.

6) Aim to involve mainly large protected areas, such as National and Regional Parks, with high tourism ambitions and high potentials for the conservation of species, habitats and landscapes. The PAN Parks concept, in principle, defines the minimum size of protected areas to be involved (25.000 ha).

### ***Complementary points of both intiatives***

**Geographical influence**

- Although both initiatives aim to become Pan-European, the Charter, at present, is designed for the EU Member States only (and therefore needs adapting for the CEE countries).
- The PAN Parks initiative started in the CEE National Parks (at present there are seven National Parks from the EU Member States involved). This initiative originated in so-called ”forest“ parks.

**Participation process**

- The Charter requires close consultation betweem all participatory parties in the preparation of a sustainable tourism strategy and action plan for the protected area. In addition it makes provision for local tourism businesses and for tourism operators using the area to prepare separate Action Plans for their enterprises.
- PAN Parks promotes the establishment of a joint independent executive organisation to define a widely supported plan for conservation and tourism development in PAN Parks.

### ***Main conceptual differences between the two initiatives***

1) The PAN Parks initiative aims to include only well-managed protected areas, especially those with outstanding conservation values (”must-see“ sites in Europe; and therefore an ”exclusive club“), while the concept of the Charter sets no such conditions.
2) PAN Parks strives to become a new organisation to be managed by a European management organisation (supported by the Supervisory and Advisory Boards and Certifying Organisation), whereas the Charter is only a strategic approach and a widely used tool for sustainable tourism development and conservation in protected areas.

### ***General conclusions and recommendations***

1) Both initiatives provide effective guidelines for developing and managing tourism in protected areas which could be applied, after some amendments, to various types of protected area networks, including european and international designations, IUCN Protected Area categories on a national level and also to Natura 2000 sites.
2) Both initiatives are mutually dependent. The Charter, at present, is in need of a good marketing and communication strategy, whereas WWF's PAN Parks concept should be supporting the use of the Charter's principles and their application in less well-managed protected areas for them to become potential future candidates for PAN Parks. On the other hand, the PAN Parks concept could take advantage of existing EUROPARC principles and criteria so that partners are involved in the process of the creation of the conservation and sustainable tourism strategy for protected areas.

# The need for collaboration and co-operation between the 2 initiatives

These 2 initiatives have been promoted by the same organisations and are originally the result of the same analysis. They have been developed separately with similar tools (criteria, pilot sites, tests, validation, signatories, and communication…). They both constitute excellent working material for the Natura 2000 network and could be the testing ground for the development of a specific tool for Natura 2000. They could also be merged into one initiative for all the sensitive and remarkable areas in Europe, made up of a variety of tools according to the different characteristics of such a diversity of sites: size, level of knowledge, stage reached in the drafting of a management plan, status and geographical situation.

The other initiatives described here should serve as a reference and should be used to encourage their partners (tour operators, the tourism industry in general, Member States, Administrations…) to adopt a sustainable tourism strategy and to commit themselves alongside protected areas.

# Part 3. Suggested General Principles for Natura 2000

## Principles based on existing experience

In preparation of the seminar, a draft list of general principles was drawn up as part of the process of putting together the seminar programme, identifying the examples of good practice and selecting the workshop topics.

This list was submitted to the participants during the seminar and served as a basis for discussion and debate in the workshop sessions. It helped the participants reach the main conclusions, including a general concensus that new detailed guidelines specific to Natura 2000 were unnecessary.

The principles, which are set out below, have been confirmed during the workshops and in the post-seminar evaluation phase. They were based on an analysis of the main principles reflected in the existing initiatives described in Part 2.

The principles can form the basis for the development of charters, strategies, and action plans for sustainable tourism.

Although the principles are not specific to Natura 2000 sites, they reflect general Natura 2000 processes, such as initial inventories, monitoring, environmental impact assessment (EIA), buffer zone co-operation, and local participation.

The principles also form a framework and basis for recommendations made in the final chapter of this report, which empasises particular issues pertaining to Natura 2000 sites in the light of analysis of the Habitats Directive. Examples of good practice, presented at the seminar, and described in the following chapter, also help to refine the principles and inform the recommendations made in the final chapter.

# Priorities for sustainable tourism in protected natural areas

## . STRATEGY – POLICY – PLANNING

**Resource assessment – characteristics of the protected area - carrying capacity – consultation and partnership in developing and implementing a sustainable tourism strategy**

### *Assessing resources, recognising vulnerability, choosing appropriate tourism*

- ***Reflect existing designations and plans***
  Keep in mind the requirements of the designation, such as directives 6.1-6.4 for Natura 2000 sites. Integrate the Natura 2000 sustainable tourism strategy into existing management plans. Refer to existing regional and national plans and strategies.

- ***Start by understanding the site***
  Base all that you do on a full knowledge of the site's needs and sensitivities. Carry out an inventory of natural and human resources, assessing their well being and need for conservation, and potential to benefit from tourism. Use, for this purpose, the information available in the Natura 2000 form that was filled in for the designation of the site.

- ***Undertake further research***
  If necessary, bring in new expertise to research areas under pressure and endangered species, to have a better idea of their vulnerability.

- ***Know your existing visitors***
  Use surveys to understand exactly who is visiting the site at the moment, when, why and with what impact.

- ***Be aware of market potential and pressures***
  Be realistic about the volume and type of visitors who might come in future. Be alert to growing pressures as well as market potential.

- ***Identify capacity limits***
  Decide whether, where and when there are limits to the number and types of visitor the site should receive in the future if the environment and heritage is not to be degraded. Consider environmental, social and inter-user capacity limits.

- ***Select types of tourism to match resources and markets***

Based on the assessment of needs, resources and markets, identify the kinds of tourism appropriate to the site in the future.

***Creating a strategy based on consultation and partnership***

- ***Involve all stakeholders from the beginning***

  Involve a wide range of local partners from the beginning. Consider holding an open forum at the outset. Make sure the strategy is based on a wide consultation between site managers, conservationists, tourism operators and local communities.

- ***Establish partnership groupings***

  Take the strategy forward through establishing working groups and seminars. Encourage an association of local tourism professionals to become official partners responsible for the strategy.

- ***Raise awareness and commitment***

  Promote widespread awareness of the strategy process. Involve local media. Organise field trips locally and to other areas. Ask all stakeholders to formally commit themselves to the strategy, including signing any resulting charter.

- ***Allocate necessary resources***

  Allow sufficient time to create the strategy (minimum of 6 months). If necessary use external consultants to help with methodology, drafting and evaluation. Designate and train a specialist in sustainable tourism to co-ordinate and oversee the strategy.

- ***Ensure the strategy is simple and clear***

  Produce a strategy document, which is well-focused, easy to read and understand and well disseminated.

- ***Keep everyone involved and informed***

  Inform your partners at every stage. Have a wide discussion on early drafts. When finalised, launch the strategy officially through an event and promote early results and visible benefits.

- ***Widen the scope of the area***

  Address strategic issues of tourism management and development in the areas around the site, including buffer zones.

***Implementing, evaluating and updating a sustainable tourism strategy. Relating it to national policy.***

- ***Establish realistic action programmes and plans***
  Prepare annual action programmes based on the strategy which are realistic and can be implemented.

- ***Select monitoring indicators***
  At the outset, consider what kinds of indicators of performance and impact should be used to monitor the strategy and judge success.

- ***Identify responsibilities for action***
  Through the action programme allocate responsibility for specific actions to appropriate partners.

- ***Use a range of direct action, incentives and controls***
  Include action to be undertaken directly by the site management, as well as incentives and controls on others. Use relevant local and regional laws and measures such as financial incentives, planning controls, labels and awards. Include corrective measures and actions to rectify problems as well as pursuing new opportunities.

- ***Seek evaluation and recognition for the strategy***
  Ask external consultants to evaluate the strategy and results or refer to official national or European assessment processes.

- ***Reflect and influence regional/national strategies***
  Make sure your approach reflects national and regional strategies on sustainable tourism and nature conservation. Through your work, seek to influence policy, laws and actions at these higher levels.

- ***Review the strategy every 3-5 years***
  See the strategy as a dynamic process. Seek to review it every 3 to 5 years.

# *OFFER – MARKET – PRODUCT*

**Market studies – Targeting new markets – Product design – Innovative programmes and packages – Contribution to local economy and conservation – Joint venture and partnership with tour operators**

## *Knowing and targeting new markets, creating new innovative packages*

- ***Reflect new trends in nature tourism***
  Refer to existing national and international data on new trends in nature related tourism, and relate this to your knowledge of existing visitors.

- ***Explore new markets which fit the needs of the area***
  Identify specific niche markets which can be easily targeted and which fit the needs of the site in terms of special interest, volume, timing of visits and environmentally friendly activities.

- ***Reflect the needs of disadvantaged visitors***
  Pay particular attention to visitors with special needs, especially disabled people but also families, young people and those with limited financial means.

- ***Work with people who are in touch with markets***
  Build up partnerships from the start with specific tour operators that have developed their own sustainable tourism policy, code of ethics and partnership with Natura 2000 sites. Ask them to help design new packages. Ask specialist associations for advice on how to adapt your offer to the needs of specific clientele, such as associations of disabled people.

- ***Design and test innovative packages***
  Identify specific visitor experiences that reflect the real value of the site, and environmental management and educational priorities. Where appropriate, work up packages with tour operators and events with local communities, and test the market reaction to them.

- ***Explore new types of marketing***
  Create specific events to target new markets. Focus on specialised & alternative forms of marketing (fairs on different topics such as birds, trekking and nature...)

- ***Network with other protected areas***
  Work with other sites and protected areas to promote a range of show case packages based on enjoying and learning about nature and cultural aspects of these areas.

***Improving the offer; supporting traditional and local products and appropriate accommodation; providing guidance to local entrepreneurs***

- ***Assess the quality of the existing offer.***
  Give priority to improving existing facilities and services before developing new ones. Introduce quality checks and improvement procedures based on obtaining feedback and setting standards.

- ***Consider including new themes and sites***
  Make a list of new locations or themes that have not been identified or promoted but have potential for tourism. Consider, in particular, opportunities for observing wildlife, developing new nature guided tours, understanding and participating in local traditions, visiting farms and craft producers, etc. Pay particular attention to opportunities in the buffer zone.

- ***Ensure tourism development which reflects local heritage***
  Favour small-scale tourism developments, which use existing resources and reflect natural and historic heritage in style, design and setting.

- ***Encourage use of local products***
  Identify locally produced food, crafts and other products. Encourage sale to visitors and use by tourism enterprises. Support networks of local producers and improve distribution systems.

- ***Support the local culture***
  Support local events, traditions, dialects, art and music, especially where these reflect the special heritage and themes of the area. Use these creatively to interpret the site.

- ***Provide recreation opportunities that reflect environmental conditions***
  Pay attention to a growing demand for outdoors-recreational activities. Where appropriate identify walking and cycling routes away from the most fragile areas and of a length to meet the demands of different kinds of visitor. Control intrusive recreational activity.

- ***Provide appropriate guidance and training***
  Provide direct advice, seminars and training programmes for local tourism enterprises to help them understand the special sensitivities and qualities of the site, as well as improve their own performance.

- ***Link product providers together***
  Encourage small accommodation enterprises, attractions, nature guides and other local services to work together. Encourage tourism enterprises to work more closely with other sectors, such as agriculture.

***Supporting conservation and local economies and communities, applying sustainable management to accommodations***

- ***Encourage tourism operators to support conservation***

  Seek direct support from tourism enterprises for conservation schemes. This may be financial or support in other forms (in kind, voluntary & environmental holidays…).

- ***Provide mechanisms for visitors to support conservation***

  Ensure visitors are fully aware of the conservation needs of the site. Explore with tourism businesses specific mechanisms for raising voluntary financial contributions from visitors (visitor payback schemes). Encourage programmes for direct participation by visitors in conservation. Ensure the results of action supported are regularly communicated.

- ***Support traditional economic activities through tourism***

  Support forms of tourism or specific initiatives, which in turn support other traditional sectors, and the maintenance of traditional landscapes, such as low intensity agriculture and wildlife management.

- ***Promote local employment***

  Favour the employment of local people in tourism and educational services. Encourage young people to take up opportunities and provide relevant training.

- ***Involve local residents in tourism planning***

  Ensure local residents are involved in the tourism strategy and have a regular opportunity to express their views and concerns.

- ***Support facilities and services for local residents***

  Support ways of improving the quality of life of local residents, including access to the site and the use of local facilities and services.

- ***Apply environmentally friendly management to accommodations***

  Encourage local accommodation establishments to adopt good environmental practice. Reduce waste by avoiding the use of individually wrapped products and favouring fresh products. Recycle waste as much as possible. Use recycled or partially recycled products as often as possible

- ***Reduce energy consumption***

  Reinforce insulation to avoid heat loss. Reduce $CO_2$ emissions by using energies such as wind or solar power. Install low-energy bulbs for lighting and low consumption electrical equipment.

- ***Communicate your environmentally oriented strategy***

  Explain the measures you have taken and the reasons for them to your guests and clients through an information leaflet and/or posters. Insist on the results achieved (savings in energy consumption and costs). Inform your guests of rules, which are very

simple to observe, and that can save energy. Organise special events to inform guests about environmentally friendly management through games or competitions.

- ***Encourage the use of environmentally friendly products***
  Encourage the use of environmentally friendly products by "eco-taxing" non-environmentally –friendly products.

## *COMMUNICATION – PROMOTION – AWARENESS*

**Image – Messages – Information – Interpretation – Environmental education – Codes of Conduct – New technologies - Ecolabels – Guidelines**

### ***Developing the right image, messages, information and interpretation***

- ***Identify the core values of the area***
  Identify and discuss the current strengths and weaknesses of all aspects of the tourism and nature product: landscape, biodiversity, living and built culture, facilities and relationships between local people and visitors.

- ***Consult and agree on images and messages***
  Compare the core values with images held by local people, visitors, local tourism enterprises and tour operators (via mixed discussion groups and surveys). Agree on an image to promote and, where appropriate, use experts to help to articulate this.

- ***Develop a communication strategy***
  Establish a working group to prepare a communication strategy. Seek support and involvement from all those who influence the image and its promotion (local people, tour operators, media etc.).

- ***Work with others to implement communication***
  Identify a programme for improving communication and changing images held about the site. Identify the right way of communicating with specific target groups (local people, tourism enterprises, and visitors) and also of improving communication by them to others.

- ***Use creative tools in communication delivery***
  Choose the most appropriate communication tools – word of mouth, local newsletters, regional guides, Internet, etc, - for the target audience. Provide mechanisms for joint promotion between local enterprises and organisations. Form promotional alliances with other sites (horizontal links) or tour operators, conservation bodies, etc. (Vertical links) at a local, national or European level.

- ***Assess and improve on-site information***

Pay particular attention to the quality of on-site information, including signposting, brochures, visitor centres and guiding services, which can have a significant influence on visitor experiences and behaviour. Ensure it is located and available where and when it can have maximum impact on visitors.

- ***Extend environmental education***

  Assess the impact of any educational programmes provided, such as guided walks, and seek to extend their outreach. Consider establishing codes of conduct for visitors.

- ***Use innovative methods to put across educational messages***

  Use original techniques and methods to work with specific targeted groups. Make the learning fun when working with children (video, internet..)

- ***Provide a follow-up to the initiative***

  Produce material on the initiative implemented, emphasising objectives and results achieved. Distribute it to all those who participated. If possible, use it as a tool.

***Developing and communicating Eco-label and certification schemes***

- ***Communicate good practice in your area***

  Identify examples of good practice (e.g. in accommodation, guided tours or local food and products) and identify their specific strengths with respect to your own priorities. Promote awareness of them within and outside the local area (e.g. through articles in media).

- ***Investigate existing Eco-labels and awards***

  Research and compare existing Eco-labels (from the Internet or experience of others). Check their criteria target groups and achieved success or weaknesses. Compare them with your interests and identify potential for co-operation.

- ***Join suitable existing schemes***

  Discuss with others the “pros & cons” for joining regional, national or international Eco-label and certification schemes. Join or recommend an existing scheme if compatible with your desired image, criteria and target groups.

- ***Develop your own Eco-label if appropriate***

  Develop your own scheme if nothing appropriate already exists. Establish a clear, achievable and dynamic set of criteria. Give advice and support to those who are interested in being awarded, through seminars, individual checking, consultation, manuals and guidance on sources of information. Make sure that the awarding process is transparent and that the awarding institution is independent from and accepted by the applicants.

- ***Promote the awarded products and services***

  Support the marketing of the awarded facilities, services and entrepreneurs through your own communication tools. Co-operate with external information services, networks and

media to multiply the information about your Eco-label and the awarded suppliers and products.

***Developing and implementing guidelines***

- ***Assess the different guidelines available***
  Find out about the various guidelines available for sustainable tourism in protected areas and sites. Set their objectives, content and approach against your own situation and requirements.

- ***If necessary adapt guidelines to your own situation***
  If existing guidelines do not meet your needs, consider how they can be adapted or improved. Relate them to other accreditation or training schemes for individual facilities in your area.

- ***Provide feedback to producers of guidelines***
  Work with other sites and the agencies developing guidelines to improve them. Give feedback on your impressions and any results arising from implementation.

- ***Encourage consistency between different guidelines***
  Encourage all agencies producing guidelines to ensure consistency between their core principles and approach. Avoid confusion amongst site managers, tourism operators and visitors.

## . ASSESSING AND MANAGING IMPACTS – IQM – TRANSBORDER CO-OPERATION

**Environmental Impact Assessment – Indicators – Monitoring – Zoning – Conflict Management – Environmental Management – Visitor and traffic management – Soft transportation – Renewable energy – Quality management – Benchmarking**

***Assessing and measuring the impacts of tourism***

- ***Prepare a baseline audit***
  Understand the current state of the natural environment and heritage resource. Make an inventory of existing assets, to form a benchmark against which to observe and measure change.

- ***Use EIAs***

  Ask for an environmental impact assessment of all proposed development of tourism facilities and infrastructure, irrespective of size. Use established methodologies for EIAs.

- ***Work with others to assess impact***

  Form partnerships with local conservation bodies. Encourage, and train local people (including tourism operators) to observe impacts on the environment. Ask visitors to report on changes and problems they encounter. Work with users, groups and clubs to monitor their impact.

- ***Measure tourism flows***

  Keep a regular check on volumes of visitors, including traffic flows and car parking. Concentrate on most densely visited areas, and also on most fragile areas.

- ***Use global and site specific indicators***

  Consider general measurements, such as air and water quality, as well as observational changes on selected sites. Work with local research institutions.

- ***Assess impact on local people***

  Obtain feedback from local people on the impact of tourism. Assess the contribution made by tourism to local jobs, as well as negative impact from congestion and intrusion.

- ***Seek to rectify adverse changes***

  Use measures of impact positively, as a basis for introducing action to reduce negative impact and restore damage caused.

***Managing visitors and traffic, reducing energy consumption and pollution***

- ***Influence land planning policies***

  Make sure that policies to control and influence the form of tourism development and promote conservation are closely integrated into the statutory planning legislation for the area, and the local management plan for the site.

- ***Use zoning techniques***

  Identify areas most suitable for different forms and levels of tourism activity. Seek to manage tourism and influence development in a buffer zone around the site. Work with neighbouring areas to identify alternative sites to promote away from the more sensitive locations.

- ***Restrict access if necessary***

  If the environment is threatened, be prepared to restrict or reduce access. If necessary, restrict traffic on certain roads or at certain times. However, be aware of the needs of disabled visitors and local residents.

- ***Use information positively***

  Influence visitor behaviour and visit patterns with information, which is positive, explaining the reason for any restrictions and promoting alternative opportunities.

- ***Reduce seasonality***

  If appropriate to the site, promote access at less busy times and discourage over-promotion of the busiest periods. Take account of the natural seasons of the site and species it supports, in terms of how this affects visitor interest as well as vulnerability.

- ***Encourage non-polluting transport***

  Favour access by walking, cycling, non-polluting vehicles and public transport, both to and within the area. Work with local bus and rail operators. Consider providing shuttle services. Promote alternative transport as a positive opportunity for visitors, not just a restriction.

- ***Promote good environmental practice and management***

  Provide advice and training to local tourism enterprises on visitor management and information as well as reducing waste and the use of energy and water. Promote alternative energy systems suitable to the local environment.

***Developing integrated quality management, benchmarking and transborder cooperation***

- ***Obtain regular visitor feedback***

  Provide a means for all visitors to give their reaction to the site and services offered. Undertake a regular survey of visitors to measure levels of satisfaction.

- ***Obtain regular feedback from staff and partners***

  Ensure everyone working on site management is involved in delivering quality and can make suggestions for improvement. Obtain regular feedback from local tourism enterprises on their needs and opinions.

- ***Set quality standards for all tourism services***

  Ensure all tourism operators meet optimal standards of safety and comfort. Promote existing quality assessment schemes where appropriate. Set quality standards for all services delivered by the site management team.

- ***Maintain a programme of improvement and training***

  Introduce initiatives to improve quality, especially through appropriate training programmes for staff and local enterprises.

- ***Make comparisons with other areas***

  Compare issues, approaches, lessons learnt and quality achieved, with other sites and protected areas. Encourage mutual study tours. Maintain close relationships with

neighbouring sites. Work within networks to improve visitor management and promote sustainable tourism.

- ***Foster cross-border co-operation***

  Where sites are close to international borders, seek partnerships with sites and protected areas across the border. Identify common conservation and visitor management issues and opportunities for co-ordinated programmes. Extend the principles of Natura 2000 and Sustainable Tourism across the whole of Europe, East and West.

# Part 4. Summary of advice and recommendations to Natura 2000 stakeholders

This chapter summarises the most relevant recommendations to the Natura 2000 network, following the analysis of the Habitats Directive in Part 1, and of existing initiatives (charters, codes, recommendations...) in Part 2. It reinforces and refines the principles for sustainable tourism for Natura 2000 suggested in Part 3 and which are illustrated by examples of good practice in the annex. These recommendations are based on the comments made by the participants at the seminar and in the follow-up evaluation questionnaire.

This summary of recommendations is addressed to all actors concerned with the implementation of a sustainable tourism strategy in Natura 2000 sites. It casts further light on aspects, which are specific to Natura 2000 such as **biological inventories, the participation of all actors, management plans, zoning, the restoration of degraded sites…**

These recommendations should be read in conjunction with the general principles set out in Part 3. In order to avoid repetition, the summary does not duplicate all these principles, but picks up and elaborates on a number of them. It highlights the main points concerning the Habitats Directive, which require detailed attention and call for particular vigilance on the part of Natura 2000 actors.

## Seeking a level of involvement appropriate to the site

There are a number of reasons why Natura 2000 sites should be engaged with tourism:

- Bringing economic benefit to local communities, thereby winning more local support for the designation and management of the site as Natura 2000.
- Improving the management of visitors, reducing adverse impacts from visitor pressure.
- Increasing understanding and appreciation of the special qualities of the site, and hence support for its conservation, amongst local people and visitors.
- Reducing negative impact of existing and future tourism enterprises, while encouraging them to promote and benefit from the site in positive and sensitive ways.

Natura 2000 sites vary greatly in their size, location, and purpose of designation, management regimes and resources. The balance of the above objectives and resultant priorities and actions will vary from site to site. For some sites, it will make sense for them to have only a limited involvement in tourism; for others it will be a key issue. The purpose of this document is to encourage all sites to consider what their relationship should be with tourism, and to set out principles, approaches and examples to follow. Each site should address and interpret these in relation to their own circumstances and resources.

Some sites may wish to develop their own action programme for tourism based on these principles. In some circumstances it may make sense for a joint approach to be adopted for a number of smaller Natura 2000 sites in the same district or region.

Larger protected areas and parks already have emerging mechanisms at the European level for stimulating and recognising sustainable tourism strategies. These have been described elsewhere in this report. The European Charter for Sustainable Tourism in Protected Areas sets out a process and accreditation system for all such areas to follow. Major parks of significant size, providing a high level of wilderness and wildlife experience, may also seek recognition as PAN Parks.

# Specific recommendations

## . *STRATEGY, POLICY, PLANNING*

### *Widen and deepen the knowledge you have about your site*

*" For the designation of a site as Special Protection Area (SPA) and Special Area for Conservation (SAC), the Directive requires preliminary inventories. In the absence of good knowledge of the site and its requirements, caution may lead to tourism projects being limited and the Natura 2000 designation itself being abandoned. Good knowledge of a site and its requirements will help understand the potential impacts that a tourism project could have." (cf. Part 1.)*

- Review what data is available, make a summary of scientific inventories carried out in the preliminary selection phase.
- Carry out additional research and investigations into areas, which are less well covered such as socio-economic data, employment, and the expected benefits of the Natura 2000 designation, impacts and monitoring.

### *Develop a specific management plan for your site with a section on sustainable tourism*

*"For special areas of conservation, it is advised to produce an adapted management plan incorporated into other development plans, which takes into account the environmental requirements of the site".*

- If the site is situated in a protected area, which already has a management plan, adapt the existing document to the specificity of the Natura 2000 site and characteristics.
- If the Natura 2000 site already has a management plan, incorporate a strategic approach to sustainable tourism into it.
- Use the suggested principles in Part 3 and the EUROPARC and PAN Parks initiatives in Part 2, which provide tools for the development of a sustainable tourism strategy in protected areas (criteria in the annex). Refer also to the guide produced in your country on how to produce strategic documents for Natura 2000 sites.

- Encourage national representatives to draw up guidelines and a national handbook on how to develop a management plan and a sustainable tourism strategy.
- Refer to the analysis of the Habitats Directive in Part 1 and the implications the Directive has on tourism projects at all stages of the elaboration of a strategy and a plan.
- Associate all the actors of the site from the very beginning when carrying out inventories, and in the development of a strategy and an action plan. Encourage participation and wide consultation.
- Encourage managers of related projects to refer to the site's sustainable tourism strategy and use it to validate their project.

***Encourage the consultation and the implication of all actors involved in the Natura 2000 site at all levels***

- After the planning phase, it is necessary to support all forms of participation in the protection of species, the management of the site, and in the better use of traditional activities and local products
- Develop partnership models between managers, the local population and private tourism operators in Natura 2000 sites (conditions, contracts, concessions, charters of commitment, codes of ethics, codes of conduct) which encourage different parties to commit themselves to the conservation of the sites.
- Develop partnerships for maintaining and developing biodiversity in protected areas, semi-natural areas and agricultural areas.
- Associate all sectors (tourism, agriculture, and forestry), including scientists, in the concertation phase. Ensure that environmentalists and private companies have the opportunity to discuss tourism projects.

## . *OFFER, PRODUCT, MARKET*

***Check how vulnerable your site is and whether developing tourism is appropriate. Remeber that the main objective is to conserve habitats and species***

*" Not every Natura 2000 site is necessarily a potential site for tourism development. It may be an area, which requires strict protection or is intended for minimal conservation actions. While one site may be under great pressure, often due to the proximity of an urban area, another site may receive few visitors and hope to attract new tourists thanks to the Natura 2000 designation."*

- Identify the potential of a site carefully in order to determine how appropriate tourism development is and define the desired level of development. Measure existing flows and work on targeting the most appropriate types of visitor for the site's characteristics.
- Seek a balance, at all times, between tourism and the protection of habitats and species. Establish precise limits between protecting the natural heritage and landscape and favouring economic development and the needs of the visitors.

***Develop services which reflect the ecological characteristics of the site***

- Work in partnership with the tour operators from the beginning who market products promoting habitats and species to the types of visitor you would like to attract (conservationists, visitors interested in participating in conservation projects...).
- Emphasise cultural, agricultural and industrial activities, which conform to certain conditions and environmental standards.

***Develop and encourage different ways for tourism to contribute to the management of sites***

- Consider different ways of raising support for conservation from visitors. Various approaches are analysed in the EU publication " Visitor Payback ". Refer to experiences in the following examples of good practice, which highlight collaboration with the private sector - " Discovery Initiatives " and the Lake District National Park's " Pathway Appeal ".
- Develop partnerships with local tourism operators and other private sector companies (sportswear companies, transport companies…) which are likely to be interested in becoming involved in the conservation of a site. Do so from the moment the site is designated, especially if the site does not benefit from any existing management system (sites which are not already part of a protected area).
- Use a diversity of forms of contribution and partnership. These can be financial (professional taxes, ecotaxes.), in kind (donation of material, voluntary work..), or intellectual (contribution of advice and know-how).
- On the basis of these contributions, contract with tourism partners to make the signature of a charter of sustainable tourism one of the prerequisites for obtaining a label or becoming certified. Let the visitors know about this type of initiative.
- Make sure that the tour operators with whom you work are involved in operations such as UNEP's " Tour operators' initiative " (cf. Part 2).

## . *COMMUNICATION, PROMOTION, AWARENESS*

***Become informed and keep your partners informed and up-to-date about the Natura 2000 procedure***

- Disseminate Part 1 of this document widely. It can be used as a brief introduction to Natura 2000 from a sustainable tourism perspective.
- Send off for documents produced by the administrations in charge of implementing the directive and Natura 2000 in your country (usually the Ministry of the Environment) and in neighbouring countries ("documents d'objectifs" in France.).
- Make good use of the documents available on the European Union internet site (the Natura 2000 newsletter, examples of good practice, the LIFE Nature procedure).
- Produce your own documents on Natura 2000, which are adapted to your particular situation.
- Refer to Natura 2000 and the Habitats Directive frequently, in any documents you produce.

***Be proud to belong to a European network and make it known***

- Use the Natura 2000 designation as an advantage. It shows the importance of your site and its interest at the European level.
- Make it known that your site was identified and designated a site of community importance.

***Develop communication and interpretation tools specific to the characteristics of your site***

- Create or refer to codes of conduct and codes of ethics which concern particular habitats or threatened species or activities which are likely to cause disturbance (photography, nature observation, canyoning, climbing...).
- Make knowledge about your site and the inventories that were carried out for its designation as SCI accessible to the public. Turn them into interpretation and nature discovery tools.
- Distribute local existing documents widely or develop your own educational tools to promote understanding of the sites and the species and raise awareness about nature conservation.
- Make documents on discovering nature and cultural heritage and codes of conduct for improving nature protection available to visitors.
- Use the guidelines and general principles developed in Part 2 and 3, and on Internet sites, which develop good practice, such as ECOTIP and ECOTOUR, to raise awareness and develop training material, particularly for tour operators.

***Work with eco-label schemes as appropriate, to encourage good practice***

- Consider the range of existing schemes to promote and identify good sustainable tourism practice in destinations and enterprises in Europe and contact those that appear most relevant and appropriate to your Natura 2000 site. Look at the table comparing European eco-labels from the Internet site ECOTIP in annex.
- Consider joining the eco-labelling initiatives that are currently being developed for protected areas (such as EUROPARC and PAN Parks) if the size and character of your site make it eligible and appropriate. Where it is not, but you are part of a larger protected area, draw these to the attention of the wider protected area management.
- Encourage local service providers on or near your site to join existing regional and national eco-labels aimed at accommodation, restaurants, sites and activities. Look at the following examples of good practice; the FFPNR “Nature Hotels”, ECEAT farm accommodation, the Luxembourg eco-label.
- Study the possibility of developing your own eco-label on a local and regional level to help encourage good practice and formalise partnerships with local suppliers of tourism services. Consider with others how this might relate to the concept of a label for Natura 2000 nationally and at a European level.
- In assessing criteria for an eco-label relating to Natura 2000 sites, emphasise environmental management, renewable energies, reducing the consumption of traditional energy sources (electricity, water, fuel), waste management, the maintenance of traditional landscapes, the restoration of degraded sites, the protection of native species, the creation of private voluntary nature reserves, and the promotion of natural heritage. (cf. the Guadeloupe National Park Mark of Confidence).

## . EVALUATE AND MANAGE IMPACTS, DEVELOP AN INTEGRATED APPROACH, ENCOURAGE CO-OPERATION

### Carry out Environmental Impact Assesment systematically for all tourism projects

*" Any project likely to affect the site, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. It shall not adversely affect the integrity of the site concerned." art. 6.3.*

- Ask for an Environmental Impact Assesment to be carried out systematically for all projects concerning tourism infrastructure.
- Ask for Environmental Impact Assesment to apply to development projects which are located in the periphery of Natura 2000 areas at the first suspicion that they would have an impact on the site itself.
- Get hold of and study Environmental Impact Assesment methods for tourism projects, which are available at the European level.

### Evaluate, limit and manage impacts and disturbances related to tourism

*" While waiting for the publication of the list of the SIC selected to be designated as SAC, the Member State must avoid any activity likely to deteriorate the sites which it has selected and submitted to the Commission "*
*" The Member States shall take appropriate steps to avoid, in the SAC, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. " Art. 6.2.*

- Develop indicators of impact to measure any disturbance or deterioration of the habitats and species and the effects of activities, visitor flows and existing infrastructure on natural sites.
- Encourage eco-audits and self-assessment based on these indicators and criteria for eco-labels.
- Measure impacts regularly and develop appropriate management tools (limiting visitor numbers, authorisations, bookings, guided visits, traffic flow plans, nature observation areas, and restricted zones…). These make it possible to control, assess and limit impacts, which can cause species to become scarce, and habitats to disappear.
- Encourage tourism developers to restrict or to avoid development in sensitive natural areas.
- Encourage the owners of tourist establishments to participate in the rehabilitation and the restoration of the degraded natural habitats (planting native plant species, eradicating pervasive or exotic plant species…).

### Set up zoning and differentiated management systems in your site from the very beginning

*Natura 2000 sites can be small. They can be isolated and not form part of an existing protected area. They can be highly visited and very exposed to the development of leisure activities. Zoning must respect the conservation objectives of Natura 2000, while, at the same time, meet the needs of visitors in terms of nature and other leisure activities (cf. the experience of Terschelling in Holland). Administrative and contractual legal measures, which the Member*

*States have to establish should include the definition of restricted access zones and sanctuaries.*

- Develop a zoning system and detail it in the management plan. It should treat each type of zone separately; intensively used zones (sports activities), vulnerable zones (nesting, reproduction...), zones for interpretation and nature observation, zones for research.

***Develop all types of soft and non-motorised transport***

- Develop innovative and non-motorised forms of transport, on the basis of 0 " cars ". Develop cycle tracks, shuttle services...
- In sites, which receive a significant number of visitors, include these forms of transport in a traffic flow and transport management plan.

***Develop an IQM (Integrated Quality Management) approach which is specific to Natura 2000***

- Look at ways of improving the quality of the site to achieve a range of tourism, community and biodiversity objectives in an integrated way. Pursue an integrated quality management approach, which involves checking and improving all aspects of visitor experiences and impacts, obtaining regular feedback from visitors, enterprises and local people. The EU publication " IQM in rural tourist destinations " explains the approach and provides examples of good practice.

***Participate in the creation of a network of sites in your area or country***

- Ask for the list of other people who are in charge of Natura 2000 sites. Contact them and exchange information.
- Seek out collaboration between sites, which have the same characteristics.
- Take joint and concerted action with other Natura 2000 sites for conservation and economic development.
- Request the means to carry out workshops, field visits, training, and to exchange know-how.
- Ask local and regional authorities to bring the Natura 2000 network to life through co-ordination and regional events.

***Develop transborder co-operation with Eastern European countries***

- Set up twinning and transborder co-operation projects between Natura 2000 sites. Contribute to the establishment of a similar network in Eastern European countries.
- Exchange experiences, good practice and other information with other countries or areas interested in this type of action in order to widen your knowledge and understanding of tools used in other areas.

European Commission

**Sustainable tourism and Natura 2000. Guidelines, initiatives and good practices in Europe**

Luxembourg: Office for Official Publications of the European Communities

2001 — 63 pp. — 21 x 29.7 cm

ISBN 92-894-1443-X

# Guidelines

# for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives



Photo : © Common Wadden Sea Secretariat

May 2007

***This document aims to reflect the views of the Commission services on this issue and is not of a binding nature.***

NATURA 2000

# INDEX


**1. INTRODUCTION AND BACKGROUND ..... 6**

***Why the need for a guidance document?*** ..... 6

***Scope of the guide*** ..... 7

***Structure of the guide*** ..... 7

***Limits of the guide*** ..... 8

**2. BROADER CONTEXT ..... 9**

**2.1. The context of EU marine biodiversity and protected areas policy 9**

**2.2. The Strategy for the Protection and the Conservation of the Marine Environment: an ecosystem-based approach to ensure conservation of biodiversity and sustainable use of natural resources 11**

**2.3. EU Maritime Policy 12**

**2.4. Links between the marine coastal environment and the EU Water Framework Directive 13**

**2.5. The challenge of constructing the Marine Natura 2000 Network. Planning a system of marine protected areas 14**

**2.6. Different marine zones. Application of Nature legislation in the European seas. 14**

***2.6.1. Definition of different marine zones ..... 15***

***2.6.2. Applicability of Nature Directives in the Sea. To what extent do Habitats and Birds directives apply? ..... 18***

***History of discussions about geographical scope of the directives*** ..... 18

***Legal principle*** ..... 18

***Duties for Member States*** ..... 19

**2.7. Some legal aspects related to the implementation of environmental legislation to marine environment. Some Management issues in the context of different competencies and responsibilities 21**

**2.8. Links with Regional and International Organisations and Agreements 22**

**2.9. Trans frontier issues for site designation and management 23**

**2.10. .... Implementation of the Natura 2000 network. Administrative steps from identification to designation of marine Natura 2000 sites. 25**

**2.11. .... Update on implementation of Natura 2000 network in marine areas. An overview of existing marine SPA and SCI 27**

**3. HABITAT TYPES AND SPECIES REQUIRING MARINE NATURA 2000 SITES. ..... 28**

**3.1. Marine Habitat types' definitions. Update of "Interpretation Manual of European Union Habitats". 28**

***3.1.1. Habitat type 1110 "sandbanks which are slightly covered by sea water all the time"..... 29***
***3.1.2. Habitat type 1170 "Reefs" ..... 30***
***3.1.3. Habitat type 1180 "submarine structures made by leaking gases"..... 31***

**3.2. Identification of existing marine Habitat types and Species of European importance for different Member States. 32**

**4. AN APPROACH FOR LOCATING AND SELECTING MARINE NATURA 2000 SITES. ..... 33**

**4.1. Locating and assessing Annex I Habitats 33**

***4.1.1. Regional scale physical data..... 34***
***4.1.2. Local or regional scale remote sensed and physical and biological sample data..... 36***

**4.2. Site selection rationale for SACs/SCIs for Annex I Habitats 40**

***4.2.1. Representativity of the natural habitat type on the site..... 41***
***4.2.2. Area of habitat types..... 43***
***4.2.3. Conservation of structure and functions ..... 44***
***4.2.4. Global assessment..... 44***
***4.2.5. Additional selection principles..... 45***

**4.3. Locating and assessing Annex II species 46**

***4.3.1. Data availability for Annex II species..... 47***

**4.4. Site selection rationale for SACs/SCIs for Annex II species 51**

***4.4.1. Proportion of Member State population ..... 52***
***4.4.2. Conservation of features of habitat important for species and restoration..... 52***
***4.4.3. Isolation of species populations ..... 55***
***4.4.4. Global assessment..... 56***
***4.4.5. Additional selection principles..... 56***

**4.5. Identifying Special Protection Areas for seabirds and other waterbirds 56**

***4.5.1. Designation of SPAs: Court of Justice clarifies some Member States' duties..... 58***
***Main conclusions of the Court*** ..... 59
***4.5.2. Species for which SPAs should be considered ..... 60***
***4.5.3. Types of SPA..... 61***
***4.5.4. Data sources for SPA identification..... 62***
***4.5.5. Data treatment for SPA identification..... 66***

**4.6. Site selection rationale for SPAs 67**

***4.6.1. Alternative approaches to site selection..... 70***

**4.7. Site boundaries 71**

***4.7.1. Boundary determination for SPAs..... 71***
***4.7.2. Cross-border SPA boundaries..... 75***

**5. MANAGEMENT MEASURES TO PROTECT MARINE NATURA 2000 SITES. ..... 76**

**5.1. The legal basis for protection. Community legislation's provisions in relation to management of ongoing activities and governing plans and projects for future developments. 76**

**5.2. Conservation objectives 79**

**5.3. Definition of conservation measures 80**

**5.4. Application of measures 81**

**5.5. Management plans-contents 81**

**5.6. Time Scale for a Management Plan 86**

**5.7. Pressures and impact of human activities. 87**

**5.8. Impact assessment. The basic technique of the construction of matrices 88**

**5.9. Human activities in marine Natura 2000 sites 91**

***5.9.1. Alien Species..... 91***
***5.9.2. Pollution (including noise)..... 92***
***Pollution types and causes*** ..... 93
***Noise pollution*** ..... 94
***5.9.3. Exploration and extraction of Oil and Gas resources ..... 96***
***5.9.4. Fisheries. ..... 96***
***5.9.5. Shipping..... 97***
***5.9.6. Electricity power generation at sea: Wind farms and other infrastructure types..... 100***
***5.9.7. Military activities ..... 100***
***5.9.8. Coastal developments. Integrated Coastal Management..... 101***
***5.9.9. Dredging. Gravel and sand extraction..... 102***
***5.9.10. Tourism, recreational navigation, maritime sports, diving…..... 103***

**6. LINKS BETWEEN COMMUNITY POLICY ON FISHING AND THE *"HABITATS"* AND *"BIRDS"* DIRECTIVES. ..... 105**

**6.1. The Common Fisheries Policy 105**

**6.2. Fisheries management measures 108**

## 1. INTRODUCTION AND BACKGROUND

### *Why the need for a guidance document?*

The need to fully apply the Habitats[1] and Birds[2] Directives to the offshore marine environment of the European Union, especially with regards to the establishment of the Natura 2000 network, represents a key challenge for EU biodiversity policy in the coming years.

The establishment of a marine network of conservation areas under Natura 2000 will significantly contribute, not only to the target of halting the loss of biodiversity in the EU, but also to broader marine conservation and sustainable use objectives.

To date there have been relatively few Natura 2000 sites identified for the offshore marine environment and this represents the most significant gap in the Natura network. Implementation of the Birds and the Habitats Directives in the marine environment presents substantial challenges, especially in relation to the offshore (as opposed to the coastal) marine environment due to the lack of scientific knowledge on the distribution/abundance of species and habitat types.

At a meeting of the Nature Directors' of Member States, which took place in October 2002, it was agreed that further work was needed to develop a common understanding of the provisions for designating and managing marine Natura 2000 sites. The European Commission was asked to establish an ***ad hoc*** working group under the Habitats Committee, with a view to providing guidance on this subject.

Since March 2003, a Marine Expert Group has been working to "develop a common understanding of the provisions of Natura 2000 relating to the marine environment in order to facilitate the designation and future management of these areas". As such, it should help the Member States to achieve this important task and to provide useful reference material for other stakeholders. The document will also be of value to the Commission services in the contemplation of any action in this field. It will also provide principal stakeholders with valuable information and more security for planning and development as the Commission opinion on several key aspects of the implementation of Birds and Habitats Directives in the marine environment will be more widely known.

---

[1] COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[2] COUNCIL DIRECTIVE of 2 April 1979 on the conservation of wild birds (79/409/EEC)

### *Scope of the guide*

The guide responds to an immediate need to make progress in establishing Natura 2000 in the marine environment. As such its primary focus is on marine species and habitat types that are covered by the site based provisions of the Birds and Habitats Directives. These are the habitat types listed in Annex I and species listed in Annexes II of the Habitats Directive and bird species listed in Annex I as well as migratory bird species covered by the Birds (79/409/EEC) Directive for which marine Natura 2000 sites need to be designated, protected and managed.

The guide aims to explain the relevant legal and technical concepts needed to underpin the establishment of Natura 2000 throughout the marine area of application of the (79/409/EEC) Birds and (92/43/EEC) Habitats Directives. It covers both the inshore and offshore marine environments.

For the purposes of this document, "inshore marine environment" is that which occurs in the internal waters and the territorial sea, as defined by UNCLOS[3], of a coastal Member State; "offshore marine environment" is that which occurs in marine zones extending beyond territorial sea limits where Member States exercise some type of sovereignty rights.

The conservation of the marine habitats and species of European conservation concern will not be achieved solely through designation and good management of Natura 2000 sites. There will also be a need to deal with human pressures on the marine environment beyond such sites as part of a broader marine conservation strategy.

### *Structure of the guide*

The guide contains the following elements and follows the same logic as the implementation process necessary for the construction of the marine component of Natura 2000:

- Chapter 2 considers the process for establishing Natura 2000 in the broader context of EU environmental policies. It provides information about Community and international legislation that is relevant for the establishment of Natura 2000 in the marine environment.
- Chapter 3 clarifies definitions of marine habitat types of Annex I of the Habitats Directive and provides more general information on marine habitats and species, including their occurrence in inshore and offshore waters of Member States.
- Chapter 4 provides information on the best means of locating and assessing marine habitats and species as well as a rationale for site selection.
- Chapter 5 provides guidance on management issues relevant to marine Natura 2000 sites.
- Chapter 6 looks more closely at the relationship between fisheries management and the ***"Birds"*** and ***"Habitats"*** Directives.

[3] ***UNCLOS, United Nations Convention on the Law of the Sea*** http://www.un.org/Depts/los/index.htm

### *Limits of the guide*

The guide is intended to be bound by and faithful to the text of the Birds and Habitats Directives and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, the document reflects only the views of the Commission services and is not of a binding nature.

It should be stressed that it rests with the EU Court of Justice to provide definitive interpretation of Community law. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject.

The guide intends to fully respect the existing case law of the Court. This determines aspects of the guide, especially where clear positions have already been established by the Court. The guide also aims to explain some legal aspects of the law of the sea and other different principles that support the designation process and future management of the marine component of the Natura 2000 network.

It is not possible for this guide to be exhaustive on all the issues related to Natura 2000 in the marine environment, especially as regards the management and protection of the sites. However, it aims to focus on the key issues related to the establishment of the network using available information. Further guidance may be necessary for specific topics at a later stage.



***Caretta Caretta** [4]*

Photo: M. Melodia. LIFE99 NAT IT/006271

[4] ***Caretta caretta***: is a priority species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: loggerhead turtle; FR: tortue de carouane; ES: tortuga boba; DE: Unechte Karettschildkröte

## 2. BROADER CONTEXT

### 2.1. The context of EU marine biodiversity and protected areas policy

EU policy for marine biodiversity, including protected areas, is developing in the context of commitments at global, EU and regional levels.

At the EU level, EU Heads of State and government have made a commitment 'to halt the loss of biodiversity [in the EU] by 2010'. And at the global level, they have joined some 130 world leaders in making a commitment 'to significantly reduce the current rate of biodiversity loss [worldwide] by 2010.' Faced with evidence of the continuing and even accelerating loss of biodiversity and of critical ecosystem goods and services – as recently highlighted in the Millenium Ecosystem Assessment - the European Council has repeatedly called for accelerated efforts to meet these commitments.

The 6th Environmental Action Programme of the European Community identifies 'nature and biodiversity' as one of the priority themes for action. Objectives and priority areas for action on nature and biodiversity laid down by the European Parliament and the Council in the 6th Community Action Programme[5] include:

- Establishing the Natura network and implementing the necessary technical and financial instruments and measures required for its full implementation and for the protection, outside the Natura 2000 areas, of species protected under the Habitats and Birds Directives (Art 6.2.a. 7th indent)

- Further promote the protection of marine areas, in particular with the Natura 2000 network as well as by other feasible Community means (Art. 6.2.g. 4th indent)

As a contracting party to the Convention on Biological Diversity (CBD) the European Community has prepared an EU Biodiversity Strategy and Biodiversity Action Plans which aim, ***inter alia***, to integrate biodiversity considerations into other Community policies. Marine biodiversity issues are addressed by both the Biodiversity Action Plan (BAP) for Natural Resources, and the BAP-Fisheries. Marine issues have also been raised in relation to the impact of European fishing fleets in international waters.

A 2003-2004 review of EU Biodiversity Policy assessed the implementation, effectiveness and appropriateness of the EC Biodiversity Strategy and Action Plans, in particular within the context of the 2010 targets. The review culminated in the Malahide conference on Biodiversity and the EU, held in May 2004 under the Irish Presidency[6] of the Council of Ministers. The resulting 'Message from Malahide' achieved a broad degree of consensus on priorities towards meeting the 2010 targets. These include completing the Natura 2000 network at sea by 2008, and agreeing and instigating management for all Natura 2000 sites by 2010.

Acting on many of the priorities identified in the Message from Malahide, the Commission adopted in May 2006 a Communication on ***Halting the Loss of Biodiversity By 2010 — And***

[5] Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ L 242, 10.9.2002, p.1)

[6] http://ec.europa.eu/environment/nature/biodiversity/develop_biodiversity_policy/malahide_conference/index_en.htm

***Beyond*** [COM(2006) 216 final][7], which sets out an ambitious policy approach to halting the loss of biodiversity by 2010. In particular, it provides an EU Action Plan with clear prioritised objectives and actions to achieve the 2010 target and outlines the respective responsibilities of EU institutions and Member States. In coherence with the above process, the first action identified in this EU Biodiversity Action Plan[8] is to accelerate efforts to finalise the Natura 2000 network. This states: "complete marine network of Special Protection Areas (SPA) by 2008; adopt lists of Sites of Community Importance (SCI) by 2008 for marine; designate Special Areas of Conservation (SAC) and establish management priorities and necessary conservation measures for SACs [by 2012 for marine]; establish similar management and conservation measures for SPAs [by 2012 for marine]". This Action Plan also specifies indicators to monitor progress, and a timetable for evaluations.[9]

This Biodiversity Communication has been broadly welcomed by other Community Institutions, including December 2006 Environment Council, which invited the Commission and Member States to proceed urgently with implementation of the Biodiversity Action Plan.

The Communication and Action Plan take account of various existing international commitments relating to marine protected areas including:

- The World Summit on Sustainable Development commitment to establish a globally representative system of marine and coastal protected areas by 2012.

- decisions on marine and coastal ecosystems and protected areas arising from conferences of the CBD, in particular the COP7 decision to establish (by 2012) and maintain a network of marine and coastal protected areas that are effectively managed, ecologically based, consistent with international law and based on scientific information.

- for the Atlantic and Baltic seas the Commitment of the Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (Bremen 2003) to complete by 2010 a joint network of well-managed marine protected areas that, together with the Natura 2000 network, would be ecologically coherent. Both, HELCOM and OSPAR agreed that the marine Natura 2000 sites qualify for the inclusion into the OSPAR/HELCOM network of marine protected areas.

- for the Mediterranean Sea the 1995 Protocol of the Barcelona Convention Concerning Mediterranean Specially Protected Areas and Biological Diversity in the Mediterranean which provides for the establishment of a List of Specially Protected Areas of Mediterranean Interest (SPAMI List)

- in the Black Sea, the Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution was signed in Sofia, Bulgaria in 2003 (ratification process is ongoing). This protocol aims ***inter alia*** to maintain the Black Sea ecosystem in a good ecological state and its landscape in the favourable conditions, to protect, to preserve and to manage in a sustainable way the biological and landscape diversity of the Black Sea in order to enrich its biological resources.

---

7 See Communication from the Commission. Halting the Loss of Biodiversity By 2010 - and beyond http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0216en01.pdf

8 See action A1.1.1 of Annex 1 to the Biodiversity Communication http://ec.europa.eu/environment/nature/biodiversity/current_biodiversity_policy/biodiversity_com_2006/pdf/sec_2006_621.pdf

9 See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/667&format=HTML&aged=0&language=EN&guiLanguage=en

As regards sites to be protected under the Birds Directive a major conference held under the Netherlands presidency in November 2004 at Bergen-op-Zoom identified significant gaps in designation marine protected areas for birds and consistent with Malahide, recommended the full extension of the SPA network to the marine environment (2008), establish an effective protection regime, put management objectives into place and initiate these for all sites by 2010. DG Environment webpage hosts the report of the Bergen op Zoom conference and other important documentation produced as part of the celebrations or relevant to them. [10]

## 2.2. The Strategy for the Protection and the Conservation of the Marine Environment: an ecosystem-based approach to ensure conservation of biodiversity and sustainable use of natural resources

The 6th Environmental Action Programme of the Community[11] considered the conservation and the protection of the marine environment a complex issue that required a broad and multidimensional approach and requested the Commission to prepare a Thematic Strategy dealing with it. The Commission adopted the Marine Thematic Strategy, including a proposal for legislative action, in 2005.[12]

The Strategy adopted is based upon an ambitious new approach to the protection and management of marine ecosystems and promotes sustainable use of marine resources. It addresses major threats that were already identified in a previous Communication: [13] an inadequate framework for the management of the seas, given institutional and legal complexities and the number of actors concerned; insufficient basic knowledge, due to insufficient links between research areas in need of action and priorities; and lack of a dedicated policy.

The vision proposed by the Strategy is to protect and restore Europe's oceans and seas and ensure that human activities are carried out in a sustainable manner so that current and future generations enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive. This new approach develops an integrated policy towards the implementation of a single, integrated and coherent set of measures for the conservation and protection of the marine environment.

The Commission proposes to implement progressively an ecosystem-based approach for the management of human activities affecting the marine, including goals and targets, to ensure biodiversity conservation and sustainable use of marine resources. This approach takes into account the concepts of favourable conservation status and good ecological status as required by the Habitats and Birds Directives and the Water Framework Directive.

Council and Parliament had supported the approach proposed by the Strategy, and have now the responsibility of adopting the proposed legal instrument. Thereafter, Member States will have to ensure that good environmental status in the marine environment is achieved by the year 2021 at the latest, and to continue the protection and preservation of that environment and the prevention of its deterioration.

---

10 See http://ec.europa.eu/environment/nature/nature_conservation/focus_wild_birds/25year_birds_directive/index_en.htm

11 DECISION No 1600/2002/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 July 2002 laying down the Sixth Community Environment Action Programme, ***Official Journal L 242 , 10/09/2002 P. 0001 - 0015***

12 COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND TO THE EUROPEAN PARLIAMENT. Thematic Strategy on the Protection and Conservation of the Marine Environment and Proposal for a Marine Strategy Directive, COM(2005)504 and COM(2005)505

13 COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT "Towards a strategy to protect and conserve the marine environment", COM(2002)539

According to the proposed Directive, actions to be taken by Member States to deliver good environmental status have to be based on sound and reliable assessments of the impact of human activities on the marine. The proposal makes every effort to ensure that proper systems of monitoring and assessment are set. These systems will include current monitoring obligations defined by the Habitats and the Birds Directives.

**ECOSYSTEM APPROACH**

The elaboration of guidelines for the implementation in the marine environment of the so-called Ecosystem Approach has been one of the activities undertaken under the aegis of the European Commission during the preparation of the Environmental Marine Strategy.

In this context, the Ecosystem Approach is embedded in the concept of sustainable development, which requires that the needs of future generations are not compromised by the actions of people today. The Ecosystem Approach puts emphasis on a management regime that maintains the health of the ecosystem alongside appropriate human use of the marine environment, for the benefit of current and future generations.

The Convention on Biological Diversity[14] defines the Ecosystem Approach as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way" and the ecosystem can be defined as "an interacting complex of living communities and the environment, functioning as a largely self sustaining unit." It recognizes that humans, with their cultural diversity, are an integral component of ecosystems".

To provide greater specificity for the purposes of the European Marine Strategy the Ecosystem Approach is described as 'a comprehensive integrated management of human activities based on best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of the marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.' This description clearly places humans as part of natural ecosystems, and stresses that human activities in these ecosystems must be managed so that they do not compromise ecosystem components that contribute to the structural and functional integrity of the ecosystem.

HELCOM and OSPAR Conventions have adopted other more specific interpretation of the Ecosystem Approach. Full text of this interpretation can be found in
http://www.helcom.fi/stc/files/BremenDocs/JointEcosystemApproach.pdf

## 2.3. EU Maritime Policy

The above-referred European strategy for the protection and the conservation of the marine environment referred in point 2.2 is to be seen within the broader context of the development of a new EU Maritime Policy.

On 7 June 2006, the European Commission adopted a Green Paper[15] on a Future Maritime Policy for the European Union. This Green Paper is the result of over a year of consulting with stakeholders, identifying gaps between sea-related sectoral policy areas and attempting to adopt best practice and learn from obstacles and challenges. The need for such a policy stems from the economic, social, and environmental importance of the maritime dimension in Europe. The vision is that of a Europe with a dynamic maritime economy in harmony with the marine environment supported by excellence in marine science.

[14] http://www.biodiv.org/programmes/cross-cutting/ecosystem/default.asp
[15] http://ec.europa.eu/maritimeaffairs/policy_en.html

The strategy for the protection and the conservation of the marine environment referred to in point 2.2 will directly contribute to the work on the future EU Maritime Policy.

## 2.4. Links between the marine coastal environment and the EU Water Framework Directive

The EU Water Framework Directive[16] (WFD) establishes a framework to enhance the protection and to improve the aquatic environment of continental, transitional, and coastal waters.

Coastal waters are defined as a one nautical mile strip extending from the baseline used to define the breadth of territorial waters. The general objectives of the WFD are to prevent any further deterioration in status and to achieve "good status" of all waters by 2015. The concept of water status comprises both "ecological status" and "chemical status". As regards chemical status the scope of WFD is extended to cover all territorial waters.

In these water bodies Member States shall achieve compliance with any standards and objectives by 2015, unless otherwise specified in the Community legislation under which the individual protected areas have been established. Where more than one of the objectives relates to a given body of water, the most stringent shall apply.

In order to achieve the environmental objectives, the WFD foresees the development of a programme of measures as part of a wider river basin management plan. The first of such plans is due in 2009. The planning scale is the river basin district, which comprises one or several neighbouring river basins together with their associated coastal waters. In drawing up the management plans, active public participation from all stakeholders should be encouraged by the competent authorities.

The WFD classification scheme for water quality includes five status categories: high, good, moderate, poor and bad. 'High status' is defined as the conditions associated with no or very low human pressure. This is also called the 'reference condition' as it is the best status achievable - the benchmark. These reference conditions are type-specific, so they are different for different types of rivers, lakes or coastal waters so as to take into account the broad diversity of ecological regions in Europe. Assessment of quality is based on the extent of deviation from these reference conditions, following the definitions in the Directive. 'Good status' means 'slight' deviation, 'moderate status' means 'moderate' deviation, and so on. These definitions are expanded in Annex V to the WFD.

The assessment of water status is based on biological, chemical and hydromorphological quality elements. In case of transitional and coastal waters, the biological elements that should be taken into account include phytoplankton, aquatic flora, benthic invertebrate fauna and fish fauna. Hydromorphological quality elements include features such as wave exposure, structure of the intertidal zone or depth variation. Transparency, oxygenation conditions or nutrients are examples of chemical elements that should be included in the assessment.

[16] DIRECTIVE 2000/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327/00, 23.12.2000. http://eur-lex.europa.eu/pri/en/oj/dat/2000/l_327/l_32720001222en00010072.pdf

This framework Directive establishes that as regards Natura 2000 protected areas and all other areas requiring special protection by specific Community legislation their environmental objectives have to be integrated into the relevant River Basin Management Plans. These Plans will include the transitional and coastal areas for which the River Basin Authority is competent.

## 2.5. The challenge of constructing the Marine Natura 2000 Network. Planning a system of marine protected areas

The marine component of the Natura 2000 network will be an integral component of the overall Natura 2000 European ecological network. As for the terrestrial environment, the marine network will aim to protect sites of European conservation importance for (i) natural habitat types listed in Annex I and (ii) the habitats for the species listed in Annex II of the Habitats Directive, in order to ensure that these features can be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The marine component of Natura 2000 network will also need to include a coherent network of Special Protection Areas (SPAs) classified pursuant to the Birds Directive. These will be the most suitable territories in number and size for the conservation of marine birds listed in annex I of Birds Directive as well as migratory marine birds, taking into account their protection requirements.

Whereas the species scope of the Birds Directive is already comprehensive for the marine it is recognised that the present Annexes of the Habitats Directive have limited focus on marine species and habitat types, especially those that occur in the offshore marine environment. Notwithstanding, an important first step in protecting the marine environment will be the full implementation of the existing marine Natura 2000 commitments.

This work may need to be complemented in the near future with the listing of additional marine habitat types and species, which would provide a legal basis for extending the scope of the marine network. In the framework of the Marine Strategy, the Commission has proposed a framework for the development of a rational approach for the full implementation of Natura 2000 at sea with a view to consider potential proposals for adapting the annexes to the Habitats Directive to strengthen them with regard to marine habitats and species.

This process is intended to provide the basis for the protection of other relevant habitat types and species. This challenging problem needs to be solved in a cooperative manner at EU level. There are a number of marine habitat types and species of European conservation concern that are not covered at present by the Habitats and Birds directives but which need protection to ensure their favourable conservation status. Many of these habitats and species are identified and listed by regional organisations such as OSPAR, The Helsinki Convention and the Barcelona Convention. Further scientific knowledge and evaluation will be needed to complement these listings.

## 2.6. Different marine zones. Application of Nature legislation in the European seas.

Member States have an obligation to apply nature legislation in waters under their jurisdiction and, outwards, in waters where they exercise sovereign rights. The Habitats and Birds Directives apply in the European territory of the Member States[17]. Therefore, waters adjacent

[17] see Birds Directive, Art 1

to the French overseas departments (DOM) and to the territories mentioned in Annex II to the Treaty establishing the European community[18] are excluded.

### *2.6.1. Definition of different marine zones*

Under international law coastal states establish several jurisdictional marine zones as the Territorial Sea, the Exclusive Economic Zone (EEZ) and the Continental Shelf. Some coastal states establish other areas in which they claim exclusive sovereignty rights over natural resources such as "fishing protection zones", "environment protection zones"…

The European Community itself accepted the international rules on maritime zones adopted in the 1982 of the United Nations Convention on the Law of the Sea (UNCLOS).

The **Territorial sea** is the adjacent belt of sea where the sovereignty of a coastal State extends, beyond its land territory and internal waters. Under article 3 of UNCLOS all states have the right to establish the breath of the territorial sea up to a limit of 12 nautical miles.[19]

The **Territorial sea** is the adjacent belt of sea (up to 12 nautical miles) where the sovereignty of a coastal State extends, beyond its land territory and internal waters.

Marine waters on the landward side of the baseline of the territorial sea form part of the **internal waters** of the State (see detailed definition of internal waters in UNCLOS, article 8)[20] In the internal waters and the territorial sea, jurisdiction extends to the air space, the water column, its bed and subsoil.

The **exclusive economic zone (EEZ)** is defined by the UNCLOS[21] as an area beyond and adjacent to the territorial sea (from 12 to 200 nautical miles[22]) in which the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The coastal state also jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment in the EEZ.

***The Continental Shelf*** [23]
Under international law, coastal states also exercise sovereign rights over the non-living resources and sedentary living organisms in the 'continental shelf'.

The term 'continental shelf' is used by marine geologists generally to mean that part of the continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 metres.

Furthermore, this term is defined in Article 76 of UNCLOS according to a complex formula. According to it, "***the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural***

---

18 Official Journal C 325 , 24/12/2002. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_325/c_32520021224en00010184.pdf

19 A nautical mile is 1' of arc on the equator; 40.000 km/360/60= 1 nautical mile=1,852km; 12nm= 22,2km

20 http://www.un.org/Depts/los/index.htm

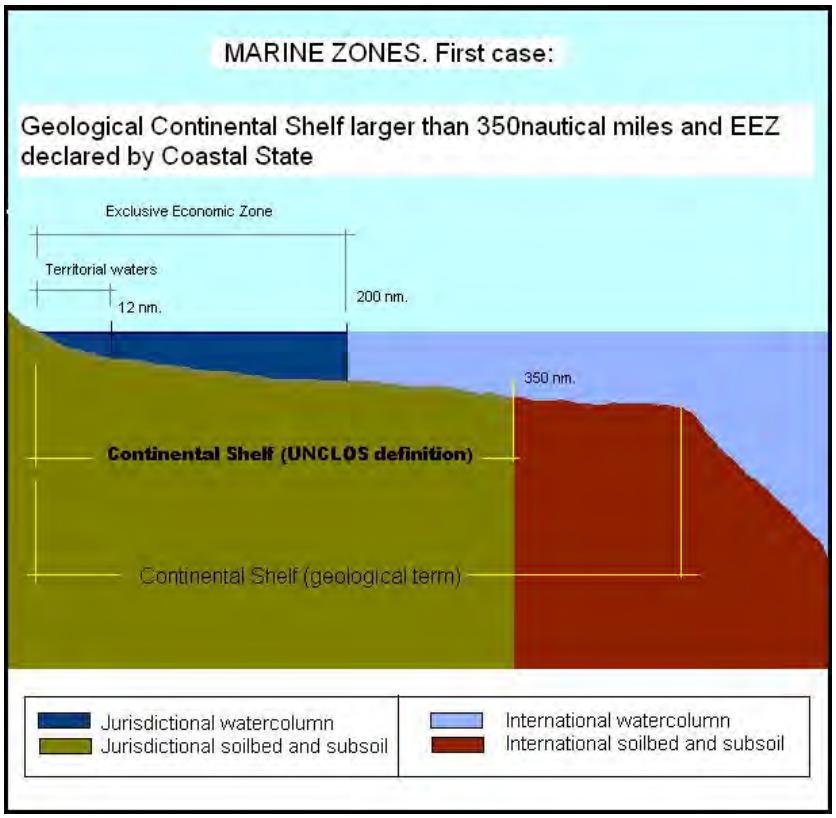
21 ***UNCLOS, United Nations Convention on the Law of the Sea, Article 55.*** The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (UNCLOS, article 56) http://www.un.org/Depts/los/index.htm

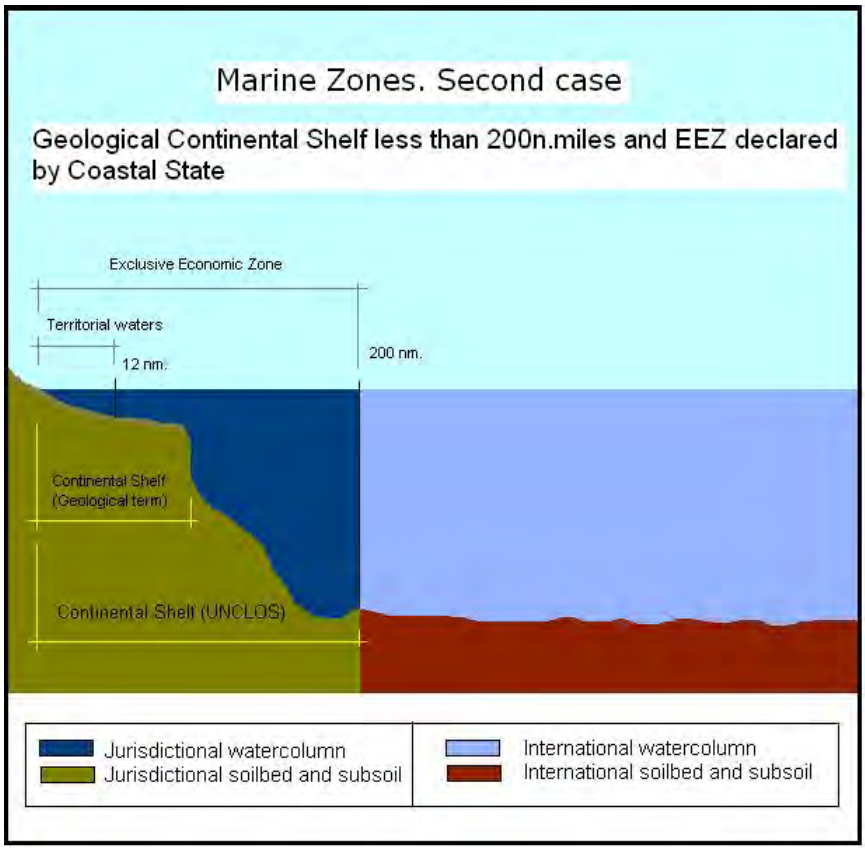
22 From 22,2 to 370,4km

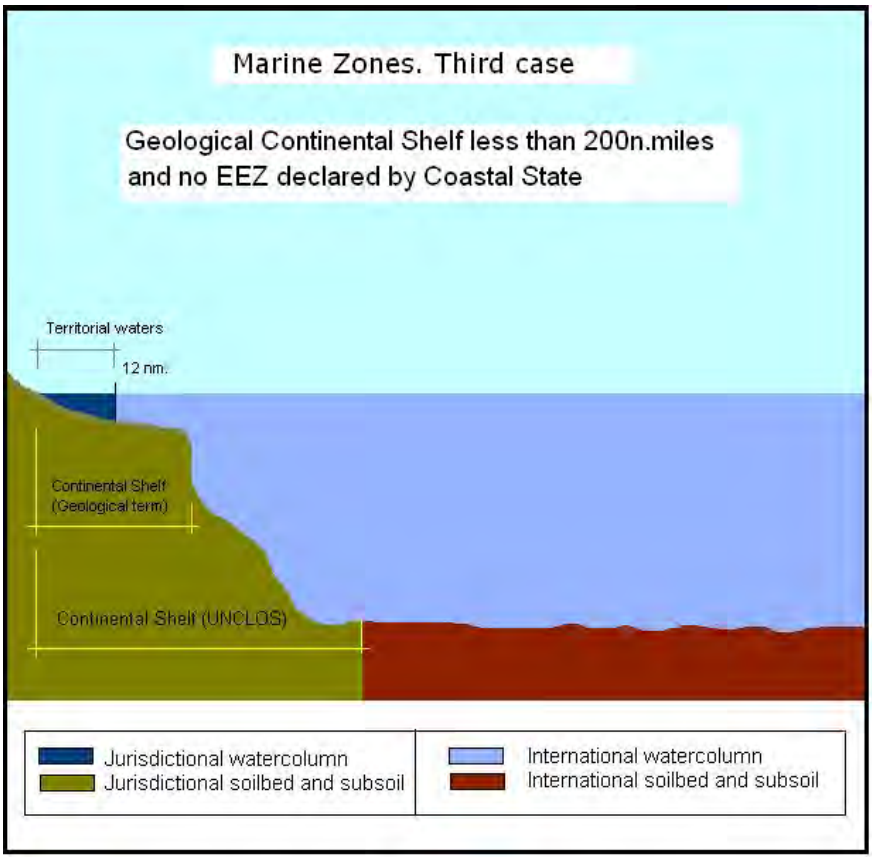
23 Note that Continental Shelf is distinct from the EEZ

***prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".***

Therefore, Continental Shelf extends for at least 200nm in the open sea. It may not extend beyond 350nm. The Continental Shelf is the seabed and the subsoil, not the superjacent water column**.** The term Continental Shelf used in this document is the legal term as defined in the previous paragraph (UNCLOS definition).




Marine Zones. Second case
Geological Continental Shelf less than 200n.miles and EEZ declared by Coastal State
Exclusive Economic Zone
Territorial waters
12 nm.
200 nm.
Continental Shelf (Geological term)
Continental Shelf (UNCLOS)
Jurisdictional watercolumn
Jurisdictional soilbed and subsoil
International watercolumn
International soilbed and subsoil


Marine Zones. Third case
Geological Continental Shelf less than 200n.miles and no EEZ declared by Coastal State
Territorial waters
12 nm.
Continental Shelf (Geological term)
Continental Shelf (UNCLOS)
Jurisdictional watercolumn
Jurisdictional soilbed and subsoil
International watercolumn
International soilbed and subsoil

A detailed case by case Coastal State database can be founded in UNCLOS website: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm, with all legal references. Several illustrative maps of marine areas are included in: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/

### *2.6.2. Applicability of Nature Directives in the Sea. To what extent do Habitats and Birds directives apply?*

#### *History of discussions about geographical scope of the directives*

The initial position of a number of Member States was to see their obligations restricted to territorial waters, i.e. up to 12 nautical miles from the baselines. The Commission has consistently challenged this, arguing for a more extensive scope since, clearly, the protection of marine habitats and species, which are included in the annexes of the Directives, cannot be adequately achieved in such a limited area. After a number of years of debate and following discussions between the Legal Services of the Commission and Council, the Council recognised the need for implementation of the nature directives in the EEZ as a key element for the protection of the marine ecosystem (See Fisheries Council conclusions Luxembourg, 2001[24]). This acknowledgement supports the application to the exclusive economic zone which in the case of the Atlantic seaboard extends up to 200 nautical miles (370,4km) from the coastline for different Member States.

This opinion was confirmed by the position of the European Court of Justice delivered in the judgment of case C-6/04 of 20 October 2005, and other Member States Courts' positions (e.g.: the UK Case nºCO/1336/1999 The Queen -v- The Secretary of State for Trade and Industry ex parte Greenpeace Limited[25])

#### *Legal principle*

In relation to the exploitation and the conservation of the natural resources, the opinion of the Commission is that recognition by a coastal state of exclusive rights in a maritime zone brings not only rights but obligations. Exclusive right to exploit natural resources implies a similar duty to preserve natural resources. Therefore, community law relative to the conservation of natural resources applies in all maritime areas where Member States exercise such rights. That includes the following maritime areas:

- The internal waters and the Territorial Sea,
- The Exclusive Economic Zone (EEZ) and/or to other areas where Member States are exercising equivalent sovereign rights (fishing protection zones, environmental protection zones…)
- The Continental Shelf.

---

[24] Extract from the Annex to Council Conclusions on the Strategy for the Integration of Environmental Concerns and Sustainable development into the Common Fisheries policy, -Luxembourg, 25 April 2001: Point ***15. The Habitats and Birds Directives( 5), and specially the associated network of protected sites in the marine environment "Natura 2000", constitute a key element for the protection of the marine ecosystem which may have consequences on fisheries. Member States are encouraged, in co-operation with the Commission, to continue their work towards the full implementation of these directives in their exclusive economic zones.***

REF: ***http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/agricult/ACF20DE.html***

[25] http://www.defra.gov.uk/wildlife-countryside/ewd/rrrpac/marine/06.htm#fn

This principle is in line with:

- Council Regulation 2913/92 "Customs Code" (Art 23) in which the definition of ***"goods wholly obtained or produced in one country "*** includes products taken from the sea-bed or beneath the sea-bed outside territorial waters, if that country has, for the purposes of exploitation, exclusive rights to such soil or subsoil. This regulation incorporates the same definition of goods wholly obtained in a country as previous Council regulation 802/1968. At this early stage, the Community already included into its scope of application the continental shelf that does not belong to the territory of the Member States. The common definition of the origin of goods which provides that produced goods and other products extracted from the sea-bed beyond the territorial sea are goods which are entirely produced in one country provided that the country exercised exclusive rights over the sea-bed for the purpose of its exploitation. Thus, according to this interpretation, the Community Law is applicable in the continental shelf and the EEZ of the EU Member States.

- Council Conclusions on the Strategy for the Integration of Environmental Concerns and Sustainable development into the Common Fisheries policy, -Luxembourg, 25 April 2001, which include the following considerations (Point 15): ***The Habitats and Birds Directives (5), and specially the associated network of protected sites in the marine environment "Natura 2000", constitute a key element for the protection of the marine ecosystem which may have consequences on fisheries. Member States are encouraged, in co-operation with the Commission, to continue their work towards the full implementation of these directives in their exclusive economic zones.***[26]

- Jurisprudence of the European Court of Justice (mainly Court case judgement C-6/04[27] and other Member States Court's position delivered in different Court Cases (e.g.: UK: The Queen -v- The Secretary of State for Trade and Industry ex parte Greenpeace Limited, Case no: CO/1336/1999[28])

***Duties for Member States***

Member States have the duty to apply Community law in the above-mentioned areas, which includes the application of the Habitats and Birds Directives. Therefore, it is expected that Member States propose in the coming years the necessary sites to complete the marine component of Natura 2000 by application of the Birds and the Habitats Directives in their internal waters, Territorial Sea, as well as in their EEZ or other similar declared zones and in their Continental Shelf area.

For management purposes, Member States will take measures for the regulation of activities falling under their responsibility. For other activities, Member States will take the necessary actions to request the appropriate competent authority to take action. In particular cases where the need to regulate fishing activities is necessary to protect a Natura 2000 site in maritime areas under Member States sovereignty or jurisdiction is dealt with in extent in Chapter 6 of this Guidelines document. The general principle is that actions are to be taken in the context of the Common Fisheries Policy and in accordance with its rules. The relevant basic rules are enshrined in Regulation 2371/2002.

---

[26] ***See: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/agricult/ACF20DE.html***

[27] See Judgement articles 115-120 (http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[28] http://www.defra.gov.uk/wildlife-countryside/ewd/rrrpac/marine/06.htm#fn

In areas beyond Member States sovereignty or jurisdiction, the Community shall, where appropriate, promote actions to be taken through appropriate international fisheries conventions.

There is a special case where the Continental Shelf extends beyond the EEZ or where no EEZ has been declared. In this case, the soil and subsoil, which are covered by Community law, are lying under an International water column. In this case, the duty to protect the marine environment of the seabed needs to be made compatible with the need to respect the international legislation of the upper water column (mainly regulated by the UNCLOS framework).

It is necessary to clearly distinguish in that particular case what natural resources are subject to community law and what are subject to international law. The natural resources of the continental shelf to which Member States have sovereign rights are defined in Part VI of UNCLOS relative to the Continental Shelf (art 77.4): ***The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil***.

Therefore, it appears that where the continental shelf is lying under an international water column only the provisions of Habitats Directive as regards habitats and sedentary species would apply, as Community law applies only to the seabed but not to the water column or surface. For the same reason the Birds Directive and provisions of the Habitats Directive related to conservation of non-sedentary species[29] do not apply in this case.

This is particularly relevant in the Mediterranean Sea where Member States -except Cyprus- have not declared an EEZ. It may also be relevant in some parts of the Atlantic Ocean where a coastal Member States claims a Continental Shelf going beyond 200 nautical miles.

In the case of the Mediterranean Sea, any action aiming at the regulation of fisheries activities beyond territorial waters should be taken in line with the policy declaration of the "Declaration of the European Community ministerial conference for the sustainable development of fisheries in the Mediterranean" Venice 25-26 November 2003.

This declaration recognizes that the creation of fisheries protection zones permits the improvement of conservation and control of fisheries and thus contributes to better resource management. However, it is considered that the process for designation of these protected zones should follow a concerted and regional approach. In order to progress in this direction, the Mediterranean States shall cooperate at the appropriate regional level.

In this context, it is useful to also mention several fisheries regulatory measures taken by international organizations as the ICCAT with regard to the Mediterranean Sea and easter Atlantic[30] (e.g.: Recommendations by the ICCAT to establish a multi-annual recovery plan for some fish species as the bluefin tuna…)

[29] which includes ***swimming*** species of turtles, cetaceans or fish

[30] See http://www.iccat.es/

**Maritime zones in the Mediterranean Sea**[31]

The situation of different maritime areas in the Mediterranean Sea is particularly complex.

The European Community as well as all its Member States have ratified UNCLOS. Most third States riparian to the Mediterranean Sea[32] have also ratified it (All except Turkey, Morocco, Libya, Israel and Syria)

Cyprus is the only Member State to have declared an EEZ in the Mediterranean. However, France, Spain and Malta have declared different types of protection zones that extend beyond their territorial waters (fishing protection zones, environmental protection zones…)

Tunisia has also declared an EEZ in the Mediterranean Sea in June 2005. Croatia has declared equivalent sovereign rights regrading the exploitation and conservation of living resources beyond its territorial waters.

## 2.7. Some legal aspects related to the implementation of environmental legislation to marine environment. Some Management issues in the context of different competencies and responsibilities

There is no legal difference between marine and terrestrial environments as regards duties of Member States in relation to the implementation of the Birds and Habitats Directive. The final obligation of delivering a favourable conservation status for species and habitat types of Community Importance is the same in both environments. The obligations of Member States are also the same in relation to the need to ensure that the site designation process is exclusively based on scientific criteria.

As regards areas to be protected under the Birds Directive, the Court of Justice has emphasised that the selection of sites and the delimitation of boundaries should be carried out on the basis of exclusively ornithological criteria[33].

As regards the Habitats Directive, case law confirms that site selection by Member States should be exclusively based on the ecological criteria of Annex III of the directive[34].

Therefore, future management challenges should not be a determining element in this process.

Potential effects on marine species and habitats from human activities that are regulated at the Community or International level are greater in the marine than in terrestrial environment. In such a scenario, it is particularly relevant to consider in which marine zone the protected site is situated, in order to identify the appropriate management approach, as different legal regimes are to be considered for the three above mentioned marine zones ***(point.2.6; territorial sea, Exclusive Economic zone, Continental shelf***).

---

31 References: i) "***Gobernanza en el Mar Mediterráneo. Estatus legal y perspectives"***. IUCN 2005. ii) ***"Marine Specially protected areas, the General aspects and the Mediterranean Regional Sysytem"*** Tullio Scovazzi 1999

32 A complete regularly updated data base on ratifications may be found at http://www.un.org/Depts/los/reference_files/status2006.pdf

33 (judgement of 2 August 1993, Commission v Spain, C-355/90 ECJ reports, p.4221, especially points 26-27; judgement of 11 July 1996, Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds, C-44/95, ECJ reports**,** p.3805, especially point 26)

34 (judgement of 11 September 2001, Commission v France, C-220/99, ECJ reports, p.5831; judgement of 11 September 2001, Commission v Ireland, C-67/99, ECJ reports, p.5757; judgement of 11 September 2001, Commission v Germany, C-71/99, ECJ reports, p.5811)

For each marine site, the responsible National Authority[35] has to establish the necessary conservation measures to ensure the favourable conservation status of the species and habitats types for which the site is designated. Depending on the site location and the type of action, the responsibility for the implementation of those measures can be different. These measures may have to be taken at Federal, National, European Community or International levels.

Actions to be taken at national and at Community level to regulate human activities in marine Natura 2000 sites will be in accordance with UNCLOS and other relevant international legislation. This is particularly relevant for the offshore marine environment.

Therefore, National Authorities have to identify the necessary conservation measures and the subsequent actors responsible for their implementation and enforcement. Each National Authority shall implement all measures of its own competencies and ask other responsible bodies to take action for measures falling under their own competencies.

A clear example is the Common Fisheries Policy, which is an exclusive Community competency. Point 6 below of this document is dedicated to this issue, given its relevance in relation to the management of the Natura 2000 sites in the marine environment. Shipping is another sector in which competencies also depend on site location.

***Limits of competencies***

A coastal State has different competencies in different sea zones. In global terms, the further offshore one goes, the less the Coastal State's exclusive competencies are to legislate and/or to enforce legislation. Some of the competencies are shared at Community level. Commercial fishing is a relevant policy where the Community has exclusive legislative jurisdiction. Some activities like military, mining or petrol prospecting/exploitation fall under national competencies over the entire Continental Shelf. Other sectors such as marine transport have different regulatory regimes for different marine zones, with different regulatory authorities. The international legal framework is defined by the ***United Nations Convention on the Law of the Sea (UNCLOS).*** Relevant bodies in this sector are the ***International Seabed Authority (ISA)*** and the ***International Maritime Organization (IMO).***

## 2.8. Links with Regional and International Organisations and Agreements

Regional environmental marine organisations and agreements like the Helsinki Convention, OSPAR, Barcelona, and Bucharest Conventions are developing different networks of marine protected areas. The Commission welcomes all these initiatives that concur with EU nature conservation policy developments. Looking for a coherent and complementary approach in the identification process of Natura 2000 sites and other networks of marine protected areas would be a favourable measure that would enhance the global coherence of the network.

As described above (point 2.5), work being carried out by these Regional Organisations / Agreements on marine habitats and species of conservation concern will be relevant inputs to be considered in the first stages of the process of possible future adaptations of the Habitats Directive annexes in terms of the marine environment.

The Helsinki Commission (HELCOM) and the Commission for the Protection of the Marine Environment of the North East Atlantic (OSPAR) have adopted a joint work programme on the

[35] The National Authority responsible for the management of a Natura 2000 site is the administrative body designated in the Standard Data Form that Member States transmit to the Commission for each Natura 2000 site in accordance with 97/266/EC Commission Decision of 18 December 1996 ***(Official Journal L 107 , 24/04/1997).***

creation of a network of marine protected areas. This programme aims to ensure that by 2010 there is an ecologically coherent network of well-managed marine protected areas for the maritime areas of both the Helsinki Convention and OSPAR. To this end, they have agreed several actions, which include the development of a common proposal for a programme aimed at enhancing the protection of species and habitats in European marine waters, in order to produce suggestions for consideration by the European Community for amendments to the annexes to the Habitats and Birds Directives. (Full information is to be found in report documents -annex 7- of the first joint ministerial meeting of the Helsinki and OSPAR Commissions, Bremen: 25 - 26 June 2003 http://www.ospar.org/eng/html/welcome.html; **Joint HELCOM/OSPAR Work Programme on Marine Protected Areas**)

The parties of the Barcelona Convention agreed a protocol in 1995 concerning specially protected areas and biological diversity in the Mediterranean establishing common criteria for the choice of protected marine and coastal areas to be considered as specially protected areas of Mediterranean importance (SPAMI, http://www.rac-spa.org/index1.htm ). The conservation of the natural heritage by the protection of threatened species and their habitats is the basic aim that must characterize a SPAMI[36]. The listed SPAMI and their geographical distribution will have to be representative of the Mediterranean region and its biodiversity.

## 2.9. Trans frontier issues for site designation and management

As the conservation of habitat types and habitats for species can have a trans-frontier dimension, it will also be necessary to ensure the coherence of proposed ***Sites of Community Importance (SCI)*** and ***Special Protection Areas (SPA)*** designated by different Member States to be incorporated into the Natura 2000 network. This task will be undertaken by the Commission in partnership with the Member States concerned and with the scientific support of the European Environment Agency.

Any future protection of a feature having an international dimension under the Habitats Directive would require the designation of different SACs in the different EEZs, each country being responsible for its own area. This will be determined by an appropriate assessment to be carried out by each MS for their areas. The appropriateness to propose its part of the feature as Site of Community Importance will be determined by:

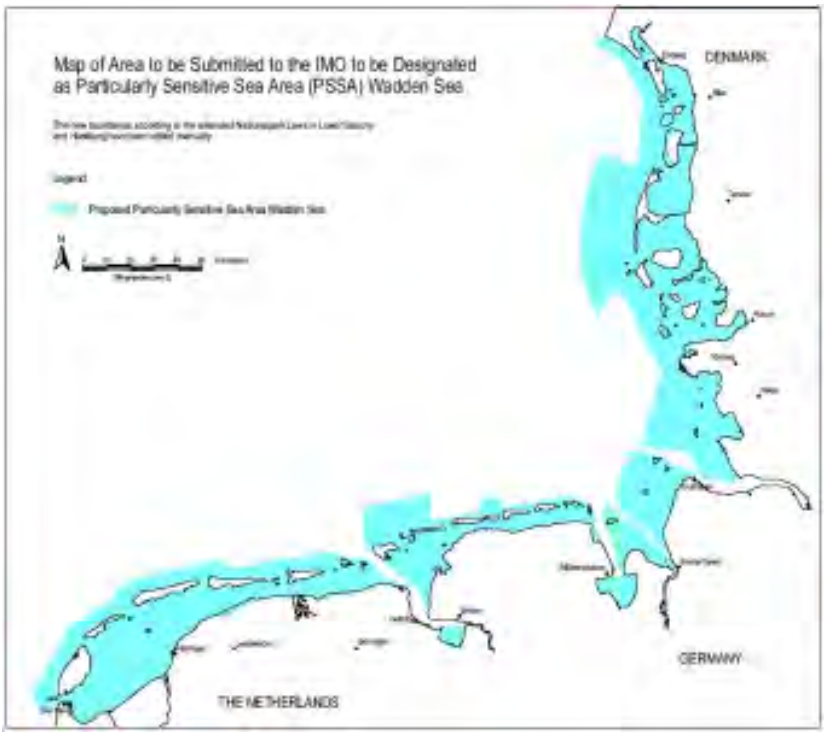
- The assessment criteria of Annex III of Habitats Directive (including sufficient representation of this Habitat type in the network and ensuring representatively of the site at national level)

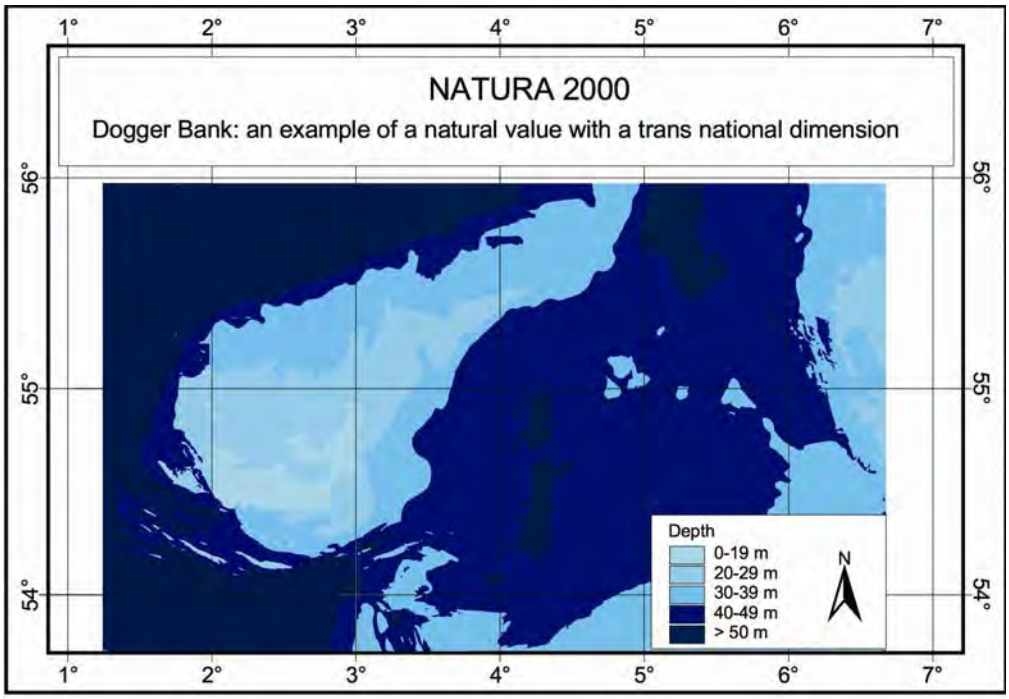
- The interest in ensuring the overall integrity of natural features of Community interest that have a trans-border dimension.

The aim is to ensure that a common approach is taken where a feature has a transboundary dimension to ensure that the sites proposed/designated by the Member States concerned adequately protect this feature in Natura 2000. Such an approach (involving common recognised features and coherent boundary shapes) will favour better management schemes, ensuring the protection of the sites by the implementation of more simple and effective measures.

[36] Protocol concerning specially protected areas and biological diversity in the Mediterranean, art 8

The Wadden Sea is a typical example of a coastal/inshore natural area of international dimension hosting species and habitats types of Community Importance. Shared by Denmark, Germany and the Netherlands, it is one of Europe's largest marine wetlands. It contains numerous features that require protection under the Birds and the Habitats Directive including habitats necessary for species protection: Wild birds listed in Annex I of the Birds Directive as well as migratory bird species, Marine mammals and fish species listed in Annex II of the Habitats Directive. Protection is also required for habitats types included in Annex I of the Habitats Directive: sandbanks which are slightly covered by sea water all the time, estuaries, mudflats, salt marshes and sand dunes...






The Dogger Bank, in the North Sea, is a natural feature that extends through the EEZ of several Member States. The top of the feature is at less than 20 metres depth and is found in UK waters close to the EEZ boundary with NL. The feature continues in a North-Easterly direction stretching through Dutch and German waters and with the water depth progressively increasing.

## 2.10. Implementation of the Natura 2000 network. Administrative steps from identification to designation of marine Natura 2000 sites.

Marine sites of the Natura 2000 network will provide protection to some of the following natural values:

1. Marine birds in accordance with the provisions of the Birds Directive: bird species listed in Annex I (article 4.1) and other migratory birds (article 4.2).

2. Habitats listed in annex I of the Habitats directive: including all habitats types classified under code 11*("Open seas and tidal areas") and 12* ("Sea cliffs and shingle or stony beaches") and habitat type 8330 (Submerged or partially submerged caves). Four habitat types relevant to marine designation of sites are listed in annex I and present in offshore waters: 1110 Sandbanks which are slightly covered by sea water all the time , 1170 reefs, 1180 structures made by leaking gases and 8330 Submerged caves

3. Species listed in annex II (18 marine species, including fish, reptile, cetacean, and seal species)

4. Marine species listed in annex IV of the Habitats Directive. Sites are not designated based on the presence of annex IV species. However, they will also need to be protected under the provisions of Article 12 of Habitats Directive.

5. Marine species listed in annex V of the Habitats Directive. As above, sites are not designated based its presence. Nevertheless, they will also need to be protected under the provisions of Article 14 and 15 of Habitats Directive.

***Sites designated in accordance with Birds Directive provisions***

Special Protection Areas (SPA) are identified and designated in accordance with the provisions of the Birds Directive. In Article 4 of this Directive, it is established that Member States shall classify in particular the most suitable territories in number and size as SPAs for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies. Not withstanding the fact that the identification and designation of SPAs is a Member State responsibility, it must be carried out on the basis of ornithological criteria and result in the selection of all the most suitable territories[37].

Once a site is designated as an SPA the legal protective requirements defined in Article 6 (2) (3) and (4) of the Habitats Directive apply to it.

Member States must send to the Commission all relevant information so that it may take appropriate initiatives to ensure that the SPA network forms a coherent whole.

***Sites designated in accordance with the Habitats Directive provisions***

***First step: elaboration of a list of Sites of Community Importance***. The criteria for selecting sites eligible for identification as Sites of Community Importance (SCI) are in accordance with annex III of the Habitats Directive and relevant scientific information. Member States will identify and carry out an assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species contained in Annex II (including priority natural habitat types and priority species). On that basis, each Member State proposes a list of SCI. The list, including appropriate information for each site, is transmitted to the European Commission[38].

***Second step: adoption of the list of pSCI***. The list of proposed SCI is to be adopted by the Commission in accordance with a procedure laid down in article 21 of the Habitats Directive. This step gives formal legal effect to the protective safeguards defined in Article 6 (2) (3) and (4) of the Habitats Directive.

***Third step: designation of special areas of conservation (SAC).*** Once a site of Community importance has been adopted, the Member State concerned shall designate that site as a special area of conservation (SAC) as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, to a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

---

[37] See key conclusions of the Court of Justice in its landmark judgement, delivered on 19 May 1998, in this important test case for the implementation of the directive.

[38] a map, its name, location, extent and the data resulting from application of the criteria specified in Annex III provided in a standard format (c.f..: Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107 , 24/04/1997).*** This format also applies to sites designated under the Birds Directive.

In the marine environment, obligations of Member States are the same as in the terrestrial environment. Therefore, the provisions of the Habitats Directive related to the site designation process are the same: the site designation process is exclusively based on scientific criteria. Future management challenges (related to any future activity such as fisheries, energy generation or distribution…) should not be a determining element in this process.

More information on this topic can be found on the Nature Conservation and Biodiversity webpage of the Commission http://ec.europa.eu/environment/nature/home.htm

## 2.11. Update on implementation of Natura 2000 network in marine areas. An overview of existing marine SPA and SCI

By June 2006, Member States had designated 480 sites which contain marine waters- (64.754 $km^2$) as SPAs under the Birds' Directive and 1249 sites (77.784km2) as pSCIs under the Habitats' Directive.

An updated Natura 2000 barometer may be found at the following address: http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/index_en.htm

Most existing marine designated/proposed sites are located in territorial waters. Therefore, present and future efforts of Member States will need to mainly focus on the completion of the Natura 2000 network in the offshore environment.

In this regard, Germany has already proposed a significant contribution to the marine component of Natura 2000 in its offshore environment (10 new sites). Two of these areas have been designated as SPAs and are also protected since September 2005 under German national legislation as nature reserves.[39]

Other Member States are in the process of identifying sites for protection under both Directives. For example in the United Kingdom the Joint Nature Conservation Council (JNCC) has delivered scientific advice to the national authorities (DEFRA) to support ***'the identification of offshore marine Special Areas of Conservation and Special Protections Areas'*** in the offshore UK waters. This relevant document contains a useful approach and rationale for the identification and future selection of Natura 2000 sites (It may be found in the following address. http://www.jncc.gov.uk/page-2412)

[39] An overview and detailed descriptions of the German process leading to the actual nominations are given in English language by a website (www.habitatmarenatura2000.de) and in the book "Progress in marine Conservation in Europe" (von Nordheim et al. (eds.) 2006). Habitat marenatura2000" http://www.habitatmarenatura2000.de/en/aktuelles-summary-nature-conservation.php

## 3. HABITAT TYPES AND SPECIES REQUIRING MARINE NATURA 2000 SITES.

### 3.1. Marine Habitat types' definitions. Update of "Interpretation Manual of European Union Habitats".

At present, only nine marine habitat types are listed in Annex I of the Habitats Directive as natural habitats types of community interest whose conservation requires the designation of special areas of conservation (SAC's).

| **92/43 Habitats Directive. Annex I**<br><br>***Open sea and tidal areas natural habitats types of community interest whose conservation requires the designation of special areas of conservation (SAC's)*** | |
|---|---|
| 1110 | Sandbanks which are slightly covered by sea water all the time |
| 1120 * | Posidonia beds (***Posidonion oceanicae***) |
| 1130 | Estuaries |
| 1140 | Mudflats and sandflats not covered by seawater at low tide |
| 1150 * | Coastal lagoons |
| 1160 | Large shallow inlets and bays |
| 1170 | Reefs |
| 1180 | Submarine structures made by leaking gases |
| 8330 | Submerged or partially submerged sea caves |

One of the objectives of the Marine Working Group has been to review the applicability of the existing definitions of marine habitats to the offshore environment and adapt these, where necessary, as a basis for extending the network of protected areas across all the European maritime areas where Member States exercise jurisdiction.

From a first review, it was considered that only three of the above listed habitat types needed a more complete definition in the Interpretation Manual of European Union Habitats[40]. The work of the experts therefore focused on these habitats types:

- 1110 ***"sandbanks which are slightly covered by sea water all the time"***
- 1170 ***"Reefs",*** and
- 1180 ***"submarine structures made by leaking gases"***

[40] The Interpretation Manual of European Union Habitats - EUR25 is a scientific reference document adopted by the Habitats Committee.

The main elements in relation to the definitions for each of the habitat types are indicated below. There are also substantial additions to the background information supporting these definitions (see Appendix 1 of this document).

### *3.1.1. Habitat type 1110 "sandbanks which are slightly covered by sea water all the time"*

Based on previous work of the Marine Expert Group, an independent panel of marine experts, co-ordinate by the European Environment Agency (EEA), reviewed the definition of this habitat type in June 2006. The EEA did this with the support of European Topic Centre on Biological Diversity[41], the ICRAM[42] and several other experts on this topic. As a final output of this process, the EEA submitted the following definition, in accordance with the opinion of the above scientific panel.

***1110 Sandbanks which are slightly covered by sea water all the time***

**Definition:**

Sandbanks are elevated, elongated, rounded or irregular topographic features, permanently submerged and predominantly surrounded by deeper water. They consist mainly of sandy sediments, but larger grain sizes, including boulders and cobbles, or smaller grain sizes including mud may also be present on a sandbank. Banks where sandy sediments occur in a layer over hard substrata are classed as sandbanks if the associated biota are dependent on the sand rather than on the underlying hard substrata.

"Slightly covered by sea water all the time" means that above a sandbank the water depth is seldom more than 20 m below chart datum. Sandbanks can, however, extend beneath 20 m below chart datum. It can, therefore, be appropriate to include in designations such areas where they are part of the feature and host its biological assemblages.

This definition is based on the best available science and is consistent with the approach already established in the habitats interpretation manual. In delivering this opinion, the above-referred independent panel had full regard of the need for a definition that is valid and operational for all marine waters covered by the EU nature directives. Further to the review of the definition, the panel of experts made several recommendations, which include:

- When identifying and defining sandbanks in inshore and offshore environments, it is likely that Member States will need to use different scales, as variations in natural conditions occur at a much larger scale in offshore than in coastal environments. Sandbanks are generally larger natural features in offshore than in coastal environments.
- It is worth underlining that further expert judgment will be needed when appraising this habitat type at national level.

[41] The European Topic Centre on Biological Diversity. A Topic Centre of the European Environment Agency. See http://biodiversity.eionet.europa.eu/ .

[42] ICCRAM (Istituto Centrale per la Ricerca scientifica e tecnologica applicata al Mare, Roma, Italy) is part of the ETC consortium) http://www.icram.org/

- Section 4 of this guidance provide further examples of the means and methods that can be used to identify the sandbank feature, including with regard to the top level and slopes.

- As for most other habitat types in the interpretation manual, the examples contained in the section 2 on 'characteristic animal and plant species' do not represent an exhaustive list and are not necessarily restricted to this habitat type (See complete definition of this Habitat type in Appendix 1)

In the offshore environment, most of the sandbanks are elevated features arising from the seabed. A sandbank consists predominantly of sandy sediment mainly within a defined range of grain sizes[43]. Larger grain sizes, including boulders and cobbles as well as smaller grain sizes, including mud, may be found on the sandbank, but only in small quantities.

For considering a sandbank as being a feature "slightly" covered by water, it has been decided to define the arbitrary depth of 20 meters below chart datum for the top of the sandbank: other parts of the feature may be found at deeper depths. Effectively, it is appropriate to also include sections of the sandbank extending below 20m in depth where these are an integral part of the overall sandbank feature.

Such features may cover a substantial area, and some of them have a trans-frontier dimension. The Doggerbank in the North Sea is a typical case of a sandbank feature that extends across the marine zones of several Member States.

### *3.1.2. Habitat type 1170 "Reefs"*

In relation to **reefs**, the following definition has been agreeded:

**1170 "Reefs"**

**Definition of the habitat:**

Reefs can be either biogenic concretions or of geogenic origin. They are hard compact substrata on solid and soft bottoms, which arise from the sea floor in the sublittoral and littoral zone. Reefs may support a zonation of benthic communities of algae and animal species as well as concretions and corallogenic concretions.

Clarifications:

- ***"Hard compact substrata"*** are: rocks (including soft rock, e.g. chalk), boulders and cobbles (generally >64 mm in diameter).
- ***"Biogenic concretions"*** are defined as: concretions, encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.
- ***"Geogenic origin"*** means: reefs formed by non biogenic substrata.
- ***"Arise from the sea floor"*** means: the reef is topographically distinct from the surrounding seafloor.
- ***"Sublittoral and littoral zone"*** means: the reefs may extend from the sublittoral uninterrupted into the intertidal (littoral) zone or may only occur in the sublittoral zone, including deep water areas such as the bathyal.
- Such hard substrata that are covered by a thin and mobile veneer of sediment are classed as reefs if

[43] For the application of this definition, sand includes grains having a diameter in the range of 1/16mm (= 0.0625mm) to 4.76 mm (passing U.S. standard sieve no. 4). This size range is in accordance with most common geotechnical standard classifications on this field.

the associated biota are dependent on the hard substratum rather than the overlying sediment.

- Where an uninterrupted zonation of sublittoral and littoral communities exist, the integrity of the ecological unit should be respected in the selection of sites.
- A variety of subtidal topographic features are included in this habitat complex such as: Hydrothermal vent habitats, sea mounts, vertical rock walls, horizontal ledges, overhangs, pinnacles, gullies, ridges, sloping or flat bed rock, broken rock and boulder and cobble fields.

Previous interpretation considered "reefs" as basically "***rocky substrates and biogenic concretions which arise from the sea floor"***. Given the importance of this habitat type for the designation of offshore Sites of Community Importance under the Habitats Directive, a clarification was needed to include all existing different types of reefs in EU waters.

Rocky substrates include complex habitats such as seamounts or hydrothermal vents. Biogenic concretions includes encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.

### *3.1.3. Habitat type 1180 "submarine structures made by leaking gases"*

In relation to **1180 *"submarine structures made by leaking gases"***, the new interpretation distinguishes more clearly two subtypes of such a structure known as "bubbling reefs" and "structures within pockmarks".

***1180 "submarine structures made by leaking gases"***

**Definition of the habitat**

Submarine structures consist of sandstone slabs, pavements, and pillars up to 4 m high, formed by aggregation of carbonate cement resulting from microbial oxidation of gas emissions, mainly methane. The formations are interspersed with gas vents that intermittently release gas. The methane most likely originates from the microbial decomposition of fossil plant materials.

The first type of submarine structures is known as "bubbling reefs". These formations support a zonation of diverse benthic communities consisting of algae and/or invertebrate specialists of hard marine substrates different to that of the surrounding habitat. Animals seeking shelter in the numerous caves further enhance the biodiversity. A variety of sublittoral topographic features are included in this habitat such as: overhangs, vertical pillars and stratified leaf-like structures with numerous caves.

The second type are carbonate structures within "pockmarks". "Pockmarks" are depressions in soft sediment seabed areas, up to 45 m deep and a few hundred meters wide. Not all pockmarks are formed by leaking gases and of those formed by leaking gases, many do not contain substantial carbonate structures and are therefore not included in this habitat. Benthic communities consist of invertebrate specialists of hard marine substrata and are different from the surrounding (usually) muddy habitat. The diversity of the infauna community in the muddy slope surrounding the "pockmark" may also be high.

To facilitate better use of this document, a complete definition of the marine habitats types from 1110 to 1180 and 8830 is enclosed in Appendix I.

## 3.2. Identification of existing marine Habitat types and Species of European importance for different Member States.

The Marine Working Group has compiled general information related to the occurrence of habitats types and species which require protection through the elaboration for the three European Seas of the EU (Baltic, Atlantic and Mediterranean), of different tables showing presence per Member State of:

1. Marine Habitat types listed in Annex I of 92/43 Habitats Directive
2. Marine species listed in Annexes II 92/43 of Habitats Directive
3. Marine birds Listed in Annex I and migratory species.

These lists also distinguish between presence in offshore and inshore waters (internal waters and territorial sea). Draft lists have now been compiled. Those lists are enclosed in Appendix 2 of this document. Once they will be completed, these lists will be considered as reference elements to be submitted to the Habitat + Ornis Scientific Working Groups for their consideration. Member States that have not yet provided the necessary information may send it to the Commission for a future revision of the text.



**** Monachus monachus*** [44]

Photo: M.Om. LIFE96 NAT GR/003225

[44] ***Monachus monachus*** is a priority species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: Monk seal; FR: phoque moine; ES: Foca monje;

# 4. AN APPROACH FOR LOCATING AND SELECTING MARINE NATURA 2000 SITES.

This chapter has two main objectives:

1. To propose the best means of locating and assessing Habitats Directive Annex I habitat types and Annex II species, AND Annex I and migratory bird species under the Birds directive, for which marine Natura 2000 sites should be considered

2. To propose a site selection rationale(s).

The guidance on designation and information provided in the following sections focuses primarily on habitats and species found away from the coast and in offshore waters, as many Member States have already identified coastal and inshore Natura 2000 sites, along with guidance and information on their designation. The aim of this chapter is to reflect best available guidance on the methods for locating and selecting marine Natura 2000 sites. It does not provide details on the amount of information required, nor on how to assess the completeness of the resulting network of Natura sites.

## 4.1. Locating and assessing Annex I Habitats

Given the lack of more detailed biological data than, the identification of Natura 2000 sites in marine areas away from the coast has to be based on more general geological, hydrological, geomorphological and biological data than is the case for coastal or terrestrial areas. For all of the marine habitats on Annex I to the Directive, methodology exists for identifying the location and undertaking physical and ecological assessment of the areas required, although existing data may be sparse or absent in some sea areas (particularly in deep waters hundreds of miles from the coast).

Where the location of sub-littoral Annex I habitat types is not already known, they can be located in two steps using available data. Broad scale geophysical or oceanographic information is often available for large sea areas, and can be used as the first step in the selection of Natura 2000 sites by helping to identify the location of potential Annex I habitats. Step two then involves focussed information gathering or new surveys, directed to those specific areas where existing information indicates that an Annex I habitat is present or is likely to be present. This approach is particularly useful for Member States with large sea areas and deep waters, where detailed biological information is likely to be sparsely distributed. The two steps involve:

1. Using available physical information mapped at a regional scale, such as modelled geological seabed data, bathymetric data (e.g. IOC ***et al.*** 2003), physical oceanographic data, navigation or naval charts (where they show seabed type), to predict the location of potential Annex I habitat. Table 1 shows the general availability of such data for each Member State, Table 2 indicates which type of broad scale data may be suitable for locating each Annex I habitat type, and Section 4.2.1 describes data sources in more detail;

2. Refine and add to this information using more localised remote sensing datasets such as side scan sonar, acoustic ground discrimination system (AGDS) surveys, multibeam bathymetric survey, aerial photography or satellite images (for some habitats in very shallow water only, such as seagrass beds or maerl). Such remote sensed data will need to be validated in the field (ground truthed) by direct sampling of sediment

and/or biota (grab/core sampling, diver survey, benthic trawls) or by remote observation (video, photography, ROV [Remote Operated Vehicle]). As well as ground validation, data obtained from direct sampling will also be used to assess the biota of the Annex I habitat directly. Section 4.2.2 below gives more detail of methods, and a summary of suitable methods for each habitat type is presented in Table 3.

### *4.1.1. Regional scale physical data*

Potential Annex I habitat types can be identified using existing, broad-scale, physical seabed information. This approach will enable those Member States with large sea areas and deep waters, where detailed biological information is likely to be absent or sparsely distributed, to focus in on a more limited number of areas for the collection/collation of more detailed data. Broad-scale physical data are available in many Member States, but with varying spatial resolution and varying coverage. Table 1 shows, in very general terms, the availability of broad scale datasets for each Member State.

Examples of such datasets which can be used include geological maps of the seabed, bathymetry data (including data from navigational charts, although note that for areas of potential conservation interest outside important navigation areas bathymetry may be very generalised), oceanographic data (such as temperature, salinity, stratification, water currents, turbidity etc.) to enable the identification of different water masses, and in some cases, satellite images. Regional scale datasets used for this purpose tend to be at a scale of approximately 1:250,000 to 1:1,000,000 to cover wide areas, and are generally produced by modelling of data from point samples, seismic tracks, etc. Regional scale data have generally been collected for purposes other than identification of biotopes or habitats, and so may use classification systems which do not fit exactly with the Annex I habitat definitions, therefore, there are limitations to their use, which depend on the habitat or sub-habitat being considered. For example, use of satellite imagery and aerial photography to identify habitats such as ***Posidonia*** beds is limited to shallow waters (down to approx. -15m water depth under good conditions). Broad scale data may not always be publicly available at a national level (e.g. Spain), or may only be available in paper form, however some digital data is available for wide areas such as the General Bathymetric Chart of the Oceans http://www.ngdc.noaa.gov/mgg/gebco/gebco.html . Table 2 gives an overview of which types of regional scale data can be used in the first step of locating different types of marine Annex I habitat.

**Table 1 Availability of broad scale seabed habitat data for each Member State**

| Table 1<br>Type of data | Broad scale data availability or coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf) | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | B | CY | D | DK | E | EST | F | FIN | UK | GR | I | IRL | LT | LV | M | NL | PL | P | S |
| Geological seabed maps (approx. 1:250,000 scale) | | | Yes[4] | Yes[5] | | | Yes[6] | Scarce | Yes[2] | | Yes | | | Yes[1] | | Yes | | | Yes[3] |
| Bathymetry >200m depth (GEBCO) | | | Yes | Yes | | | Yes | Yes | Yes | | Yes | | | N/A | | N/A | | | Yes |
| Bathymetry <200m depth | | | Yes | Yes | | | Yes | Yes | Yes | | Yes | | | Yes | | Yes | | | Yes |
| Satellite images | | | | ? | | | Yes | Yes | ? | | Yes | | | No | | Yes | | | Yes |
| Other (see notes) | | | Yes[4] | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | | |

Notes:

1 LV: Gulf of Riga: 100%; Baltic Proper: 63% of Territorial waters (or 16% of Continental Shelf), (1:200,000 scale)

2 UK: approx. 95% of inshore waters and out to Continental Shelf designated area

3 SE: less than 50%

4 DE: Geological seabed maps approx. 75% coverage. Also Navy charts, historical and recent fishing charts

5 DK: Geological seabed maps approx. 60% coverage.

6 FR: Partially

| Table 2<br><br>Type of broad scale data | Broad scale data useful to identify and locate habitat or habitat sub-type? | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1110 Shallow sandbanks | 1170 Reef (bedrock) | 1170 Reef (stony) | 1170 Reef (biogenic) | 1170 Reef (Hydro-thermal) | 1180 Submarine structures | 8330 Sea caves | 1120 Posidonia beds |
| Geological seabed maps/data | Yes | Yes | Partially | No | Yes | Partially | Partially | Partially |
| Bathymetry | Yes | Partially (won't distinguish between some sub-types of reef) | | | | Partially | No | Partially |
| Oceanographic data (temp, currents, turbidity etc) | No | No | No | Partially | Partially | No | No | Partially |
| Satellite images & aerial photography (shallow waters only) | Partially | Partially (won't distinguish between sub-types of reef) | | | No | No | No | Partially |

NOTE: Point or line sampling data, such as benthic grab, dredge, video or photographic sampling can also be used in conjunction with geostatistical analyses to identify habitats.

### *4.1.2. Local or regional scale remote sensed and physical and biological sample data*

The second step to identify and locate Annex I habitat, is to collate any existing physical and biological information on both known areas of Annex I habitat, and on those areas of potential Annex I habitat identified in step 1. Where existing information on habitats is lacking, new survey can be focussed on areas of Annex I habitat identified in step 1, thus avoiding the need to survey vast areas of seabed. Collation of data should involve examination of scientific archives and data from relevant academic, government, NGO, and industry stakeholders. This information can include historical charts of relevant seabed features and fishing grounds.

As well as physical information on the location and extent of an area of Annex I habitat, biological data with which to assess the flora and fauna of a potential site is essential, however, the quantity and quality of data required is difficult to define. As a guide, the information required to be able to complete the Natura 2000 data form[45] must be regarded as the minimum level required. Commission Decision 97/266/EC summarises the information, which must be collected by Member States, and defines the data format for the transmission of information for Natura 2000 sites. There are obligatory fields in the Natura 2000 data form that must be completed: 4.1 "General site character" and 4.2 "Quality and importance". Inclusion of other relevant site-specific biological information is desirable for Section 3.3 "Other important species of flora and fauna". Information necessary to complete these fields would include information on the presence of Red Data book species and species listed on

[45] Standard Data Form. Is defined by 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107, 24/04/1997. See*** ***http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/standard_data_forms/index_en.htm***

international conventions as well as key and typical species present on the site. Information that is confined to a few easily observed and widespread or common species is generally not sufficient to make an evaluation.

Collated data from archives, existing maps and data from a variety of sources, including from stakeholders, are likely to exist in a wide variety of formats and at different levels of detail. All biological data relevant to marine Annex I habitats should be collated and can be plotted in a geographic information system (GIS) and overlain upon the maps of seabed type or other broad scale physical or hydrographic data. Existing results of benthic mapping programmes using the EUNIS classification should be used, to the highest possible level, to help in characterising habitats biologically (Dahl et al 2004). Historical maps and charts (e.g. of fishing grounds) may also be used to help provide information for certain habitats. Marine habitat survey and mapping has become increasingly common and widespread over the past 5-10 years, spurred on by both improvements in technology and the increasing demand for this type of information. Whilst the purpose for doing the mapping varies considerably (e.g. industry environmental assessments, conservation, fisheries, planning), the underlying techniques and type of data collected have a great deal in common. Table 3 gives examples of the type of data likely to exist and be useful to help in both locating the position of habitat types, estimating the geographical extent of the habitat, and assessing biodiversity.

In Table 3, data obtainable from different types of survey method are shown against different marine habitat types and sub-types likely to be found in offshore waters. In the table, a note is included to indicate whether each type of data could be used:

- to determine the location on the seabed of Annex I habitat types or habitat sub-types ('locate');

- to map the extent on the seabed of the Annex I habitat or habitat sub-type ('extent'); or

- to provide information on the biodiversity of that habitat or habitat sub-type ('biodiversity').

In practice, different types of survey method may be used to provide information on different types of habitat depending on various factors including the financial and time resources available and the depth and area of sea to be covered. Remote sensing methods can be used to cover large areas of seabed, but will need validation by direct sampling such as photographic or grab sampling. Some methods (e.g. satellite images or aerial photography) are only suitable for use in very shallow waters. A few of the direct sampling methods (those which dig-in to the seabed) can be destructive of fragile habitats such as biogenic reefs or seagrass beds, and therefore their use should be restricted to where obtaining a sample (for example to examine infauna) is necessary, and such methods should not be used to determine the extent of a sensitive habitat. For such destructive sampling methods, existing data obtained using these methods may be used to help provide information on areas of seabed, but if new survey is planned, then less destructive survey methods should be used.

Various publications and references give further details of useful methods for mapping and characterising marine habitats. Bäck et al 1996 and 1998 describe methods used for mapping and monitoring marine habitats in the Baltic Sea. Davies et al 2001 provide information on techniques for monitoring marine SACs in the UK, including consideration of the approximate costs of different techniques, and many of the methods can also be used for locating subtidal Annex I habitats and assessing their biodiversity as potential SACs.

| **Table 3** Type of data | Data useful to locate, determine extent and assess biodiversity of habitat or habitat sub-type? | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1110 Shallow sandbanks | 1170 Reef (bedrock) | 1170 Reef (stony) | 1170 Reef (biogenic) | 1170 Reef (Hydro-thermal) | 1180 Submarine structures | 8330 Sea caves | 1120 Posidonia beds |
| **Remote methods:** | | | | | | | | |
| Side scan sonar[1] | Locate, extent? | Locate, extent | Locate, extent | Locate, extent | ? | Locate, extent | Not applicable | Applicable |
| Multibeam bathymetry[1] | Locate, extent | Locate, extent | Locate, extent | Locate, extent | Locate, extent | Locate, extent | Not applicable | Applicable under conditions |
| AGDS (acoustic ground discrimination systems)[1] | Locate, extent | Locate, extent | Locate, extent | Locate, extent | ? | Locate, extent? | Not applicable | Locate, extent |
| Satellite images[1, 2] | Locate, extent | Locate, extent (won't distinguish between sub-types of reef) | | | ? Locate, extent | Not applicable | Not applicable | Locate, extent |
| Aerial photography[1, 2] | Locate, extent | | | | Not applicable | Not applicable | Not applicable | Locate, extent |
| **Direct sampling or observation methods:** | | | | | | | | |
| Grab/core sampling[3] | Extent<br>Biodiversity | Not applicable | Biodiversity (limited application) | Biodiversity (not recommended) | Not applicable | Biodiversity (limited application | Not applicable | Biodiversity (not recommended) |
| Diver sampling | Biodiversity | Biodiversity | Biodiversity | Biodiversity | Biodiversity | Biodiversity | Biodiversity | Biodiversity |
| Towed video[3] | Extent | Extent | Extent<br>Biodiversity (not | Extent | Not recommended | Biodiversity (limited | Not applicable | Extent |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | Biodiversity | Biodiversity | recommended | Biodiversity | | application | | Biodiversity |
| Drop-down video/photo-graphy/ROV | Extent<br>Biodiversity | Extent<br>Biodiversity | Extent<br>Biodiversity | Extent<br>Biodiversity | Extent<br>Biodiversity | Extent<br>Biodiversity | Biodiversity | Extent<br>Biodiversity |
| Epibenthic trawls/dredges[3] | Biodiversity (limited application) | Not applicable | Not recommended[3] | Not recommended[3] | Not applicable | Not recommended[3] | Not applicable | Not recommended |

Notes:

[1] For all remote sensing, distinguishing habitats from each other and from the surrounding seabed depends on the resolution of the sampling method – higher resolution will provide better data to distinguish habitats, but covers smaller areas and is more expensive to collect and process than lesser resolution data.

[2] Aerial photography and satellite images are restricted in use to shallow waters (6-7m depth), depending on water clarity and other factors.

[3] Grab/core sampling and benthic trawling/dredging are relatively destructive sampling methods. These methods can provide useful data, but extensive use of these methods is not recommended for assessment of habitats sensitive to physical damage (e.g. biogenic reef, seagrass and maerl beds), and should not be used to identify their extent. Towed video can also be destructive of fragile habitats , if it impacts with the seabed, and is not recommended in these cases.

## 4.2. Site selection rationale for SACs/SCIs for Annex I Habitats

Article 3.1 of the Directive (92/43/EEC) states that "a coherent European ecological network of special areas of conservation shall be set up", and that "This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range". The network shall also include special protection areas classified by Member States under the Birds Directive (79/409/EEC).

As set out in Article 4.1 of the Habitats Directive, site selection criteria for Annex I habitats are prescribed by Annex III of the Directive text. Stage 1 assessment criteria (listed below for habitats) and are applied at a national level to assess the relative importance of sites for each habitat listed on Annex I to the Directive, as amended in 1997 and 2004.

Stage 1A:

a) "Degree of representativity of the natural habitat type on the site;

b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within the national territory;

c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities;

d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

Each of these criteria is discussed below.

Once sites are identified by Member States at Stage 1, their Community Importance is assessed, as set out in Article 4.2 and using the Stage 2 criteria included in Annex III to the Directive, by the Commission, with the help of the European Environment Agency and others, and in agreement with each Member State. This assessment is applied to the lists of sites irrespective of whether they have been identified for Annex I habitats or Annex II species or a combination of both. Assessment of the Community Importance of the sites included on the national lists using the Stage 2 criteria for Annex II habitats will take account of :

a) "Relative value of the site at a national level;

b) Geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

c) The total area of the site;

d) The number of natural habitat types in Annex I [and species in Annex II] present on the site; and

e) The global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic of unique aspect of its features and the way they are combined."

The assessment at Stage 2 has been carried out for terrestrial and inshore sites so far with reference to the biogeographical regions listed in Article 1(c)(iii) of the Directive. The terrestrial boundaries of these regions were derived based on terrestrial ecology. However, for the marine environment it appears reasonable to consider an approach based on the major sea areas. Therefore, when assessing at stage 2 the global ecological value of the proposed marine sites, the marine areas (Internal waters, Territorial Sea, EEZ and Continental Shelf) to consider for each biogeographical region could be the following:

- Marine areas surrounding the three European Macaronesian archipelagos to the Macaronesian biogeographical region
- North East Atlantic Ocean and the North Sea to the Atlantic biogeographical region
- Baltic Sea to the continental and the boreal biogeographical regions.
- Mediterranean sea to the Mediterranean biogeographical region.

The adhesion of Bulgaria and Romania, and future potential adhesion of Turkey, requires considering the Black Sea separately. For management purposes, borders between seas and oceans should be established in accordance with existing borders of regional marine organizations. Division between Baltic and Atlantic will be as defined by HELCOM[46].

### *4.2.1. Representativity of the natural habitat type on the site*

This criterion is a measure of how typical a site is for a particular habitat. The explanatory notes to the Natura 2000 data form (EC 1995) specifically state that it should be linked to the Interpretation Manual of Annex I habitats (EC 1999), as this provides a definition, list of characteristic species and other relevant information for each habitat. The additional information on habitat interpretation for marine habitats provided in Section 3 of these guidelines should also apply. In considering the degree of representativity of Annex I habitat types on individual sites, Member States should take account of the best examples in extent and quality of the main type and its main variants (Hopkins and Buck 1995).

According to Article 3.2 of the Directive, sites should be selected to represent the range of habitat types present within the territory of the Member State. The meaning of territory of the Member State applied to the marine environment is explained in section 2.6 of this document. It includes all marine areas areas where Member States exercise sovereignty or jurisdictional rights (internal waters, territorial sea, Exclusive Economic Zone (EEZ) and/or to other areas where Member States are exercising equivalent sovereign rights and the Continental Shelf.

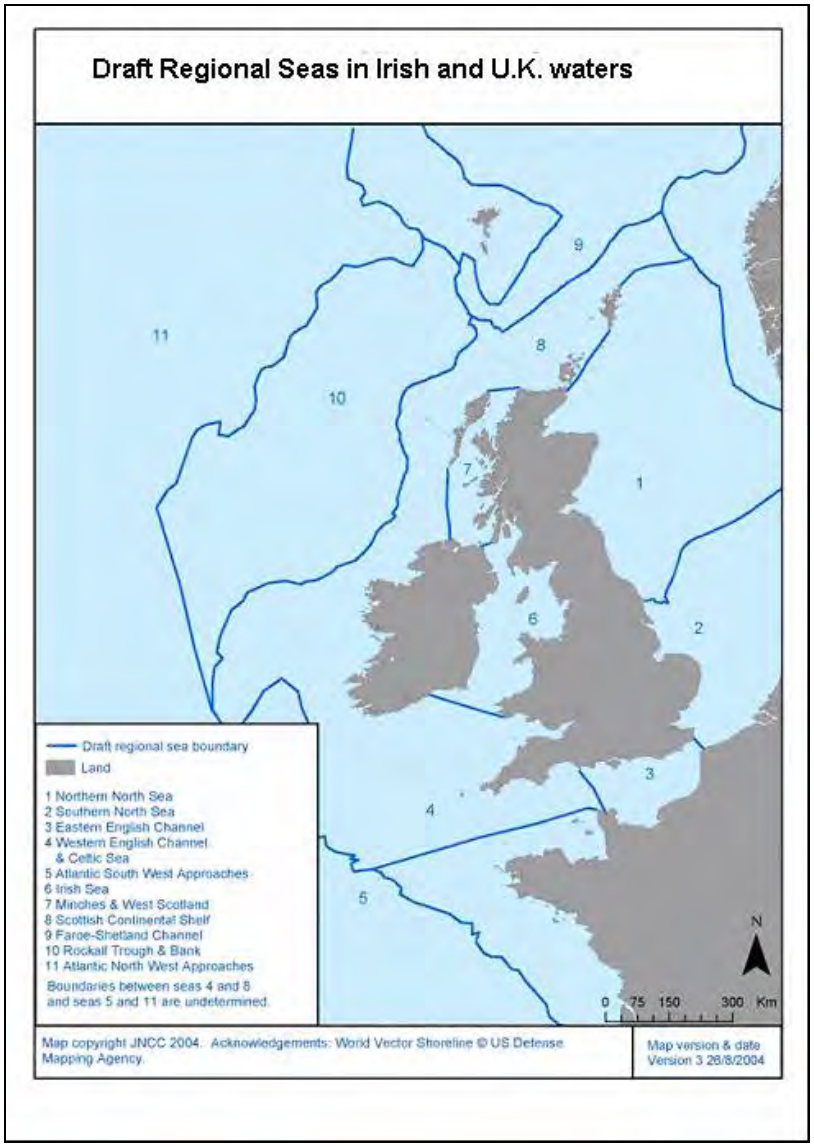
Because the marine habitat types listed in Annex I to the Directive are very broad, a number of different habitat 'sub-types' may be present within the jurisdiction of a Member State. The range of sites selected for a particular habitat may be selected to represent the range of habitat sub-types present, as well as the geographical natural range of the habitat itself. For example, within the habitat type 1170 reef, sub-types of bedrock reef, stony reef and biogenic reef (constructed by various species) are likely to occur.

In order for the suite of sites identified by each Member State for each Annex I habitat type to represent both the ecological and geographical range of variation present in the marine part of its territory, possible sites, can be identified firstly in terms of the geographic location of areas

[46] (This comment has been supported by representatives of Sweden and Denmark in the Scientific working group of Habitats Committee, February 2006)

of habitat types in national waters, and secondly in terms of their physical and ecological characterisations. For possible sites in offshore waters, note should also be taken of possible sites in neighbouring Member State waters where an area of habitat may straddle national boundaries.

Major marine biogeographical regions can be further sub-divided into regional seas or sub-regional seas as an aid to assess representativity in terms of geographic location. These sea areas should be based on physical and ecological characteristics of seabed and water masses, using topographic form, structural character and substratum type as well as oceanographic characteristics such as depth, water temperature, stratification, salinity, etc. A draft example (Figure 1) has been produced for Regional Seas within the Atlantic biogeographic region, centred on Irish and UK waters (Vincent ***et al.*** 2004), and sub-regions have also been developed for the Baltic region. Any specifically marine regions developed should be ecologically based, not based on administrative or national boundaries.



### *4.2.2. Area of habitat types*

The Explanatory Notes to the Natura 2000 Standard Data Form (EC 1995) explain that one needs to measure the surface covered by the habitat type on the site, and the total surface of the national territory that is covered by the same habitat type, to be able to select a suitable proportion of the habitat type as SAC/SCI. Although this is evident, it can be extremely difficult to make these measurements, especially those concerning the reference national surface. EU decision 97/266/EC recognises the difficulties in using all the criteria, especially those criteria referring to national territory. For this reason, data entries can be made in broad classes e.g. for the estimation of the relative surface of habitats in an SAC/SCI three classes are sufficient (A: 100>p>15%, B: 15>p>2% and C: 2>p%). A rough estimate of the total surface of the relevant habitats for offshore waters can be obtained where geological maps of the seabed exist, supplemented by other data sources.

When using these classes for broad habitat types such as 1170 reef and 1110 shallow sandbanks, which may be widely distributed in Member State waters with large sea areas (such as UK) most offshore sites are likely to fit into class C, and even very large sites (of the order of 50,000ha) may only fall into category B.

Consideration of area of habitat for candidate site selection is related to other principles used for site selection, for example, structure and functions (see below) are most often best conserved in sites that are extensive (McLeod ***et al.*** 2002).

With regard to selection of sites at Community level, the Commission has provided a reference document (Hab 97/2 rev4) to assist this process. This indicates certain percentage thresholds for examination of Member States proposals in biogeographic seminars. Where a proposal covers less than 20% of the resource this would normally be considered inadequate. Where it covers more than 60% it would normally be considered sufficient. For proposals that cover between 20 – 60%, the conclusions would need to be based in expert judgement in relation to the particular habitat or species concerned. Priority habitats and species would normally be expected to have the biggest level of representation in the network. However, document Hab 97/2 rev 4 is not a specific reference document for the marine environment, and the figures mentioned are not specific targets for national contribution to the Natura 2000 network, which need to be assessed on a case by case basis.

Different methods used for identification of Natura 2000 sites in the marine environment are described in detail in the book "Progress in marine Conservation in Europe" (von Nordheim et al. (eds.) 2006).[47]

[47] http://www.habitatmarenatura2000.de/en/aktuelles-summary-nature-conservation.php

**Swedish practices on selecting Marine Protected Areas, including Natura 2000 sites**

**in the marine environment**

The practice for selecting MPAs and marine Natura 2000 sites in Sweden is a modification of the system suggested by IUCN (Kelleher and Kenchington, 1992). Some conclusions:

Marine biological systems are different in certain respects from systems on land, and therefore criteria for selecting MPAs/Natura 2000 sites may differ from those used to select areas for protection on land. Marine systems also tend to be more open than terrestrial systems and this is why marine protected areas tend to be directed more towards protecting habitats, biotopes or ecosystem functions, rather than individual species.

MPAs and marine Natura 2000 sites are usually not well known to the public, or have little aesthetic value. Therefore, the information to the public about these areas is of the utmost importance.

In the management of a MPA/Natura 2000 site zonation is a way to set management practices and regulations for different activities in different parts of a MPA. (More details in Appendix 4.1)

### *4.2.3. Conservation of structure and functions*

Article 1e to the Habitats Directive refers to conservation status of a natural habitat type, including structure and functions. The Explanatory Notes to the Natura 2000 Standard Data Form (EC 1995) explain that this criterion comprises three sub-criteria:

1. Degree of conservation of structure
2. Degree of conservation of functions
3. Restoration possibilities

Although these sub-criteria could be evaluated separately, they should nonetheless be combined for the requirements of selection of sites as they have a complex and interdependent influence on the evaluation process (EC 1995). Sites selected (and their boundaries) should take into account the structure and function requirements of the particular habitat.

In general, knowledge of the structure and functions of marine habitats is sparse and incomplete. For marine habitats which depend on certain aspects of the wider marine environment for maintenance of their structure (for example, biogenic reef formed by ***Sabellaria*** spp. depends not only on the presence of the species itself, but on tidal conditions and sediment supply), site selection (and in particular boundary definition) should take account of this.

An indirect method to estimate conservation of structure and functions is to assess the naturalness of the habitat using information on location and intensity of damaging activities, and by comparison with historical data for certain habitats. Use of models can be an effective tool if correlation between pressure factors and important elements of structure and function is established (Dahl et al. 2004). All available data on natural variability and likelihood of damage or vulnerability of the habitat need to be taken into account for assessing the conservation status.

### *4.2.4. Global assessment*

This criterion is used to assess the previous three criteria in an integrated way, and to take into account the different weights they may have for the habitat under consideration (EC 1995).

### *4.2.5. Additional selection principles*

Additional selection principles, such as those outlined below, may be used to assist in the site selection process.

- Priority/non-priority status (see Habitats Directive Article 1 (d));
- Geographical range (see Articles 1 (e) and 3.1);
- Special responsibilities (see Article 3.2);
- Multiple interest (Annex III Stage 2.2(d));
- Rarity;
- Ecological coherence of the Natura 2000 network(Annex III Stage 2.2)

**EXAMPLE OF SITE SELECTION FOR ANNEX I HABITAT TYPE REEF (CODE 1170) IN THE GERMAN EEZ**
"(BOEDEKER ET AL. 2006)"

**SELECTION PRINCIPLES**

(1) The first step in achieving a complete suite of potential reef sites in the German EEZ was to produce the following national mapping guidance and explanations for the habitat type:

> "Elevations permanently submerged or at low tide emerging, consisting of hard substrates like rocks, littoral rock beds, till (moraine material), biogenic hard substrates (e.g. mussel beds and Sabllaria-reefs), including also fields of boulders and blocks on submarine moraine-ridges. Due to the specific glacial and postglacial development in the North Sea and Baltic Sea complex mosaics with habitat type 1110 (sandbanks) frequently occur. Elevations of mixed substrates (e.g. sands, mud, marl, till) are also classed as habitat type 1170, if hard substrates dominate".

(2) The second step was to identify where the Annex I reef habitat type is present within the North Sea (Atlantic Biogeographic Region) and the Baltic Sea (Continental Biogeographic Region). The following steps were carried out to produce a GIS map of potential reef habitats:

- Identification of potential reefs through analysis of existing maps on sediment distribution, fishery charts, and an evaluation of scientific archives.
- Verification of potential reef sites using sidescan-sonar and/or video profiles.
- Assessment of grain sizes of cobble fields with underwater video recordings (laser measurement), and in some areas scientific diving.
- Ascertainment of biological features through bottom dredge trawls (benthic samplings), and/or video profiles, and in some areas scientific diving.
- Photo and video documentation of habitat types by video profiling and scientific diving.

(3) The third step was to achieve a complete suite of ecologically valuable reefs within pSCI-proposals, which also reflect the different ecological forms and features of the habitat types in a representative way. The following forms of reef habitats occur in the German EEZ:

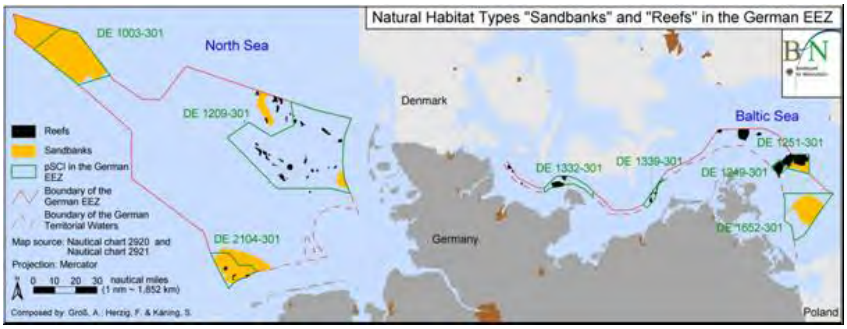
**a. North Sea (Atlantic Biogeographic Region):**

- Reefs in the form of boulder or cobble fields, which arise from the sea floor in the central part of Amrum Bank. stony reef bands along the slope of the glacial Elbe Valley and scattered stony reefs (Borkum-Riffgrund).

**b. Baltic Sea (Continental Biogeographic Region):**

- Stony reefs and mussel beds at the slope of Fehmarn Belt with high salinity (up to 25 psu) and with macrophyte vegetation.

- Stony reefs and mussel beds on and along the slopes of the Darss Sill representing “deeper reefs” with a medium salinity of 10 – 18 psu with macrophyte vegetation. Stony reefs and mussel beds on a deeper bank with low salinity and without macrophyte vegetation (Rönne Bank).
- Reefs in the form of boulder or cobble fields, which arise on the top of a shallow bank with low salinity and rich macrophyte vegetation (Adler Grund).




## 4.3. Locating and assessing Annex II species

Article 3.1 of the Habitats Directive states that a coherent European ecological network of sites hosting the habitats of species listed in Annex II shall be set up. However, Article 4.1 of the Habitats Directive also states that for aquatic species which range over wide areas, SACs will be proposed only where there is a “clearly identifiable area representing the physical and biological factors essential to their life and reproduction”.

For those Annex II species which spend time in recognised areas on land to breed or moult, e.g. seals and turtles, such areas clearly represent areas essential to the life and reproduction of the species’ concerned, and should therefore be considered for SAC selection. This section of the guidance focuses on the identification of sites at sea away from the coast for marine Annex II species, especially for those species which range over wide sea areas in part or all of their life cycle or geographical range.

For species such as cetaceans or fish which do not spend time on land, and for parts of the life cycle of those species that do, it can be difficult to identify areas of sea “essential to their life and reproduction”. This is partly because such species are mobile within the water column and difficult to observe, and partly because data concerning their distribution patterns while at sea are sparse, and such research is expensive and needs to be conducted over long time periods. However, data are available for some Annex II species in some sea areas, and further research including relatively new methods such as use of PODs (porpoise detectors) and satellite tracking of individual animals (seals, cetaceans and turtles) can provide data on aggregation patterns which may be used to identify areas for consideration as SACs. Geo-statistical techniques, similar to those proposed for identification and delimitation of aggregations of birds at sea (see Section 4.6) may also be used to identify densities and distribution centres in space and time for mobile species such as cetaceans (Schiceidat et al 2002). These methods have been used for the identification and delineation of concentrations of harbour porpoise and shad in territorial and offshore waters.

- To assist with identifying SAC sites for migratory species such as harbour porpoise (***Phocoena phocoena***), an ***ad hoc*** meeting was convened by the European Commission on 14 December 2000 (EC (2001) Habitats Committee, Hab. 01/05) The meeting concluded

that "it is possible to identify areas representing crucial factors for the life cycle of this species" (see below). These areas would be identifiable on the basis of:

- The continuous or regular presence of the species (although subject to seasonal variations);
- good population density (in relation to neighbouring areas);
- high ratio of young to adults during certain periods of the year.

Additionally, other biological elements are characteristic of these areas, such as very developed social and sexual life."

In addition to any protection provided within SACs, or where SACs cannot be identified for these species, Articles 12 and 14 of the Habitats Directive provide mechanisms for the protection of those mobile marine species listed in Annexes IV and V (which include those listed also under Annex II) in the wider sea area.

### *4.3.1. Data availability for Annex II species*

The availability of data at a regional scale on the distribution of Annex II species is very sparse, and data are not available for all marine areas. Types of data which may be used for identification of sites for Annex II species may include:

- Records of cetacean sightings from Seabirds at Sea surveys (in the North Sea and Skagerrak and Kattegat, e.g. Reid ***et al.*** 2003);
- SCANS survey for parts of the North Sea, Skagerrak and Belt sea (Hammond ***et al.*** 2002) and additional areas for SCANS II (see box);
- Specific aerial surveys (e.g. Scheidat ***et al.*** 2004);
- Stationary acoustic device (POD) surveys (for cetaceans, Verfuß ***et al.*** 2004);
- Satellite tracking of individual animals (for seals e.g. McConnel ***et al.*** 1999, turtles, Matthiopoulos ***et al.*** 2004, and cetaceans e.g. Dietz ***et al.*** 2003, Teilmann ***et al.*** 2004);
- Statistics from national fish surveys (often data for non-commercial fish are obtainable, but not collated or analysed);
- Incidental sightings and strandings data;
- Satellite images and ice cover maps (specifically for those species such as Baltic ringed seal using sea ice for breeding or moulting);
- Data from dataloggers with capability for reconstruction of movement in space by dead-reckoning (running calculation of estimated position from measurements of speed and travel direction); Ref. Adelung and Wilson, Univ. Kiel, and
- Passive acoustic dataloggers, either as towed arrays behind survey ships or hull-mounted systems on ferries etc. Towed array e.g. Gillespie and Chappell (2002). Hull mounted system not yet developed.

**Small Cetaceans in the European Atlantic and North Sea (SCANS I and II)**

**SCANS I** generated the first large-scale abundance estimates for the harbour porpoise, and other small cetaceans throughout the North Sea, Kattegat, Skagerrak and Celtic Sea, in 1994. These estimates were relatively precise and unbiased due to the extensive survey area and methodology used. Using the abundance estimates for harbour porpoise, bycatch levels in the North Sea and Celtic Sea were calculated and shown to be unsustainable by the IWC criteria. This project was largely a success due to the coordinated effort between UK, Denmark, France, Germany, Ireland, Sweden, Norway and the Netherlands.

A follow up on this project is the presently ongoing **SCANS II**, which benefits from the participation of twelve countries. Its three principle objectives are:



**- to determine the absolute abundance of small cetacean populations,** namely the harbour porpoise (***Phocoena phocoena***), bottlenose dolphin (***Tursiops truncatus***) and common dolphin (***Delphinus delphis***). In addition to the area previously surveyed, SCANS II will also **cover continental shelf waters** to the west of Britain, Ireland, France, Spain and Portugal.

**- to develop and test methods to monitor cetacean populations.** SCANS-II will develop and test potential methods and recommend a suite of monitoring protocols tailored by species and area.

**- to develop a framework for management of by-catch.** SCANS-II will develop a management framework based on abundance estimates and other available information to enable conservation objectives to be met in the short and long-term.

First results came in June 2006 and the final report in December 2006 including management recommendation. In 2007 an offshore surveys west of the existing survey area will be started. Results form this project are expected in 2008.

See http://biology.st-andrews.ac.uk/scans2/

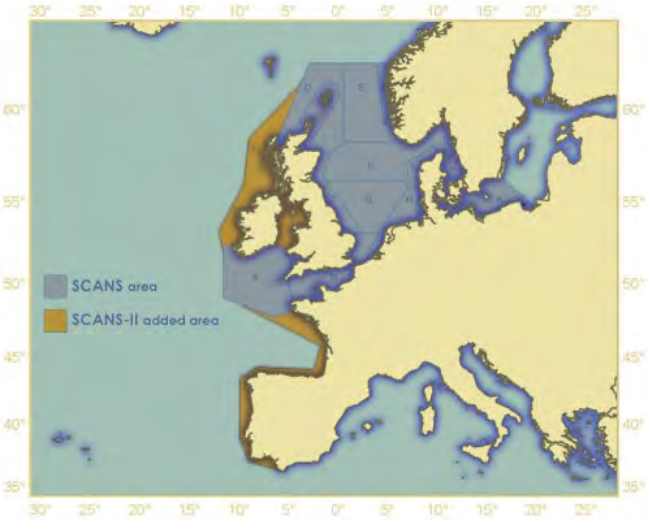


**Table 4 Availability of broad scale data on distribution of marine species at sea for each Member State**

| Type of data | Broad scale data availability or coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf) | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | B | CY | D | DK | E | EST | F | FIN | GB | GR | I | IRL | LT | LV | M | NL | PL | P | S |
| Specific aerial and boat surveys of animals at sea (sightings) | | | Yes | Yes[10] | Yes | Yes[2] | Yes[4] | Yes[2] | Yes[4] | | | | | | | Yes | | | Yes[2] |
| SCANS survey for parts of the North Sea (Hammond ***et al.*** 2002); | | | Yes | Yes | Yes[5] | | Yes[4] | | Yes[4] | | | | | | | Yes | | | |
| European Seabirds at Sea (ESAS) survey cetacean sightings (Reid ***et al.*** 2003) | | | | Yes | | | | | Yes | | | | | | | Yes | | | |
| Stationary acoustic device (POD) surveys (for cetaceans, Scheidat ***et al.*** 2004); | | | Yes | Yes[10] | | | | | ? | | | | | | | Yes[8] | | | |
| Satellite telemetry (tracking) | | | Yes | Yes[11] | Yes[6] | Yes[3] | Yes[4] | Yes[3] | Yes[4] | | | | | | | Yes[9] | | | Yes[2] |
| Incidental sightings or strandings | | | | Yes | Yes | | | | Yes[4] | | | | | | | Yes | | | |
| Satellite images | n/a | n/a | ? | n/a | Yes[7] | | n/a | | n/a | n/a | n/a | n/a | | | n/a | n/a | | n/a | |
| Ice cover maps | n/a | n/a | ? | n/a | n/a | | n/a | Yes[1] | n/a | n/a | n/a | n/a | | | n/a | Yes | | n/a | |

Notes: n/a = not applicable

1 Fin: In Finnish waters, ringed seals breed on sea ice in open sea rather than on land. The location and extent of the sea ice varies.
2 Fin: For grey and ringed seal
3 Finland and Estonia: for ringed seal, sporadic in Finland
4 UK and FR: Limited data for few areas and data available for a small number of animals.
5 E. Data related to SCANS II in Atlantic sea areas - Gulf of Cádiz (south-western Spain) and Cantabric Sea (northern Spain).
6 E: For beaked whale in the central-east Atlantic Sea (Canary Islands) and sea turtles in the Mediterranean Sea (south-eastern Spain).
7 E: Specific data for the habitats selection for cetaceans and sea turtles in the Mediterranean Sea (south-eastern Spain).
8 NL: Limited to potential wind park areas
9 NL: Harbour (common) and grey seals
10 DK: Systematic surveys for porpoises in western Baltic. Small-scale systematic surveys for monitoring at offshore wind farms and other developments.
11 DK: For porpoises, harbour and grey seals in areas of inner Danish waters, Skagerrak, Danish Waddensee and other areas.

**Member States that have not yet provided the necessary information, may send it to the Commission for a future revision of the text**

**Table 5**

| Type of data | Data useful to assist in site identification for Annex II species at sea | | | |
|---|---|---|---|---|
| | **Seals** | **Cetaceans** | **Turtles** | **Fish** |
| Specific aerial surveys of animals at sea (sightings) | No[1] | Yes | Yes | No |
| Specific boat surveys of animals at sea (sightings) | No[1]? | Yes | Yes | No |
| SCANS surveys for parts of the North Sea (Hammond ***et al.*** 2002) and Atlantic; | No | Yes | Yes | No |
| European Seabirds at Sea (ESAS) survey cetacean sightings (Reid ***et al.*** 2003) | Partly useful (no possible differentiation at species level) | Yes | No | No |
| Stationary acoustic device (POD) surveys (for cetaceans, Scheidat ***et al.*** 2004); | No | Yes | No | No |
| Satellite telemetry (tracking)[2] | Yes | Yes | Yes | ? |
| Incidental sightings or strandings[3] | Supplementary information only | Supplementary information only | Supplementary information only | Supplementary information only |
| Satellite images/ice cover maps[3] | Yes (ringed seal breeding areas only) | Yes Supplementary information only | No | No |
| Fishing catch/bycatch records | Supplementary information only | Supplementary information only | Supplementary information only | Yes ? |
| National fish surveys | Supplementary in some countries | Supplementary in some countries | Supplementary in some countries | Partly |

Notes:

[1] Aerial survey provides site exact location for ringed seals on ice only during their moulting season (in Finland). Aerial survey is very reliable, but resource costly with a limited number of repeats. Boat surveys are cheaper and can cover longer periods and have more repeat surveys, but give less precise records.

[2] Very exact but costly method for a limited number individual animals, but may provide estimates of habitat use through predictive use of spatial models.

[3] Information may be used to supplement data used for identification of a site (e.g. identification of high productivity sea areas), but cannot be used to determine the extent of a species aggregation nor to identify a site for that species.

### 4.4. Site selection rationale for SACs/SCIs for Annex II species

As noted in Section 4.3 of these guidelines, Article 3.1 of the Directive (92/43/EEC) states that "a coherent European ecological network of special areas of conservation shall be set up", and that "This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range". The network shall also include special protection areas classified by Member States under the Birds Directive (79/409/EEC).

As set out in Article 4.1 of the Directive, site selection criteria for Annex II species are prescribed by Annex III of the Directive text. Stage 1 assessment criteria (listed below for species) and are applied at a national level to assess the relative importance of sites for each species listed on Annex II to the Directive, as amended in 1997 and 2004.

Stage 1B:

a) Size and density of the population of the species present on the site in relation to the population present within the national territory;

b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities;

c) Degree of isolation of the population present on the site in relation to the natural range of the species;

d) Global assessment of the value of the site for conservation of the species concerned.

Each of these criteria is discussed below. Once sites are identified by Member States at Stage 1, their Community Importance is assessed, as set out in point 4.2 and using the Stage 2 criteria included in Annex III to the Directive, by the Commission, with the help of the European Environment Agency and others, and in agreement with each Member State. This assessment is applied to the lists of sites irrespective of whether they have been identified for Annex I habitats or Annex II species or a combination of both. Assessment of the Community importance of the sites included on the national lists using the Stage 2 criteria for Annex II species will take account of:.

a) "Relative value of the site at a national level;

b) Geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

c) The total area of the site;

d) The number of [natural habitat types in Annex I and] species in Annex II present on the site; and

e) The global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic of unique aspect of its features and the way they are combined."

Further guidance on interpretation of the above criteria, which includes some relevant to marine species, has been developed during Biogeographical Region meetings from 1994 to

2004[48].Site selection for species should include sites or areas important for different aspects of the life cycle of the species (EC 1995). These categories relate primarily to birds, but are also applicable to marine species:

- Resident (to be found throughout the year on the site);
- Breeding/reproducing (uses the site to nest and raise young);
- Staging (site used on migration or for moulting outside breeding grounds); and
- Wintering (uses the site during the winter).

This information must be included in the Standard Data Form (97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites Official Journal L 107, 24/04/1997). Explanatory comments on this form may be found in section 4.1.2 of this document

### *4.4.1. Proportion of Member State population*

Where population estimates are available for a species, the proportion of the national population present on the site (or within the area) can be estimated. Defining boundaries for 'sites' in offshore waters which support a given percentage of the national population of some mobile species may be difficult due to the lack of obvious natural boundaries (such as coast, topographical boundaries, etc.) in the open sea. This criterion is also challenging to use in the offshore marine environment where populations may often be distributed across several national boundaries. However, recent progress in the use of geo-statistical techniques to identify densities and distribution centres in space and time for mobile species such as cetaceans (Scheidat et al 2002) and birds (Garthe & Skov 2004, Skov et al 1995 and 2000) can support the site selection process for mobile species. Use of these techniques can normally provide data of sufficient resolution to estimate which of the three population size classes applies: A: 100%>p>15%; B: 15%>p>2%; C: 2%>p>0% (EC 1995)

Where Annex II species populations are too small to be naturally viable, or where they occur only as vagrants, Member States may exclude them from consideration for site selection.

### *4.4.2. Conservation of features of habitat important for species and restoration*

This criterion comprises the two sub-criteria:

- Degree of conservation of the features of the habitat important for the species; and
- Restoration possibilities.

To define sites using this criterion it is necessary to understand which habitat features are of importance for the species being considered. For wide ranging marine species, identifiable sites used for breeding and feeding are obviously important to that species' life and reproduction. There may also be identifiable sites used for other purposes (e.g. moulting) which may be important for the species. However, whether any such site is "a clearly identifiable area representing the physical and biological factors essential to the life and

[48] Additional 'guiding principles' to aid in interpretation of the Stage 1A criteria were produced by UK following the 1994 Atlantic biogeographical region meeting, and these are reproduced in Hopkins & Buck.

reproduction" of the relevant species (Habitats Directive Article 4.1) will need to be determined, for example, by expert opinion.

If a site's features are seen to be in average or partially degraded condition then an evaluation of how possible it would be to restore the features to a well conserved condition needs to be made.

**Monk Seal *Monachus monachus* – Example of site selection rationale**

A Life-Nature project conducted fieldwork in four areas recognised as important strongholds for the monk seal population in Greece. Monitoring actions and fieldwork were undertaken enabling an estimation of the population size, an inventory of biotic and abiotic factors, an identification of threats and an assessment of the importance of each site.

Of these four sites, **two key sites** were identified on the islands of ***Kimolos-Polyaigos*** and ***Karpahos-Saria.*** Together these sites represent over **10% of the world population** and therefore are important conservation areas both nationally and internationally.

Based on these results, the island of ***Kimolos*** was included into the neighbouring Natura 2000 site of ***Polyaigos*** due to its importance for monk seal breeding habitats. The ***Karpathos-Saria*** island complex has now also been designated as a Natura 2000 site

***See Appendix 4 for more details.***






source: www.alonissos.com/ monk_en.htm

## Example of site selection for Harbour porpoises (*Phocoena phocoena*) in the German EEZ of the North Sea

(Krause et al. 2006)

In application of the criteria of Art. 4.1 of the Habitats Directive only one pSCI in the German EEZ of the North Sea was identified and in major parts delineated for Harbour porpoises. The identification and demarcation was possible using the three criteria of the "ad hoc" meeting convened by the EC (EC 2001) (see text) and one additional: high proportion of sensitive behaviour, i.e. resting.

**Selection Principles:**

(1) **Data collection**: Harbour porpoises occurrence, distribution and behaviour was studied by quasi synoptical aerial transect surveys. In areas with higher occurrence of harbour porpoises additional flights with a higher resolution of line transects were carried out.

These data were completed and verified by long time data sets from the observations in the seabird-at-sea database (SAS), observations of local aerial data collections for environmental impact assessments, data from SCANS I, and data from porpoise detectors (POD). The last method was used successfully in the Baltic Sea only.

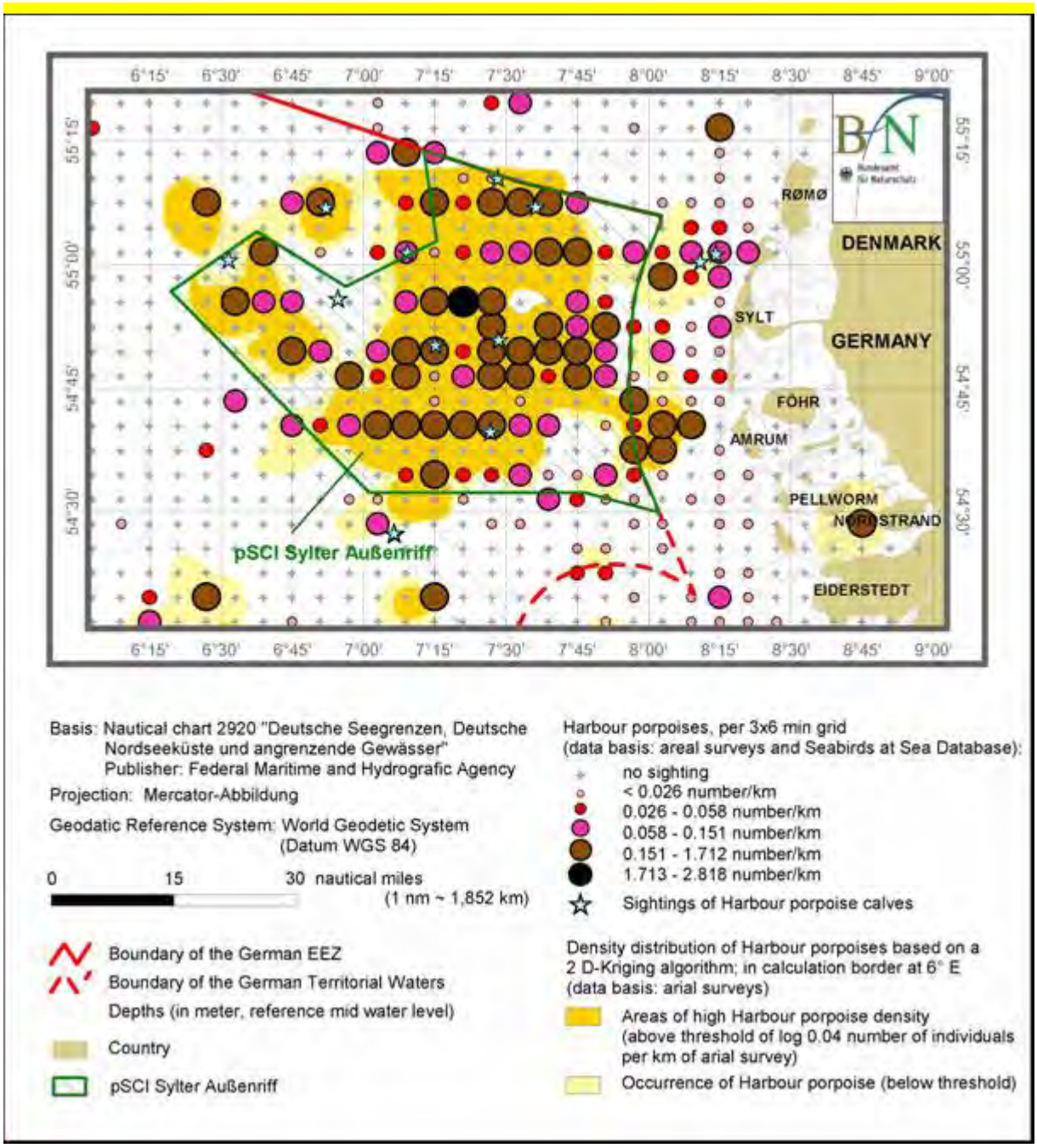
(2) **Species distribution maps.** Harbour porpoise concentrations from May to August (reproduction time) were modelled by geo-statistical methods, based on variogram analysis and ordinary kriging, and were visualised as distribution maps in a GIS:

(3) **Concentration areas:** Concentration boundaries were identified by using density threshold suggested by a marine mammals expert (log 0.04 per km² transect).

(4) **Population size estimation:** Within the pSCIs and for the whole German North Sea the population size was calculated and the proportion of harbour porpoises within given borders was estimated.

(5) **Selection and demarcation:** Only one concentration site with an up to 10 fold higher population density of harbour porpoises during the important time span for reproduction was selected. Demarcation of this pSCI was mainly according to the density gradient of harbour porpoises. However, also the distribution of the habitats "sandbanks" and "reefs" were important delineation criteria.

Finally the boundary lines were simplified and straightened in order to ensure simple and secure marking of sites at sea. In most of the other German pSCIs harbour porpoises occur regularly, but were registered in EU data forms as "present" only, because their population density do not fulfil the criteria named in Art. 4.1.




### *4.4.3. Isolation of species populations*

This is an approximate measure of the contribution of a given population to the genetic diversity of the species and of the fragility of the specific population at the site being considered (EC 1995). Using a simplistic approach, the more isolated a population is, the greater its contribution to genetic diversity of the species concerned. Consequently, the term 'isolation' should be considered in a wider context, applying equally to strict endemics, to subspecies, varieties or races, as well as sub-populations of a meta-population (97/266/EC). In this context, the following grading should be used:

A: population (almost) isolated;

B: population not isolated, but on margins of area of distribution;

C: population not isolated within extended distribution range (EC 1995).

Where Annex II species populations are too small to be naturally viable, or where they occur only as vagrants, Member States may exclude them from consideration for site selection.

#### *4.4.4. Global assessment*

This criterion is used to sum up the previous criteria and also to assess other features of the site thought to be relevant for a given species using best expert judgement (EC 1995). Such other features may vary from species to species and might include human activities on the site or in nearby areas which are capable of influencing the conservation status of the species, land management, the statutory protection of the site, ecological relations between the different types of habitats and species, etc. (97/266/EC).

#### *4.4.5. Additional selection principles*

Additional selection principles, such as those outlined below which were developed at Biogeographical Region meetings[49], may be used to assist in the site selection process.

- Priority/non-priority status (see Habitats Directive Article 1 (d) and Annex II);
- Geographical range (see Articles 1 (e) and 3.1);
- Special responsibilities (see Article 3.2);
- Multiple interest (Annex III Stage 2.2(d));
- Rarity;
- Ecological coherence of the Natura 2000 network(Annex III Stage 2.2)

These criteria are in principle very useful, but in practice it is often very difficult to compare different areas on a quantitative level, as there may be lack of data from some areas, and more importantly, data collected by different methods (ship-based and aerial surveys, incidental sighting, passive acoustic monitoring etc.) and under different conditions (time of year, sea state, trained vs. untrained observers etc.). There is a great need for coordinated efforts in the direction of collecting quantitatively comparable data, such as SCANS and SCANSII. Coordination needs to be at both national and trans-national levels.

### 4.5. Identifying Special Protection Areas for seabirds and other waterbirds

Articles 4.1 and 4.2 of the Birds Directive require Member States to classify "the most suitable territories in number and size as special protection areas" for those bird species included in Annex I of the Directive and also for regularly occurring migratory species of bird, taking account of their protection requirements at sea as well as on land.

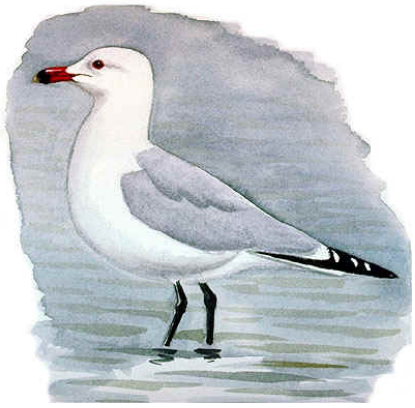
Breeding colonies of seabirds and coastal, wintering or resting areas for waterbirds on migration are clearly among the 'most suitable territories', and are relatively easy to identify. However, a variety of Annex I and migratory birds use benthic and pelagic habitats, from the sea bed through the water column to the sea surface, in areas near and distant from the coast, for a variety of purposes, including feeding, resting, and moulting. Such usage occurs throughout the year, and areas of particular importance need to be considered for inclusion in the Natura 2000 network as Special Protection Areas (SPAs).

[49] E.g: Hopkins JJ & Buck AL 1995 The Habitats Directive Atlantic Biogeographical Region. Report of Atlantic Biogeographical Region Workshop, Edinburgh, Scotland, 13-14th October 1994. Joint Nature Conservation Committee Report 247, Peterborough, 31pp

**Box A. A complementary approach to the identification of SPAs.**

BirdLife International (2004) has prepared a document proposing a general approach to the identification of marine areas that are important for the conservation of birds in Europe. It is included in appendix 4.1 of this guidance document.

Relevant issues for the identification of IBAS as boundary definitions and the use of Marine Classification Criterion are well covered.



Birds are observable on the sea surface for much longer time periods than is the case for those marine species accorded special protection under the Habitats Directive. However, some of the scientific problems encountered when attempting to identify sites for wide-ranging marine mammals at sea are very similar to those that arise when attempting to identify non-coastal marine sites for seabirds and other waterbirds. These relate largely to the scarcity of suitable data for many areas, and of how to robustly determine specific areas ("most suitable" for birds, or "essential to the life and reproduction" of Habitats Directive Annex II species) for species that are highly mobile and may be very widely distributed. In practice, some areas identified for marine species under the Habitats Directive and for seabirds under the Birds Directive are likely to overlap, for example, where they exploit the same food resources or use the same habitats.

For these and other reasons, approaches adopted for the identification of SPAs on land are not easily transferable to the marine environment. Marine habitats, for example, have a greater three dimensional quality. Habitat boundaries are often unseen, may be much more dynamic, both spatially and temporally, and may extend across small to very large scales. Consequently, it can be extremely difficult to define discrete sites, to estimate bird numbers within them, and thereby assess their relative or absolute importance to the birds.

However, seabirds, and other birds that use the sea, distribute themselves in a non-random way when at sea, often showing strong associations with habitat features. These could be the distribution of other birds, marine mammals or other taxa, but also physical and/or biological processes and features. The distribution of prey will clearly be a major determinant of the distribution of feeding birds. Such factors governing bird distribution at sea, along with the biology and ecology of the birds themselves, will also determine the spatial nature of bird concentrations; for example, birds may form large, dense flocks or be more loosely aggregated. The nature of important aggregations will in turn determine the attributes of SPAs such as size and boundary locations.

Therefore, the scales at which seabird and other waterbird dispersion occur in the marine environment vary from very small, tens of metres for example in some non-breeding concentrations of seaduck, to tens or even hundreds of kilometres, such as the dispersion of some procellariids. Nevertheless, at whatever scale, bird distribution will be associated with the distribution of physical habitat features, such as water depth, sea substrate, and other dynamic features such as fronts, as well as biological features such as food resources. So it is

important that where possible, ecosystem processes and functioning be considered when distinguishing such areas because, even if birds use them transitorily (perhaps spending significant periods travelling or at breeding colonies or terrestrial roosts), they may be essential for the survival and reproduction of their populations. That such areas might be used only seasonally or for a short time does not diminish their importance. If Annex I or migratory species occur in numbers that satisfy site selection criteria (see below), then this should be sufficient to determine qualification of the site for SPA status, irrespective of whether the species are accorded special protection under any other international instruments.

However, the process of identifying SPAs in the marine environment will vary among Member States, although the general principles to be applied will be very similar. Application of these guidelines will be determined ***inter alia*** by the physical and biological nature of the sea territory of each Member State and the bird complement it hosts.

### *4.5.1. Designation of SPAs: Court of Justice clarifies some Member States' duties*

Member States are obliged to classify as Special Protection Areas (SPAs) all the sites, which applying ornithological criteria, appear to be the most suitable for the conservation of bird species listed in Annex I of the Birds Directive. This is the key conclusion of the Court of Justice in its landmark judgement, delivered on 19 May 1998[50], in this important test case for the implementation of the directive. It upheld the Commission's claim that a Member State had clearly failed to classify a sufficient number and area of SPAs.

This case focused on the key duty under Article 4(1) of the directive for the protection of endangered and vulnerable bird species. This requires Member States to ***'classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies***'. It was the first time that the Court was confronted with a case relating to the overall nature of the duty to classify SPAs.

This and other judgements have confirmed the importance of ornithological criteria. Scientific criteria for identifying important bird sites had already been elaborated as early as 1981 when the first inventory of important bird areas in the European Community was prepared. During the 1980s the European Commission had also set up a working group, which led to the identification of Community-wide criteria for the selection of SPAs.

The Commission, whilst fully recognising that other conservation measures are required for many Annex I birds, including wider land or waterside measures for dispersed species, argued that these cannot be a substitute for classifying the most suitable territories as SPAs. This failure to classify effectively meant that such areas would not be subject to the protection regime, now defined in Article 6 of the Habitats Directive2, that applies to all SPAs.

[50] Case C-3/96, Commission v Netherlands, supported by Germany. http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-3%2F96&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

***Main conclusions of the Court***

The judgement of the Court of Justice in case C-3/96 includes the following key elements:

- Article 4(1) of the directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other conservation measures
- economic requirements mentioned in Article 2 of the directive may not be taken into account when selecting an SPA and defining its boundaries.
- the margin of discretion that Member States have in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I of the directive .
- consequently Member States are obliged to classify as SPAs all the sites, which applying ornithological criteria, appear to be the most suitable for conservation of the species in question
- the IBA inventory, though not legally binding on the Member States concerned, represents a list of sites of great importance for the conservation of wild birds in the Community.
- in this case the IBA 89 had proven to be the only document containing scientific evidence making it possible to assess whether the defendant State had fulfilled its obligation to classify as SPAs the most suitable territories in number and area for the conservation of the protected species.



***Sterna dougallii***:[51]

Photo: Bretagne Vivante. LIFE98 NAT F 005250

[51] ***Sterna dougallii*** is a Bird species listed in Annex I of the Birds Directive ES: Charrán rosado FR: sterne de Dougal; DK: Dougalisterne; DE: Rosenseeschwalbe EN: Roseate tern

**CRITERIA USED FOR THE 1989 Inventory of Important Bird Areas (IBA)**

**Breeding sites**

1. Sites supporting 1% or more of the breeding pairs of the biogeographic population.
2. If 1) is not appropriate (e.g. the biogeographic population not known, 1% criterion too high to select important sites), criteria have been based on the specific characteristics of dispersion and habitat preferences of the species
3. If 2) also impossible, all sites with proved breeding (this applied to six very poorly known seabirds only: ***Bulweria bulwerii, Puffinus puffinus mauretanicus, Puffinus assimilis, Pelagodroma marina, Oceodroma leucorhoa***, and ***Oceodroma castro***)
4. Sites of particular importance for marginal or isolated breeding populations, with criteria based on specific characteristics of dispersion and habitat preferences of the species
5. All regular sites of rare or endangered species or sub-species; or small or endangered distinct biogeographical populations: c.2,500 pairs. (for some colonial species a level of five pairs is used to exclude irregular breeding sites).
6. For widely dispersed species, sites are selected on the basis of high densities or good numbers
7. Regular sites for significant numbers of three or more Annex I species

**Sites other than breeding sites**

8. Sites having 1% (at least 100 individuals) of the flyway or biogeographical population of one species
9. Sites having (at least) 20,000 waterfowl or 5,000 birds of prey on passage during a migration season
10. Sites with particular importance for marginal populations, with criteria based on specific characteristics of dispersion and habitat preferences of the species
11. Sites which hold 5 (gregarious species 25) individuals of rare and endangered species or sub-species or small and endangered biogeographic populations (less than 10,000 individuals in number).
12. Sites regularly holding significant numbers of three or more Annex I species

**Sites were also included if they were amongst the 100 most important in the Community, or among the five most important in a region of the Community for Annex I species or sub-species.**

### *4.5.2. Species for which SPAs should be considered*

Broadly, there are two categories of Annex I and migratory species for which SPAs should be considered – seabirds and waterbirds. In Europe, seabirds include species in the following families:

Procellariidae (fulmars, petrels, shearwaters)
Hydrobatidae (storm-petrels)
Sulidae (gannets)
Phalacrocoracidae (cormorants)
Stercorariidae (skuas)
Lariidae (gulls)
Sternidae (terns)
Alcidae (auks)

Waterbirds comprise species in the following families:

Gaviidae (divers)
Podicipedidae (grebes)
Anatidae (ducks)

In addition, it may be necessary to consider Phalaropodinae (phalaropes), whose members make significant use of the marine environment.

A list of species that occur in European marine waters for which SPAs need to be considered is presented in Appendix 2 of this Guidelines document (Table 3). Most, if not all, of these species may be considered to be migratory, thereby justifying their consideration for SPAs at sea. The dispersion scales at which these species migrate seasonally will vary both among and within species. Table 3 of appendix 2 indicates those species included in Annex I of the Birds Directive, and also attempts to indicate the scales over which these species might typically be aggregated when not migrating. Every species potentially might be dispersed from small to very large scales, depending on various environmental and other conditions. In highlighting likely dispersion scales, the Table merely attempts to allow some preliminary assessment of the types of SPA that might be appropriate for the species; a comprehensive assessment in the context of the species ecological requirements and known dispersion patterns must be undertaken in order to fully identify potential types of SPA.

Of course, the list of species in Appendix 2, table 3 may not be exhaustive, and it does not preclude from consideration other potential qualifying seabird or waterbird species that use the marine environment.

### *4.5.3. Types of SPA*

Sites selected as SPAs should be clearly identifiable, which renders it necessary to identify discrete aggregations of seabirds and waterbirds, or indeed discrete patches of habitat that are essential for the survival and reproduction of the species. As these aggregations are scale-dependent (spatially and/or temporally), governed by the species' ecology and biology, various types of bird aggregation may be identifiable. Table 3 in Appendix 2 indeed suggests that different sorts of SPAs are necessary for certain species of seabird and waterbird. Similarities in ecological requirements across species, perhaps within families or other taxonomic groups (but not necessarily), enable the identification of four broad types of possible SPA:

i) Extensions of existing terrestrial SPAs into the marine environment. In many cases, it is appropriate to extend existing coastal and island seabird colony SPAs into the marine environment because the birds already protected within these SPAs make extensive use of the waters adjacent to colonies (out to varying distances from the colony) for a wide range of purposes. This may include important inshore feeding areas in the breeding season for species such as divers, and species-specific seasonal concentrations, such as "rafting" Manx and Cory's shearwaters ***Puffinus puffinus*** and ***Calonectris diomedea*** in the breeding season;

ii) Areas hosting concentrations of certain species of birds usually, but not necessarily, in the non-breeding seasons, typically in shallow, coastal and inshore waters. For example, many species such as seaduck, divers and grebes form large aggregations outside the breeding season at predictable locations for resting, moulting and feeding. In some cases aggregations of these species may be catered for by extensions of existing terrestrial SPAs supporting assemblages of non-breeding waterbirds;

iii) Offshore areas hosting concentrations of seabirds. Throughout the year seabirds use the seas around Europe for many purposes, notably feeding. If important foraging areas for pelagic species, which might include highly productive fronts, currents, shelf-break areas, gyres and eddies, and upwellings, can be defined then these should be considered for SPA classification. Such areas might be quite distant from breeding colonies and it could be that such concentrations of birds are aggregated at scales too large to allow identification of discrete sites. However, the extent to which these (large-scale) aggregations of birds occur

regularly and comprise sufficient numbers of birds and species to merit SPA status requires considerable attention; few relevant analyses of existing data have been conducted;

iv) Migration hotspots. For some species, it may be necessary to consider areas where birds gather or travel in significant and regularly occurring concentrations during migration. Such areas could be migration staging posts, bottlenecks or pathways that are crucial for the survival of the species.

### *4.5.4. Data sources for SPA identification*

In common with SACs under the Habitats Directive, analytical aspects of the SPA identification process, including issues of data quality, must be considered with respect to the final outcome of that process. Conclusions need to be sound, as far as possible objectively determined, robust to challenge, and reached using repeatable methods.

Identification of marine SPAs should always be at least partly data-driven, and very often will be entirely determined by analysis of (survey) data. For many species of pelagic seabirds, limited information exists on their habitat requirements and other factors governing their fine scale distribution, thereby rendering it difficult to predict where birds occur. However, many appropriate survey data have already been collected in the seas of north-west Europe and the sorts of data needed to enable a range of approaches to be adopted are relatively easy to collect. It is likely that data will derive from sampling and that further manipulation and analysis will be required to inform SPA identification (see below).

As in the terrestrial environment, the best available data should always be used for the SPA identification process, and treatment of these data should follow as far as possible strict scientific protocols. Site determination may be derived in a variety of ways, from ***ad hoc*** analyses of existing data to customised analyses of especially collected data. The quality of data needs to be assessed. Several factors are pertinent to the assessment of data quality, among them:

i) experience of observers to minimise errors in the estimation of numbers of birds and in species identification;
ii) survey/study design; data from systematic as opposed to casual or opportunistic surveys and observations are likely to be of higher quality, for example in avoiding over- or undercounting arising from bird movement;
iii) spatial and temporal extent of survey; an assessment of whether all parts of an area suitable for the birds should be made in order to identify possible bias or incompleteness, and allow proper determination of site boundaries. This assessment should include whether the count was made from land, aircraft or ship;
iv) sampling bias; an assessment may be required of the representativeness of samples; for example biased sampling of an area will result if surveying follows transect lines that are oriented parallel to important linear habitats, such as elongated banks, river channels, or some oceanographic fronts;
v) survey or recording conditions; some study results might have been affected by unusual events such as poor weather or a pollution incident;
vi) atypical behaviour of birds; it is important that the behaviour or dispersion of birds is not affected by survey platforms, such as low-flying aircraft, or by invasive techniques such as transmitter or logger attachment;

and the results of early manipulations of the data also need to be treated equally cautiously, for example in:

vii) derivation of population estimates; whether a population estimate derives from a complete count or from sampling may affect the likely accuracy of the estimate;
viii) robustness of population estimates; it may be possible to derive more than one population estimate from a single survey. When this is the case, the most robust population estimate should be used.

Any data considered inadequate for population estimation or for determining dispersion patterns must be treated as such, although it may still be useful in determining the need for more detailed or structured survey work in a particular area. Again, it is difficult to be prescriptive here; there are probably limitations attached to most studies. For example, a well-planned and well-executed aerial sampling survey using experienced observers and distance estimation should yield good population estimates, but additional information may be needed from land-based or boat-based surveys to supply accurate species identification or to count inconspicuous species or those close to the shore. In some situations (e.g. small or enclosed sites), boat-based or systematic land-based surveys might provide better population estimates.

As far as possible data should derive from systematic data collection conducted at appropriate scales, over appropriate time periods, and using robust methods. If lower quality data only are available, they must be used with appropriate caution. To reiterate, the quality of all data must be assessed and the degree to which they are appropriate for SPA determination should always be formally assessed; consideration should be given to the collection of new, better-quality data. However, a careful balance will need to be struck between seeking 'perfect data' and ensuring an area of known importance is afforded SPA protection as soon as practicable. Lack of 'perfect data' should not be argued to delay. Opportunities should be identified to make use of existing surveys to supplement data gaps.

The following table indicates the possible sources of data suitable for the identification of different types of SPA outlined above. Table on next page summarises the availability of data on the dispersion of seabirds and waterbirds in Member States.

**Sorts of data that might typically be used in the identification of different types of marine SPAs.**

| **Type of SPA** / **Type of data** | **Marine extensions to existing colony SPAs** | **Inshore aggregations of birds usually outside the breeding season** | **Offshore aggregations of seabirds** | **Migration hotspots** |
|---|---|---|---|---|
| Customised aerial transect | Yes | Yes | Possibly (highly clumped aggregations) | No |
| Customised boat transect | Yes | Yes | Yes | Possibly |
| Existing at-sea survey data (e.g. | No | Yes (offshore) | Yes | No |

| | | | | |
|---|---|---|---|---|
| European Seabirds at Sea data) | | | | |
| Telemetry (radio/satellite)[1] | Yes | Yes | Yes | Yes |
| Bio-logging | No | Possibly | Yes | Yes[5] |
| Radar | No | Possibly (inshore) | No | Yes[2] |
| Land-based sightings | Yes | Supplementary information only[3] | Supplementary information only | Yes (partially)[4] |

[1] The relative costs of different methods vary, but satellite or other tracking of individuals provides good data for (typically) few birds at considerable cost, so should not be considered unless other methods prove unsuitable. However, for certain species and specific questions this may be a very apt technique.

[2] Radar surveys can provide specific information on migration pathways, but this is a labour intensive and costly method suitable only for use in certain types of areas.

[3] May be a principal source of data for some enclosed coastal sites or where the broad distribution of target species is confirmed by boat or aerial survey to be within the range of land-based surveyors.

[4] As for Inshore aggregations.

[5] GPS loggers are capable of establishing migration corridors or bottlenecks

**The availability of data on the dispersion of seabirds and water birds in each Member State.**
**Broad scale data availability or survey coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf)**

| Type of data | B | CY | D | DK | E | EST | F | FIN | GB | GR | I | IRL | LT | LV | M | NL | PL | P | S | SL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Customised aerial transect | Yes | | Yes | Yes | | | Yes[8] | | Yes[1] | | | | | | | Yes | | Yes | | |
| Customised boat transect | Yes | | Yes | Yes | Yes[7] | | Yes | | Yes[1] | | | | | | | Yes | | Yes | | |
| Existing at-sea survey data (e.g. European Seabirds at Sea data) | Yes | | Yes | Yes | | | Yes[9] | | Yes[2] | | | | | | | Yes | | Yes | | |
| Telemetry (radio/satellite) | No | | No | No | Yes[7] | | Yes[10] | | Yes[3] | | | | | | | No | | Yes | | |
| Radar | Yes | | Yes | Yes[6] | | | | | No | | | | | | | Yes[5] | | Yes | | |
| Land-based sightings | Yes | | Yes | Yes | Yes[7] | | Yes | | Yes[4] | | | | | | | Yes | | Yes | | |

[1] UK: only for areas of known wintering bird concentrations; survey is ongoing
[2] UK: database collated for North Sea and parts of Atlantic ocean, database contains data over 25 years
[3] UK: only for a small number of species (Manx shearwater ***Puffinus puffinus***, red-throated diver ***Gavia stellata***)
[4] UK: from popular coastal areas
[5] NL: near potential windfarms
[6] DK: near potential windfarms
[7] ES: Occasional data from previous survey. Recently survey is ongoing.
[8] FR: the most efficient technique for large areas
[9] FR: Data available for the south-west of France
[10] FR: only for very small number of few species (Cory's shearwater)

### *4.5.5. Data treatment for SPA identification*

SPA identification will most likely be made using distribution and abundance data of birds within study areas. Much of the time these will be existing data, and this will apply largely in those Member States where there is a long history of data gathering. Typically, however, the data will have been collected for purposes other than SPA identification, so they will demand to be analysed in support of SPA identification differently from the ways originally envisaged (and often in novel ways). Similarly, existing data may often be sample data that do not readily act as indicators of total population sizes. In addition, the resolution at which these data have been collected will usually be at a scale too coarse to readily determine site boundaries. Of course, where appropriate data exist these should be used. Care should be taken to ensure the scale at which boundaries are determined reflects the spatial scale at which the qualifying species use marine habitats over time – spatial distribution can vary greatly diurnally, seasonally and between seasons.

Provided existing data are of sufficient quality and quantity, however, it is appropriate that they be used as the basis for further modelling and analysis in order to assess site qualification (in terms of numbers of birds present), as well as boundary determination. Statistical and spatial modelling techniques may also be enhanced by the inclusion of habitat and other environmental data as co-variates within models of bird dispersion. However, if simple count and localised data are adequate to determine the boundary of a site, additional modelling may not be required.

Several modelling techniques exist or may be readily adapted to further interpret bird dispersion data, from simple geographical, through statistical and spatial modelling, or a combination of two or more techniques. In addition to assessing data quality (see above), it is imperative that the data requirements of all statistical and modelling tools applied, including assumptions regarding the underlying distribution of the data, be observed. Whether estimating population size or determining the spatial extent of bird distribution (see below), violations of all test and other methodological constraints should be avoided. However, if it proves necessary to relax test requirements, through lack of data for example, this should be explicitly recognised and the possible consequences for the analysis identified.

Any analysis of marine bird dispersion data should aim to identify potentially suitable areas of high density (or 'hotspots'). In the absence of co-variate data, spatial interpolation methods of various kinds, which apply the inherent spatial structure of observed bird dispersion at a finer resolution throughout the area surveyed, such as kriging (see Boxes E, F), are appropriate Where co-variate data are available, for example habitat information, other modelling tools would also be appropriate, tools that might allow extrapolation of the bird dispersion data to areas outwith the area surveyed.

Whereas most data on the distribution of birds at sea comes from boat-based and aerial surveys, increasingly more data derives from remote (radio and satellite) tracking and biologging. Protocols for the application of such data need to be developed (see Box B). Although methods for the identification of core areas of use have been outlined in BirdLife (2004), some of them, such as kernel analysis, need to be applied with care (Hemson ***et al***. 2005) and certainly in consistent ways across relevant research in support of SPA identification. Analytical techniques should be applied at all stages in the determination of site qualification and boundary definition.

**Box B. Important Bird Areas for seabirds (marine IBAs) in Spain and Portugal – a multi-faceted approach using novel methods**


© Filipe Viveiros

Between 2004 and 2008, BirdLife International partners in Spain (SEO) and Portugal (SPEA) are conducting two strategic Life-Nature projects to contribute to the implementation of the Birds Directive in the marine environment. The projects will develop a methodology for the analysis of the spatial distribution of offshore and pelagic species. This will be based on the newest methods in marine ornithology (BirdLife International 2004) deriving from telemetry data, density distribution maps, and kernel analysis to identify the areas that birds use most intensively

The projects are carrying out detailed inventories, using objective methodological criteria to determine Important Bird Areas (IBA) at sea for those seabird species listed in Annex I of the Birds Directive that occur in Spanish and Portuguese marine waters, which includes some of Europe's rarest bird species, such as the globally threatened ***Puffinus mauretanicus, Pterodroma madeira and Pterodroma feae***, and many seabird species that are of conservation concern, e.g. ***Calonectris diomedea***, ***Puffinus assimilis, Larus audouinii*** and ***Sterna sandvicensis***.

The inventory will include a characterisation of the Portuguese and Spanish EEZs, and a detailed characterisation for each IBA, with GIS geo-referenced cartography, and a description of the main threats affecting it. To achieve this, the relationship between oceanographic data and the presence/absence of seabirds will be studied. Monitoring of certain species will be carried out through satellite (***Calonectris diomedea*** and ***Larus audouinii***) and radio tracking (***Bulweria bulwerii***, ***Puffinus assimilis***, ***Oceanodroma castro),*** survey of coastal waters, analysis and mapping of ringing recoveries in Spain and Portugal, and the creation of a database of beached birds. The identification and generic sampling of the most favourable areas is being carried out based on the oceanographic characteristics of the areas concerned.

The combination of these methods will provide evidence on the key areas for seabird conservation (e.g. as foraging grounds). In contrast to gregarious coastal species, pelagic seabirds may depend on less clearly defined areas for their survival. Those areas need to be identified through mostly indirect methods such as telemetry as traditional methods of counting bird aggregations (e.g. Skov ***et al.*** 1995) cannot be used for these species.

All European globally threatened seabird species live in Portuguese and Spanish waters. Their behaviour at sea is poorly known and the methodologies used to track them are still under development. Both the SPEA and SEO projects will cross-check data from direct observations at sea (boats, plane surveys) with the seabird-tracking data. However, seabird densities at sea may be far lower than those recorded in the northern seas. A standard methodology for the identification and delimitation of IBAs at sea, based on standardized and quantitative criteria, will be developed; this could be used to identify IBAs off other countries, thereby improving the protection at sea for truly pelagic seabirds.

## 4.6. Site selection rationale for SPAs

While Article 4 of the Birds Directive does not offer precise criteria for SPA selection, some Member States have produced specific guidance for SPA selection. Selection guidelines should be clearly defined, based on scientific principles, agreed judgements, and easily applied. The aim here is to offer guidelines for the identification of marine SPAs and not to offer prescriptive rules to be applied among all Member States. However, application of selection guidelines within individual Member States should follow a procedure as prescriptive as is feasible, one that is tailored to the individual Member State's requirements.

Present guidelines for the establishment of SPAs in the marine environment aim to be consistent with established guidelines for the terrestrial environment, and be formulated with regard to the overall aim of achieving ecological coherence of the SPA and wider Natura networks as a whole.

The achievement of ecological coherence is likely to be an iterative process, both within and among Member States. The principles of coherence should be based upon knowledge of the ecology of all Annex I and regularly occurring migratory species and should also aim to include consideration of functional assemblages of species.

Understanding the protective requirements of the species (as required by Article 4) is an essential step in deciding what level of contribution the SPA network should make to the conservation of each of the species covered by the Directive requiring SPA designation.

Stroud et al (2001) suggest that the species for which the highest proportions of species' populations should be located within a protected area network are those which:

- occur locally in high densities (congregatory species);
- occur, to a large extent, on natural or semi-natural habitats;
- show predictable occurrence at particular sites regularly between years (i.e. species that are not irregular or dispersive);
- have restricted national or international ranges; or
- have small national or international population sizes.

It will be essential to understand the ecological requirements of each species before deciding on the best approach to adopt for each stage of its life cycle. This is particularly true of some seabird species that do not congregate in the same way some waterbird species do, but are likely to occur at sea in higher densities at predictable spatial and/or temporal scales. In respect of foraging birds from seabird colonies, care should be taken to ensure they do not have to qualify twice for SPA designation i.e. once for the breeding colony and once for foraging areas during the breeding season.

Foraging seabirds from a breeding colony are a good example of where traditional percentage thresholds e.g. 1%, should be applied with care, as they may not always give the best indication of whether a particular seabird species is amenable to a site-based approach for part of its life cycle. For example, only one-third of a breeding guillemot colony typically forages at any one time and so may never form congregations of 1% or more of its biogeographic or national population. Yet, it may form feeding concentrations that are spatially stable and predictable in occurrence between years that merit protection to ensure the ecological requirements of a particular breeding colony SPA are secured.

Therefore, assessing the protective requirements of each seabird species will require careful consideration of its ecological requirements and its behavioural characteristics during the different stages of its life cycle.

For example, in the UK, site selection follows a two stage process (Stroud ***et al***. 2001). The initial stage, Stage 1, aims at the identification of suitable territories through the application of selection principles based on the objective assessment of the relative numerical importance of the bird populations under consideration. If application of Stage 1 guidelines fails to identify an adequate suite of sites for the conservation of a species, then, Stage 2 judgements must be applied.

## Stage 1 Guidelines

Application of Stage 1 guidelines depends on the availability of adequate data for the relevant populations and species being considered for protection within SPAs. If sufficient data are available then important populations should be identified by placing them in an appropriate context.

**UK example of Stage 1 guidelines for qualification of areas as SPA**

An area qualifies as an SPA if:

(1) it is used regularly by 1% or more of the Great Britain (or all-Ireland) population of a species listed in Annex I of the Birds Directive in any season;
(2) it is used regularly by 1% or more of the biogeographical population of a regularly occurring migratory species (other than those listed in Annex I) in any season;
(3) it is used regularly by more than 20,000 waterfowl (as defined by the Ramsar Convention) or 20,000 seabirds in any season.

Again, Denmark applies very similar Stage 1 guidelines that suggest that an area qualifies if:

(1) it is used regularly by 1% or more of the national population of an Annex I species,
(2) it holds a density of an Annex I species that is more than three times the national average for that species;
(3) it is used regularly by 1% or more of the flyway population of a migratory species;
(4) it holds a density of a migratory species that is more than three times the national average for that species;
(5) it is used regularly by more than 20,000 waterbirds in any season.

In these contexts, "regularity" should be operationally defined. For the most part, the Ramsar definition has been applied:

(1) the requisite number of birds is known to have occurred in two thirds of the seasons for which adequate data are available, the total number of seasons being not less than three; or
(2) the mean of the maxima of those seasons in which the site is internationally important, taken over at least five years, amounts to the required level (means based on three or four years may be quoted in provisional assessments only).

In certain cases, for example for species that are particularly rare or in very remote areas (such as might particularly apply in the marine environment), hotspots might be identified on the basis of fewer data (see Stroud ***et al***. 2001).

Population estimates used in the assessment of the importance of potential SPAs should ideally be derived from robust censuses and/or analyses (see above). The basis for designation will naturally be based upon the best available data. Preferably these will be those covering the most recent five years in each appropriate season, but it may be necessary to consider longer series of data (for example 25 years of UK/ Netherlands/ Denmark/ Germany/ Belgian North Sea seabird dispersion data, or 10 years of Belgian nearshore waterbird data). Use of longer time-series can help address the potential problem of long-term (but possibly cyclical) shifts in distribution. This emphasises the need for adequate marine bird monitoring systems to improve understanding of spatial and temporal variations in distribution.

Overall, such Stage 1 approaches offer repeatable and, as far as possible, objective protocols that result in a consistency of solution that might be important in avoiding or countering subsequent challenge.

## Stage 2 guidelines

If application of Stage 1 guidelines does not enable the identification of a suitable series of SPAs for any species, for whatever reason, then Stage 2 judgements have to be made. An area

that meets the requirements of one or more Stage 2 guidelines should be considered for SPA classification. These guidelines may (and do in various Member States) accord favoured consideration on the basis of:

(1) Relative population size and density. Areas that host relevant species of birds in greater numbers or higher densities than others should be favoured for selection;
(2) Species range. Areas selected should provide the widest geographical coverage across the range of a species;
(3) Breeding success. Areas of higher breeding success than others should be favoured for selection;
(4) History of occupancy. Areas of known longer history of occupancy should be favoured for selection;
(5) Multi-species areas. Areas holding the larger number of qualifying species under Article 4 of the Birds Directive;
(6) Naturalness. Areas comprising natural or semi-natural habitats should be favoured for selection over those that do not;
(7) Adverse environmental conditions. Areas used at least once every 10 years by significant proportions of the biogeographical population of a species in periods of severe weather or of other unfavourable conditions in any season and which are vital to the survival of a viable population should be favoured for selection.

### *4.6.1. Alternative approaches to site selection*

An alternative approach that combines Stage 1 and Stage 2 judgements is offered by BirdLife International (BirdLife 2005). This approach aims to identify Important Birds Areas in the marine environment. The relevant criteria are presented in Box D.

**Box D. Criteria applied by BirdLife International that are pertinent to the identification of Marine Important Bird Areas (see also Box A)**

(1) The site regularly holds significant numbers of a globally threatened species, or other species of global conservation concern;

(2) The site is known or thought to hold, on a regular basis, 20.000 waterbirds or 10.000 pairs of seabird of one or more species;

(3) The site is known or thought to hold 1% or more of a flyway population or other distinct population of a waterbird species;

(4) The site is known or thought to hold 1% or more of a distinct population of a seabird species

(5) The site is one of the 'n' most important sites in a country for a species with an unfavourable conservation status in Europe, and for which the site-protection approach is thought to be appropriate; (***"n" to be defined per country for a given species***)

(6) The site is one of the 'n' most important sites in a country for a species with a favourable conservation status in Europe but with its global range concentrated in Europe, and for which the site protection approach is thought to be appropriate;

(7) The site is known to regularly hold at least 1% of the flyway or EU population of a species considered to be threatened in the EU;

(8) The site is known to regularly hold at least 1% of a flyway population of a migratory species that is not considered to be threatened in the EU;

(9) The site is one of the five most important in the European region in question for a species or subspecies considered threatened in the European Union.

## 4.7. Site boundaries

While the terrestrial model provides a good basis for the identification and classification of Natura 2000 sites, in the marine environment it must be recognised that there are important differences between the two approaches. These relate to:

**Site size** The boundaries of a potential Natura 2000 site must be defined to ensure that they provide the basis for adequate protection of the features of conservation interest. Where the protected species primarily occurs should be considered the core area of the site, and should be included within the site boundary. Particularly in the case of designation of SPA, where the nature or scale of the species dispersion results in more loose aggregations, resulting in smaller concentrations disjunct from the core aggregation, the decision whether to include such satellite concentrations within a boundary should be made by reference to the overall size of the qualifying interest. It may also be determined by formal rules relating to the regularity with which the satellites qualify as important over several surveys. All concepts introduced here must of course be defined operationally. For the UK working definitions of "satellite", "regularity" of importance, and "importance", see (Webb ***et al***. 2004a, b, c; McSorley ***et al***. 2004).

Member States might wish to consider the value of identifying buffer zones around Natura 2000 sites. They are not a legal requirement under the Birds Directive of Habitats Directive, although any activities or developments that are harmful to the qualifying feature and which take place outside the site are still subject to the protection and procedural safeguards of Article 6 of the Habitats Directive[52].

**Site Shape**. In the marine environment, where sites may be far from the coast, it is preferable to have simple site boundaries, based on "straight" lines and convex polygons, which 'box' the qualifying interests. This approach will simplify future management of the site survey and monitoring, and notification of duties to be carried out by other responsible authorities.

### *4.7.1. Boundary determination for SPAs*

The spatial extent of hotspots or bird interest features for which protection is being established must be defined as far as possible by application of objectively defined criteria. Seaward boundaries of sites, may be defined in various ways, but ideally based on the application of "objective", well-established analytical techniques to species dispersion data, and ideally mapped within a Geographical Information System. For example, they may be delimited by isolines that separate regions where the gradient in bird density meets an agreed or operationally defined threshold (e.g. Garthe and Skov 2004; see Box E).

**Example of site selection for seabirds in the German EEZ of the Baltic S**ea (Krause et al. 2006)

The identification and selection process of Special Protection Areas in the German EEZ of the Baltic Sea results in a single large SPA of ca. 2.000 km² designated and transmitted to Commission in May 2004. This area is defined by overlapping concentrations of more than half a million seabirds, primarily by the distribution and abundance of divers, Slavonia grebe, red-necked grebe, great crested grebe, black guillemot, red-breasted merganser, long-tailed duck, black scoter, velvet scoter, common scoter and common eider.

[52] ICES report on ***Distribution of cold-water corals in the North Atlantic and the relation to fisheries in the North East Atlantic. Cooperative research report Nº262. December 2003***

**Selection principles:**

(1) **Bird species selection for SPA delineation:** Seabird distribution in the Baltic Sea has been studied by aerial transect surveys and from ships. From the total list of 33 species to be considered for the selection of marine SPAs, eleven species of Annex I and migratory bird species were found to occur regularly in offshore areas of the German Baltic Sea and use distinct aggregation areas.

(2) **Species distribution maps:** These bird species concentrations were modelled by geo-statistical methods, based on variogram analysing and ordinary kriging, and were visualised as distribution maps in a GIS.

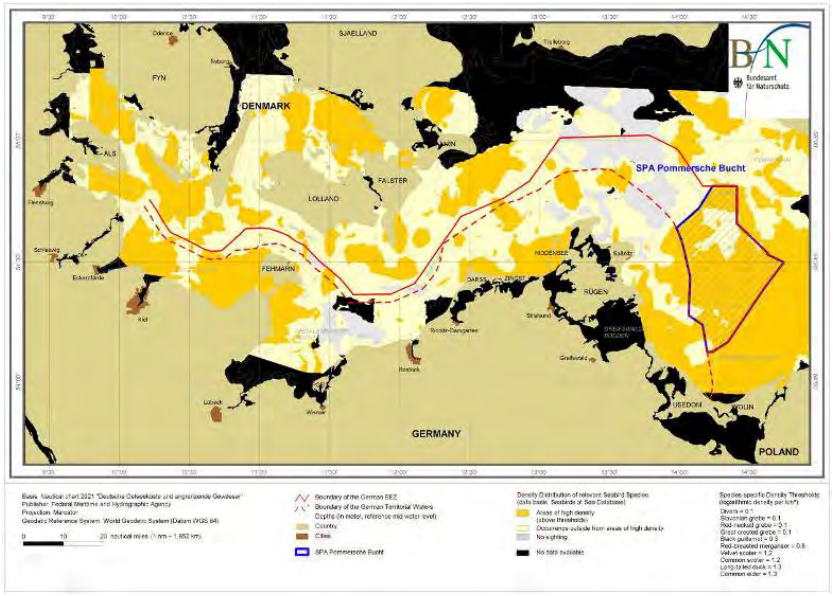
(3) **Definition of important seabird concentrations:** For each of these species, concentration boundaries were identified by gradient analysis (Species-specific density thresholds (logarithmic density per km²) divers 0.1, slavonian grebe 0.1., red-necked grebe 0.1, great crested grebe 0.1, black guillemot 0.3, red-breasted merganser 0.8, velvet scoter 1.2, common scoter 1.2, long-tailed duck 1.3 and common eider 1.3). The density value of the borderlines were used as the species- and season-specific minimum density for each relevant seabird concentration.

(4) **Converting single-species data into multi-species data:** By overlaying the concentration areas of each single species, the most important areas were identified. The respective areas and contour lines were then combined so that a set of areas of potential conservation areas were identified.

(5) **Population size estimation:** Within each concentration area, the mean density and population size for each species were calculated.

(6) **Selection and assessment of SPAs in the German Baltic Sea:** Finally the most suitable areas in number and size for the protection and conservation of species of wild birds that are listed in Annex 1 of the Directive, and of regularly occurring migratory species were chosen. In case of the German EEZ in the Baltic Sea a single large site was sufficient to nominate adequate populations numbers of the relevant Annex I and migratory bird species.

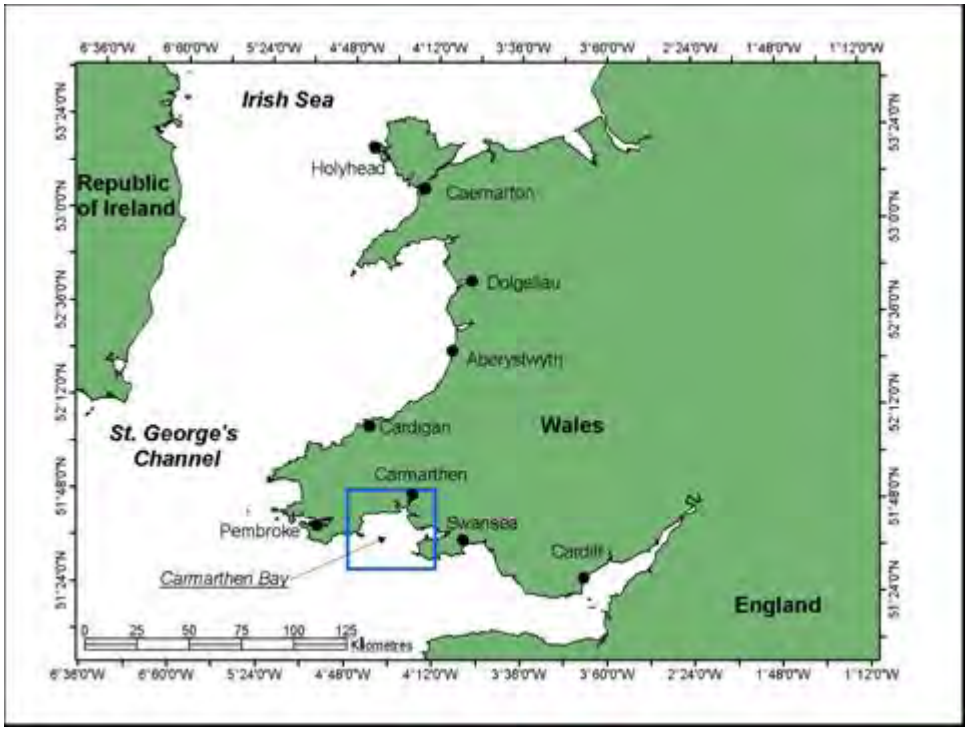
see also : www.habitatmarenatura2000.de



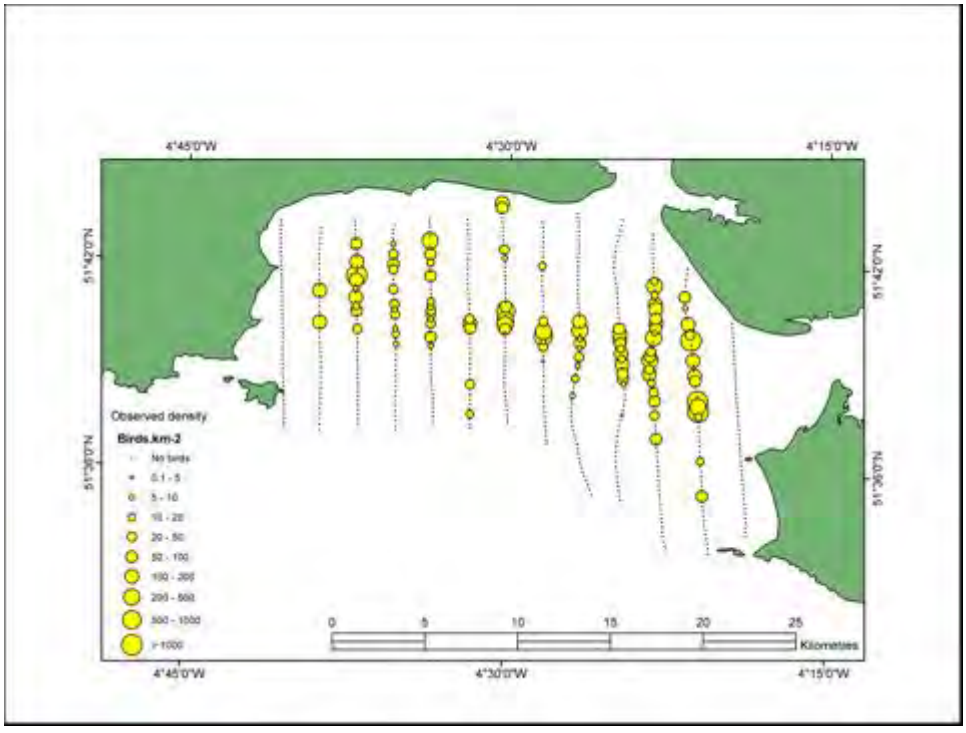

Alternatively, marine SPA boundaries may be identified by that part of the distribution that hosts a similarly agreed or operationally defined threshold of total or total estimated/modelled numbers of birds (e.g. Webb ***et al***. 2004a, see Box F).

**Box F. Determining the boundary of Carmarthen Bay SPA**

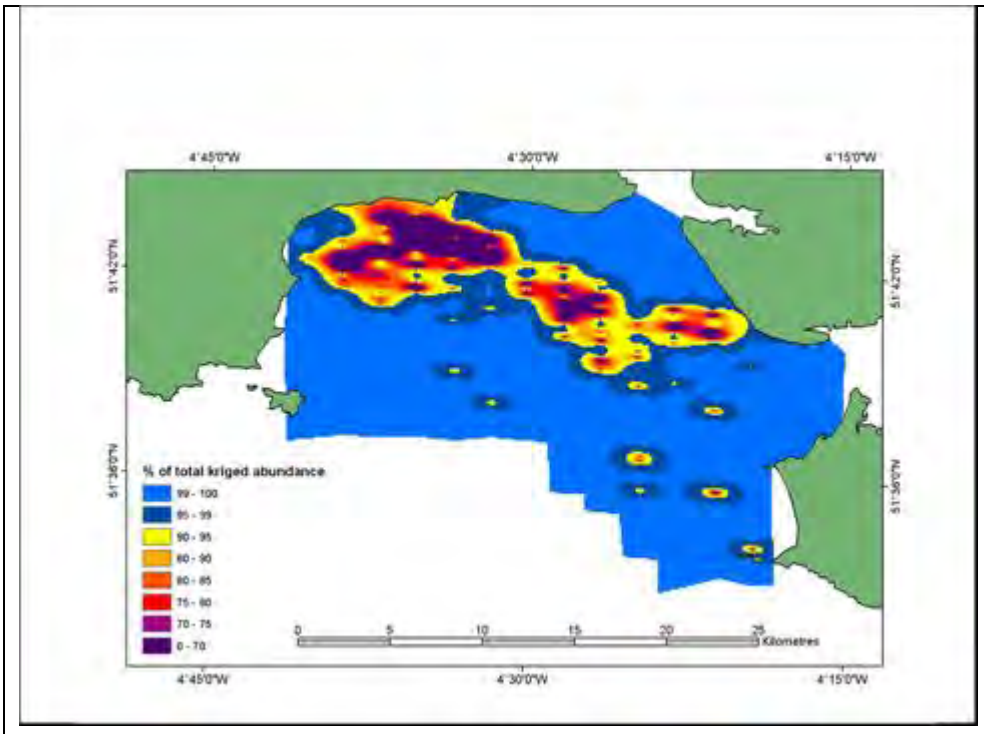
Carmarthen Bay, south Wales, hosts internationally important concentrations of Common scoter ***Melanitta nigra*** outside the breeding season.




Aerial surveys, deploying a atandardised methodology (Kahlert ***et al***. 2000) were undertaken over the area in winter 2001/02. Sampled densities of scoter were converted into total population size using distance methodology (Buckland ***et al***. 2001).




Scoter density was modelled throughout the survey area using kriging, a spatial interpolation method based on variography (Cressie 1991).




Recommendations for the seaward boundary of the SPA were made, such that 95% of the modelled population was contained within the boundary. See Webb ***et al***. (2004a) for full details of this case study. See also McSorley ***et al***. (2004) and Webb ***et al***. (2004b,c) for further details of the methods applied in identifying sites and boundaries for inshore concentrations of waterbirds outside the breeding season, including rules for the inclusion of satellite aggregations disjunct from the core aggregation.

Again, boundaries might be identified through analyses of the areas of sea that birds use to a "significant" degree (again operationally defined; see Box G).

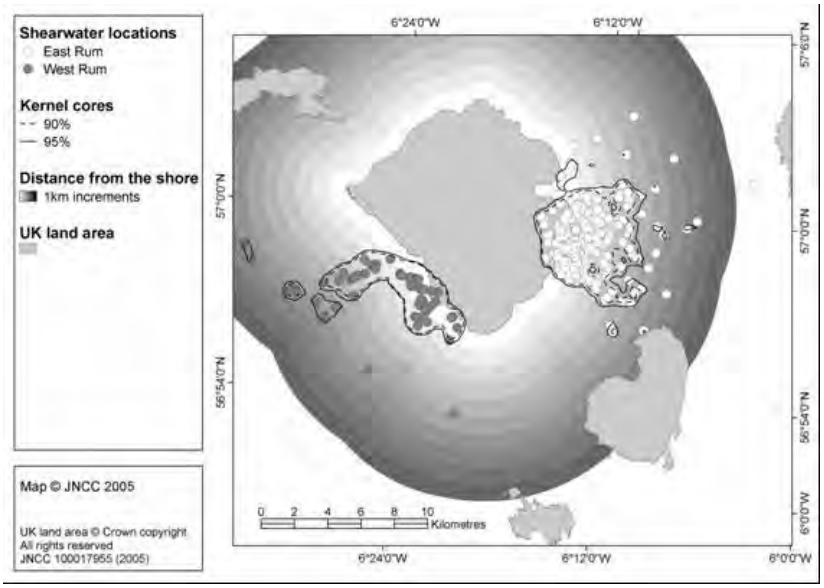
**Box G. Determination of possible SPAs for Manx shearwaters *Puffinus puffinus* using radio telemetry.**

Radio transmitters were attached to breeding Manx shearwaters at three existing terrestrial breeding colony SPAs in the UK – Bardsey, west Wales, Skomer, south-west Wales, and Rum, west Scotland. These birds form dense flocks ("rafts") on the sea before dusk before entering the breeding colony.





In order to identify likely boundaries for an extension of the existing SPAs into the marine environment, the results from radio-tracking birds in rafts were analysed using kernel analysis. This method aims to define the home range or area of greatest use of animals (Powell 2000).




Recommendations for seaward extensions to the SPA boundaries at these three colonies have been made based on the areas within which the birds appear to spend 95% of their time (McSorley ***et al***. 2005). Although an arbitrary proportion 95% seemed a sensible one for three reasons:
a) there was little difference between the 90% and 95% kernels at all three colonies;
b) 95% is a useful analogy with statistical significance (though it should not be confused with that);
c) it accords with other studies.

Of course, site boundaries may be identified with reference to known boundaries of habitats important for the species under consideration, which clearly depends on the availability of such data. Investigations incorporating two or more of these approaches might be particularly fruitful and lead to more robust solutions.

Where SPAs abut the terrestrial environment then the landward boundary placement may be determined by other, more practical considerations that are peculiar to the site.

Clearly, qualifying numbers of birds (see above) will be present in any area of the sea if that area is sufficiently large, so in order to identify more discrete areas, or the most important hotspots for each species, other optimisation techniques may be applicable to dispersion data from surveys, for example an appropriate formulation of the Marine Classification Criterion (Skov ***et al.*** 1995). The MCC ensures that qualifying numbers of birds are contained within appropriately sized (i.e with regard to the species' dispersive abilities) potential SPAs.

### *4.7.2. Cross-border SPA boundaries*

Boundaries for any SPA that extends into the maritime zones of two or more Member States will require to be the subject of co-operation between neighbouring Member States in order to ensure the integrity of the site and to avoid discontinuities in the boundary of a single feature. There will need to be agreement on the extent of the feature concerned at the junction of the Member State jurisdiction, as well as co-operation between policy makers of the individual States to aim to achieve some consistency of approach on boundary determination. Similarly, co-operation with non-Member States may be necessary, for example in the Baltic with Russia, in the Atlantic with Iceland and Norway, and in the Mediterranean Sea with several non-EU countries

# 5. MANAGEMENT MEASURES TO PROTECT MARINE NATURA 2000 SITES.

The management of marine Natura 2000 sites may present particular challenges due to the complexity of some sites as well as costs of working in this environment. The decision process of some actions to be implemented beyond the territorial sea may also be complex as more Community or international institutions are involved. On the other hand, the total number of stakeholders in these areas is normally less than in those close to the coast or on land. Adequate management schemes to address the threats and to ensure that conservation objectives are achieved have to be supported by appropriate monitoring systems.

This chapter considers the general management issues that frequently need to be addressed for marine Natura 2000 sites. It outlines the legal context for such management and protection of the sites, as defined in Article 6 of the Habitats Directive and for which the Commission has already provided interpretative and methodological guidance. A possible structure and content format for management plans is presented as a tool to assist in the management of sites and the management planning cycle considered. Different types of pressures on Marine Natura 2000 sites, relevant to the management and protection of sites, are identified and major human activities potentially affecting Natura 2000 sites are considered. This chapter is not exhaustive. Management issues related to fishing activities and Natura 2000 are considered in the following chapter. Several marine management case studies are given in this chapter. More examples and details are provided in Appendix 4.

## 5.1. The legal basis for protection. Community legislation's provisions in relation to management of ongoing activities and governing plans and projects for future developments.

The 'Conservation of natural habitats and habitats of species' section of the 92/43/CEE Habitats Directive addresses the establishment and conservation of the Natura 2000 network. Within this chapter, Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. This article has three main sets of provisions

- Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. The main objective is the maintenance or restoration of habitats and species at "favourable conservation status". Article 6(1) complements Article 4(4) of the Directive, which requires that, within six years from the adoption of EC lists of Sites of Community Importance (SCI), Member States designate SCI as SAC and establish conservation priorities. Within the same deadline, Member States must establish the necessary conservation measures involving, where necessary, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural values present on the sites. As for terrestrial based SACs and SPAs, management plans are a useful tool in managing the marine sites and facilitating the achievement of the objectives of Natura 2000.

- Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventative.

- Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site.

Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general protection and management regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

The protection requirements regarding Special Protection Areas (SPAs) are given in Article 4(4) of Directive 79/409/EEC which provides that, for those areas, ***'… Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article …'.***

After the entry into force of Directive 92/43/EEC the above obligations are replaced pursuant to Article 7 of Directive 92/43/EEC which provides as follows: '***Obligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof…'*** Thus, the provisions of Article 6(1) do not apply to special protection areas (SPAs). However, analogous provisions apply to SPAs by virtue of Article 4(1) and (2) of Directive 79/409/EEC. As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these now apply to already classified SPAs.

The European Commission has published two reference documents on management of human activities in relation to Natura 2000 sites[53]. The first one is entitled ***Managing Natura 2000 sites, the provisions of Article 6 of the 'Habitats' Directive 92/43/CEE***. This document aims at providing guidelines to the Member States on the interpretation of key concepts of Article 6 of the 'Habitats' Directive[54]. The second document ***Assessment of Plans and Projects Significantly Affecting Natura 2000 sites*** provides methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC in relation to assessment of plans and projects significantly affecting Natura 2000 sites (same rules for marine or terrestrial).

**Impact assessment:** Other relevant legislation governing the process of future development plans or projects likely to have effects on a Natura 2000 site is that relating to the assessment of the environmental effects of these activities. These Directives are:

- Council Directive 85/337/EEC of 27 June 1985 ***on the assessment of the effects of certain public and private projects on the environment***[55] (EIA Directive). The EIA procedure ensures that environmental consequences of projects are identified and assessed before authorisation is given. The public and environmental authorities must be consulted on the application for development consent and the environmental information, and the results of these consultations must be taken into account in the authorisation procedure of the project. The public must be informed of the decision afterwards. The Directive defines which project categories shall be made subject to an EIA, the procedure to be followed and the content of the assessment. It has been amended in 1995 and in 2003 (references in footnote)[56]

---

53 http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

54 Relevant Appendixes include i) Considerations on management plans ii) Considerations of plans and projects affecting Natura 2000 sites, iii) Standardized forms for submission of information to the European Commission according to Article 6(4), iv) Court case references and v) Examples of LIFE-Nature projects that have involved management

55 Official Journal NO. L 175 , 05/07/1985 P. 0040 - 0048

56 a): Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. Official Journal L 073 , 14/03/1997 P. 0005 - 0015
b): Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC

- Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 ***on the assessment of the effects of certain plans and programmes on the environment***[57] (SEA Directive)**.** This Directive requires the environmental effects of certain plans and programmes to be identified and assessed during the preparation of the plan or programme and before its adoption. As with EIA, the public and environmental authorities must be consulted and their comments as well as the environmental report must be taken in to account in the preparation of the plan or programme. Certain information must be provided when the plan is adopted, including details of the arrangements for monitoring the implementation of the plan or programme. A plan which has been determined to require an assessment under Article 6 or 7 of Directive 92/43/EC automatically also requires assessment under Directive 2001/42/EC but in appropriate cases arrangements can be made to combine these assessments into a single procedure complying with both Directives.

- Both Directives 85/337/EEC as amended and 2001/42/EC require consultation with any other Member State that might be affected by the project, or plan or programme as the case may be.

The Commission website[58] provides further information on the European Community's laws on Environmental Impact Assessment of projects and the Environmental Assessment of certain plans and programmes together with other related information, including guidance documents on both the EIA and SEA Directives. As regards Directive 85/337/EEC as amended, guidance documents are available in relation to screening, scoping, the review of environmental information and the assessment of indirect and cumulative impacts, as well as impact interactions. Commission Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment can also be downloaded from this webpage.



***Tursiops truncatus***[59]

Photo: GECEM. LIFE03 NAT F/000104

57 Official Journal L 197 , 21/07/2001 P. 0030 - 0037

58 http://ec.europa.eu/environment/eia/home.htm

59 ***Tursiops truncatus***: is a species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: Bottlenose dolphin; FR: Grand dauphin; ES:delfin mular; DE: Großer Tümmler

## 5.2. Conservation objectives

Conservation measures to be established will aim at maintenance or restoration of species and habitat for which the site has been designated, to favourable conservation status. The following box includes the definition of "favourable conservation status" concept, as established in the Habitats Directive provisions.

**Favorable conservation status (Habitats Directive provisions, art1)**

***Conservation status of a natural habitat***, in accordance with the Habitats Directive, is considered as the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species. It will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable.

***Conservation status of a species*** means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations. The ***conservation status*** will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

Possible natural features present in a marine Natura 2000 site, for which conservation objectives have to be defined, are found among the following:

1. Marine birds listed on according with Articles 4.1 and 4.2 of the Birds Directive
2. Habitat types listed in annex I of the Habitats directive (codes 11*, 12* and 8330)
3. Species listed in annex II (18 marine species, including fish, reptile, cetacean, and seal species)
4. Marine species listed in annex IV of the Habitats Directive. Sites are not designated on the basis of annex IV species presence basis but, if they are present in the site, they also will have to be protected under the provisions of Article 12 of Habitats Directive.
5. Marine species listed in annex V of the Habitats Directive. As above, sites are not designated based its presence. Nevertheless, they will also need to be protected under the provisions of Article 14 and 15 of Habitats Directive.

These features are identified in the Standard Data Form that Member States send to the Commission by the competent national authority via the national Permanent Representation for special protection areas (SPA), for sites eligible for identification such as Sites of

Community Importance (SCI) and for special areas of conservation (SAC) in accordance with the 97/266/EC Commission Decision of 18 December 1996.[60]

From this point it is the responsibility of the competent authorities in each Member State to define the objectives to be reached in terms of conservation status for these features[61]. A clear definition on conservation objectives with measurable indicators and an appropriate monitoring programme are major elements for the successful management of a Natura 2000 site.

Questions to be answered will include: What is the global objective? What are the specific objectives? What is to be protected and/or restored? What is the final agreed target protection level? What is to be done? Who will do it? In what timeframe? Some of these questions may appear obvious. Nevertheless, they are not always easy to respond to in a clear and operational way.

As for terrestrial based SACs and SPAs, management plans are a useful tool in managing marine sites, facilitating achievement of the Natura 2000 objectives. This is an important tool to help effective management decisions, including those aimed at avoiding significant disturbance.

### 5.3. Definition of conservation measures

Data from surveillance[62] and monitoring programmes should allow Member States to identify the conservation status of species and habitats present in the sites. Member States will also need to identify potential pressures. Thereafter, they will need to define appropriate maintenance and/or conservation measures to deliver favourable conservation status. In fulfilment of Article 6.1 of the Habitats Directive, they will need to establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites.

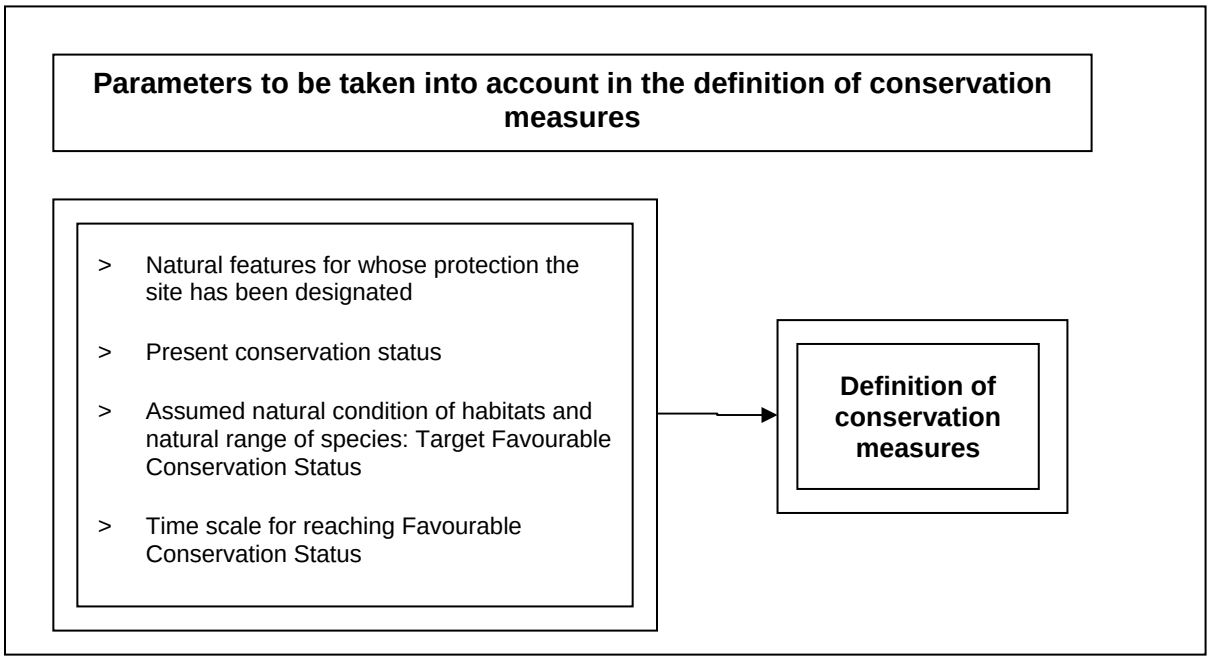
For the different features subject to protection in a given site, their conservation status at present, their target status and the time scale to reach it, are the driving elements for the definition of conservation measures to be taken.

---

60 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997D0266:EN:NOT

61 Competent national authority designated responsible for the management of the Natura 2000 site, as transmitted by Members States in accordance with the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107 , 24/04/1997. Standard data form in section*** 1.6 "RESPONDENT(S):"

62 According to Article 11 of the Habits Directive, "Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species."




## 5.4. Application of measures

Measures have to be applied by the relevant competent authorities. The identification of the competent authority depends on the type (e.g.: is it related to transport, geological exploitation, fisheries, tourism…) and the location of the measure to be taken -territorial waters or offshore–

Natural protected features subject to similar pressures need similar protection. Nevertheless, depending on the site location and the type of action, the responsibility for the implementation of these measures may be different. These responsible actors can be federal, national, European community or international institutions.

Therefore, the competent authority[63] in charge of the site has to identify the necessary conservation measures and the subsequent actors responsible for its implementation and enforcement. This Authority has to implement all measures under its competence and ask other responsible bodies to take action in areas for which they are competent. (See point 2.7 )

## 5.5. Management plans-contents

While the Habitats Directive does not specify the content of a management plan, there is already a lot of experience on this subject, which Member States are applying to Natura 2000 sites. In this regard, it is potentially an effective tool to help reach the conservation objectives of the site. Several regional organisations and NGOs have developed useful guidance tools to this end, outlining the structure of a management plan for a Marine Protected Area. One useful example of an outline Structure for a Management Plan is that proposed by OSPAR for

[63] National competent authority responsible for the management of the Natura 2000 site, as defined in the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107 , 24/04/1997. Standard data form, section 1.6 "RESPONDENT(S):"***

its network of marine protected areas. This is reflected in the following box. It is based on the IUCN model developed for this purpose[64].

**Example of a Management Plan:**

**Outline structure for an MPA of the OSPAR and HELCOM Networks**

1. **Executive Summary**
2. **Introduction**
   - 2.1 Purpose and scope of plan
   - 2.2 Legislative authority for the plan (national and international)
3. **Description of the site and its features**
   - 3.1 Regional setting: location and access
   - 3.2 Resources (facts pertinent to management; other data in an appendix or separate document)
     - 3.2.1 Physical: e.g., marine landscape features, currents, bathymetry, hydrology
     - 3.2.2 Biological: ecosystems (e.g., cold water coral reefs, seagrass beds); critical habitats (e.g., feeding, spawning); species (e.g., endangered, commercial, charismatic)
     - 3.2.3 Cultural: archaeological, historical, religious
   - 3.3 Existing uses (description, facilities, etc.)
     - 3.3.1 Recreational
     - 3.3.2 Commercial
     - 3.3.3 Research and education
     - 3.3.4 Traditional uses rights, and management practices
   - 3.4 Existing legal and management framework
   - 3.5 Existing and potential threats and implications for management (i.e. analysis of compatible or incompatible uses, solutions
   - 3.6 Existing gaps of knowledge
4. **The Plan**
   - 4.1 Goals and objectives (general and specific)
   - 4.2 Management tactics
     - 4.2.1 Advisory committees
     - 4.2.2 Interagency agreements (or arrangements with private organizations, institutions or individuals)
     - 4.2.3 Boundaries
     - 4.2.4 Zoning plan
     - 4.2.5 Regulations
     - 4.2.6 Social, cultural, and resource studies plan
     - 4.2.7 Resource management plan
     - 4.2.8 Education and public awareness
   - 4.3 Administration
     - 4.3.1 Staffing
     - 4.3.2 Training
     - 4.3.3 Facilities and equipment
     - 4.3.4 Budget and business plan, finance sources
   - 4.4 Surveillance and enforcement
   - 4.5 Monitoring and evaluation of plan effectiveness
   - 4.6 Time table for implementation
5. **Appendices (Proforma for the OSPAR MPAs Network, etc.)**
6. **References**

As regards Natura 2000 sites, the following considerations are relevant to such a plan structure.

[64] Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (Reference Number: 2003-18). http://www.ospar.org/eng/html/welcome.html. http://www.ospar.org/documents/dbase/decrecs/agreements/03-18e_Guidelines%20management%20MPA.doc. Marine and Coastal Protected Areas. IUCN, Gland: 370pp. and Kellerher, G. 1999.

**Purpose and scope (Outline structure, point 2.1),**

A clear identification and description of the features for which the area has been selected is a key element of a management plan. The key features for SPA designation are birds listed in annex I of the Birds Directive and migratory birds. The key features for SACs are habitat types listed in Annex I and/or habitats for species listed in Annex II of Habitats Directive. Species listed in Annex IV, if they are present in the site, should also to be taken into consideration in the SAC management requirements[65]. This information should be contained in the Standard Natura 2000 data form[66].

In the case of the marine environment, it would be a good and strategically useful management measure to consider, in addition to the key Natura 2000 features, habitat types and species covered in regional agreements protection lists, and areas containing habitat types and species of conservation concern that may, reasonably, be included in a further adaptation of the Habitats Directive annexes. Clearly, this consideration is not a mandatory obligation that Member States have under Community legislation. However, identification of all these complementary features, during the first marine geological survey campaigns carried out as part of the future SCI selection process, might be a relevant task to avoid duplication of works to be carried out in future. This approach will also favour the coherence of future marine protected areas under Natura 2000 and other sets of protected areas.

This approach will also contribute to enhancing the compatibility between Natura 2000 and other networks established under regional agreements/conventions (OSPAR, HELCOM or Barcelona). It will also facilitate the process of selection and management of future sites resulting from a more complete application of the Habitats Directive in the marine environment.

**Legislative authority for the plan (Outline structure, point 2.2)**

The Legislative authority ultimately responsible for the elaboration of a Natura 2000 site Management Plan is the National Authority[67]. It has a duty to establish the necessary conservation measures to ensure the favourable conservation status of the site. However, as outlined in point 2.7, responsible actors for the implementation of management measures can be Federal, National, European community or International institutions[68].

The responsible authority implements all measures under its competence and asks other bodies to take action in areas for which they are in charge. Management plan objectives and specific measures to be taken have to be agreed by all relevant actors.

**Description of the site and its features (Outline structure, Point 3)**

One of the key steps for the management of a Natura 2000 site will be the description and assessment of the conservation status of each of the identified features in the Standard Data Form, ideally with quantitative indicators. The definition of this "base line" is a major element for the definition of measures to be taken and for assessing their future effectiveness to ensure favourable conservation status.

---

65 (Sites are not designated on annex IV specie's presence basis but, if they are present in the site, they also will have to be protected under the provisions of Article 12 of Habitats Directive).

66 As defined in the Standard Data Form. (97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107, 24/04/1997).***
***http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/standard_data_forms/index_en.htm***

67 Legal basis: 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***Official Journal L 107 , 24/04/1997***

68 E.g.: Defence, mining, offshore prospecting, research, tourism are national competencies. Fisheries are a community competency. Some aspects of shipping regulation are dealt at international level by the International Maritime Organization (IMO)…

Another key element of a management plan is to understand the nature and interactions of potentially positive and negative external pressures and influences that will affect the global evolution of the conservation status of the features. The use of an impact matrix can be a useful way to gain better understanding of this problem (see chapter 5.8 below).

**Summary of LIFE co funded UK marine SACs Project**

The UK Marine SACs Project was set up to establish management schemes for selected marine Special Areas of Conservation (SACs). It focused on a selection of twelve coastal marine SACs around the UK and on developing specific areas of knowledge needed for the management and monitoring of European marine sites.

The website (http://www.ukmarinesac.org.uk/index.htm) communicates the experience and knowledge and outputs from the UK Marine SACs Project to a wider audience. All the documents and background information that have been published can be accessed through this site (http://www.ukmarinesac.org.uk/publications.htm). Details in appendix 4



## Monitoring and evaluation of plan effectiveness (Outline structure, point 4.5)

Once the site has been designated, Member States will take the necessary measures to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora for which the site has been designated. (Birds Directive Art. 1 and 4; Habitats Directive, arts.1 & 2)

For this purpose, a monitoring programme is necessary to assess the present condition of the site and to inform appropriate maintenance and/or restoration measures. National Authorities[69] are ultimately responsible for monitoring of sites (Habitats Directive, Article 11). Assessment of the effectiveness and appropriateness of enacted measures will permit the Authority responsible for the site to plan new activities to achieve conservation targets and to report on the conservation status of the site in accordance with the requirements of the Habitats Directive (Articles 11, 17…) and Birds Directive (Articles 4, 12..).

After thorough discussions with Member States, the Commission sent a document (DocHab-04-03/03 rev.3) to the Habitats Committee proposing a framework for assessment, monitoring and reporting of conservation status in view of preparing the 2001-2007 report under Article 17 of the Habitats Directive. This document was approved by the Habitats Committee on 20th

[69] National Authority responsible for the management of the Natura 2000 site, as defined in the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites ***OJ L 107 , 24/04/1997.***

on April 2005. It proposes a reporting format, evaluation matrices, definitions of key terms and a process between Member States and the Commission to accompany that process. More information may be found at: http://forum.europa.eu.int/Public/irc/env/monnat/home

WWF and the World Bank have developed a planning tool for management of protected areas entitled "***Score Card to Assess Progress in Achieving Management Effectiveness Goals for Marine Protected Areas. 2004***"[70]. The following table is included in this document. It has been built to provide some overall guidance in the development of assessment systems and to encourage standards for assessment and reporting.

TABLE 1
**Summary of the WCPA Framework**

| Elements of evaluation | Explanation | Criteria that are assessed | Focus of evaluation |
|---|---|---|---|
| Context | **Where are we now?** Assessment of importance, threats and policy environment | Significance<br>Threats<br>Vulnerability<br>National context | Status |
| Planning | **Where do we want to be?** Assessment of protected area design and planning | Protected area legislation and policy<br>Protected area system design<br>Reserve design<br>Management planning | Appropriateness |
| Inputs | **What do we need?** Assessment of resources needed to carry out management | Resourcing of agency<br>Resourcing of site<br>Partners | Resources |
| Process | **How do we go about it?** Assessment of the way in which management is conducted | Suitability of management processes | Efficiency appropriateness |
| Output | **What were the results?** Assessment of the implementation of management programmes and actions; delivery of products and services | Results of management actions<br>Services and products | Effectiveness |
| Outcome | **What did we achieve?** Assessment of the outcomes and the extent to which they achieved objectives | Impacts: effects of management in relation to objectives | Effectiveness appropriateness |

*Source:* Hockings et al. (2000)

**Wadden Sea – transboundary or international management**




The Wadden Sea is one of Europe's largest marine wetlands and is shared by **Denmark, Germany and the Netherlands.**

It holds numerous habitats that require protection under the Habitats Directive Annex I including:

• sandbanks, estuaries, mudflats, salt marshes and sand dunes

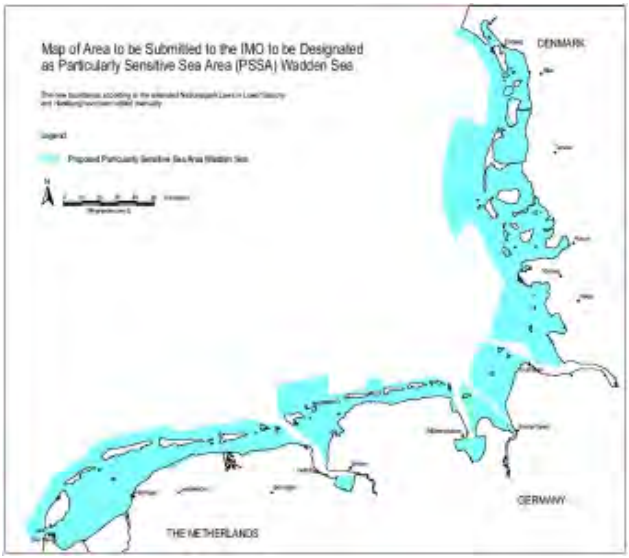
[70] http://www.icriforum.org/mpa/SC2_eng_nocover.pdf. (see Annex V)

These habitats are important areas for conservation as they represent nursery grounds for fish species, feeding areas for migratory birds and support many marine mammals (Harbour Porpoise ***Phocoena phocoena***, harbour seal ***Phoca vitulina***).

At the 1982 Wadden Conference, where the three concerned governments met, an Agreement was signed that they would consult each other and coordinate efforts in order to implement relevant EU Directives and other international legal intruments such as the Ramsar and Bonn Conventions.

Many conservation actions have been undertaken trilaterally since. The Seal Management Plan (SMP) is an example of a conservation project that arose from this cooperation and was strengthened by it. Among other actions, a number of seal reserves have been set up throughout the Wadden Sea. The SMP has been recognised as having played a big part in saving the harbour seal population and remains a useful tool for conservation.

***See Appendix 4 for more information***




http://www.waddensea-secretariat.org/news/publications/maps

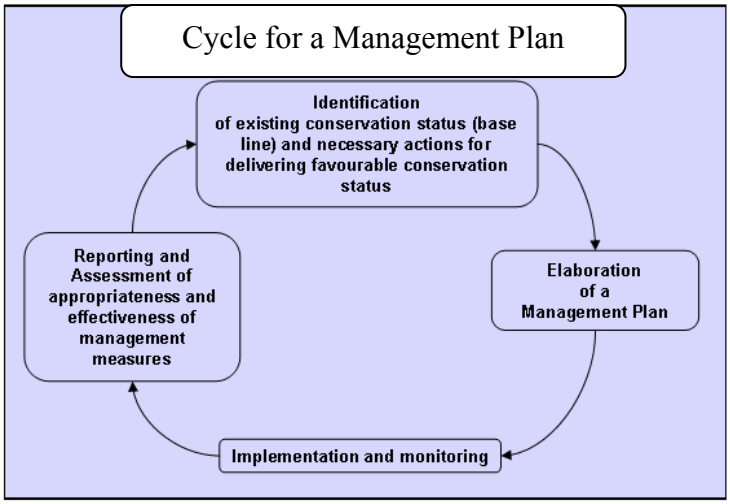


## 5.6. Time Scale for a Management Plan

Measures considered at the present time as being the most appropriate to maintain or to restore the favourable conservation status of a site will not necessarily be the same in the future. Nature, external forces acting on nature, scientific knowledge and conservation management techniques change over time.

Therefore, management plans have to be revised and/or updated in an appropriate time scale taking full account of changes that have occurred in the site. The plan should have a clear time horizon. Some Member States consider 10 years as a reference period for Management Plans of Nature Protected Areas. Regular monitoring of activities and more periodical assessment of their effectiveness will allow for the taking of intermediate decisions to adapt the action plans.

In general terms, climate change related impacts may be important for the evolution of marine protected Areas. This could be a relevant issue from long term management issues. Environmental changes related to climate change will need to be monitored and management decisions taken with an adaptive approach.




## 5.7. Pressures and impact of human activities.

A wide range of human activities may affect the marine environment. Several regional seas conventions have developed interesting listings of activities and some of the main effects that they might have on marine habitats and species[71]. The National authority responsible for the Natura 2000 site may need to regulate these activities to ensure the favourable conservation status of the features for which the site has been selected. Some examples of human activities and possible effects are:

**Examples of human activities and their effects on the marine environment**

**Human activities**

- Pollution: Chemical liquid pollution (chemical, nuclear, biological), organic and mineral waste (dredging activities)
- Exploration and extraction of mineral resources : Oil and gas, sand, gravel...
- Fisheries, aquaculture, harvest..
- Shipping, navigation, shipping infrastructures
- Military activities : Maneuvers, research, waste...
- Constructions: coastal and maritime, including pipelines, oil infrastructures and wind farms
- Tourism, recreational navigation and maritime sports...

**Effects of human activities**

**Physical**

- Substratum removal and change, turbidity, siltation,
- Waste diposal
- Noise disturbance
- Visual disturbance (birds...)
- Water characteristics changes (temperature, salinity, flow...)
- ....

**Chemical**

- Contamination from organic compounds (pesticides...), heavy metals, hydrocarbons, nuclear waste...
- Organic matter increase, nutrient changes (Coastal urban water waste, polluted rivers waste, agriculture drainage water, eutrophication in close areas...)
- ...

**Biological**

- Removal of target and non-target species
- Physical damage to species (inc. abrasion)
- Displacement (moving) of species
- Changes in population or community structure or dynamics
- Introduction of microbial pathogens or parasites
- Introduction of non-indigenous species and genetically modified organisms
- ...

[71] http://www.ospar.org/documents/dbase/decrecs/agreements/03-18e_Guidelines%20management%20MPA.doc Adapted from Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (Reference Number: 2003-18)

**Habitat restoration in the Azores supported by a Management Plan**

The Azores seabird assemblage is characterised by a transition between tropical and temperate birds and for this reason important for biodiversity conservation.

The following Azorian bird species are covered by the Birds Directive:

Madeiran storm petrel (***Oceanodroma castro***), Roseate tern (***Sterna dougallii***), Cory's shearwater (***Calonectris diomedea borealis***), Common tern (***S.hirundo***), Little shearwaters (***Puffinus assimilis***).

These species are threatened by introduced predators, disturbance from tourism, soil erosion and vegetation degradation which has led to a **loss of nesting habitat** and consequently breeding pairs.

Measures taken to increase populations:

- **Eradication** of the non-native rabbit
- Erosion control and **replantating of native vegetation**
- Contruction of **nest boxes** and artificial nests
- Information panels and nature warden to **raise awareness**.

Breeding numbers are now increasing as a result of these actions.

Praia islet now holds the **largest Common Tern colony in the Azores** with over 1000 pairs.

***See Appendix 4 for more details.***






***Source: Steve McConnell(EEA website)***

## 5.8. Impact assessment. The basic technique of the construction of matrices

Section 5.1, above, describes existing legal instruments concerning the process of assessment of the impact of development activities on the environment. Environmental Impact

Assessment (EIA) is a key instrument of European Union environmental policy. Since the passage of the first EIA Directive in 1985 (Directive 85/337/EEC) both the law and the practice of EIA have evolved. An amending Directive was published in 1997 (Directive 97/11/EC) and the European Commission have published three guidance documents reflecting current EU legislation and the current state of good practice. These documents concern three specific stages in the EIA process: Screening, scoping and EIS Review.

The aim of the above mentioned guidance is to provide practical help to those involved in these stages in the EIA process, drawing upon experience from around Europe and worldwide. By following the screening and scoping guidance, it is hoped that better decisions will be made on the need for EIA and on the terms of reference for the studies that are required, thus starting the EIA process off on a better footing. The EIS Review guidance aims to help developers and their consultants prepare better quality Environmental Impact Statements and competent authorities and other interested parties to review them more effectively, so that the best possible information is made available for decision making. Full information on this is found on the website of the Commission at:
http://europa.eu.int/comm/environment/eia/home.htm

In order to develop a systematic approach to management, it is useful to identify the sort of activities that could have "a priori" significant negative impacts on the site, including listing the activities (e.g: shipping, fisheries, wind parks, oil and gas exploration…) that could interact with the protected features of the site and effect the conservation status of the habitats types and species of community importance.

In such a context, several Member States use matrices as a tool for decision making. Each matrix should clearly show whether different external human activities are expected to have significant effects on specific conservation features. The following matrix is aimed to be considered as an example only. Real cases should be elaborated with existing Natura 2000 site features and foreseen human activities. Such matrices should be worked out and completed by specialists, preferably with the participation of stakeholders and ensuring that appropriate specialised knowledge is represented.

The matrices should contain all ecological features subject to protection and all users. Only relevant uses for that particular area/sub-area have to be indicated. The first dimension of the matrices concerns the ecological features for which the site has been designated.

In some cases it may also be relevant also to include elements (habitats or species) which are necessary for the favourable conservation status of the protected features under the Birds and Habitats Directives (e.g.: fish stock status needed for protected seals or birds…).

Not all individual marine habitats or species from the annexes of the Birds and Habitats Directives need to appear in the matrix, as they may be grouped according to similar sensitivities. Many species are sensitive to similar activities, and many activities have similar effects. For example, all shellfish species may be impacted by a dredger, beam trawl or other sediment disturbing activity.

The second dimension concerns human activities in relation to the specific sensitivity of the ecosystem.

Different activities/ users or stakeholders should be listed and grouped according to their possible interaction with habitats and species. Only relevant uses for that particular area/sub area have to be indicated. When describing the uses and their impacts it is important that specialists from different regions and backgrounds are involved. It is important to underline

that possible interactions refer to tangible (present or planned) activities rather than different economic sectors/ industries considered in global terms.

A matrix showing the two dimensions could look as follows (this is not filled in. For completed examples showing potential effects, see Annex 3 of this guidance document.)

| **An example of the use of the matrix<br>Site NNN** | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **Activities related to** | **Habitats** | | | **Species** | | | | **Other elements of conservation concerns but not listed in EC Directives** | | | |
| | 1110 sandbanks | 1170 reefs | 1180 leaking | Cetaceans | Birds eating | Birds eating | Phoca vitulina | Large fish | Large moluscs | Natural physical processes | selected species xx |
| **SPACE** | | | | | | | | | | | |
| windmills | | | | | | | | | | | |
| Harbours | | | | | | | | | | | |
| Art. islands | | | | | | | | | | | |
| Oil and gas exploration | | | | | | | | | | | |
| Oil and gas exploitation | | | | | | | | | | | |
| Shipping channels | | | | | | | | | | | |
| Pipelines/cables | | | | | | | | | | | |
| Military practice | | | | | | | | | | | |
| Tidal energy | | | | | | | | | | | |
| | | | | | | | | | | | |
| **FISHERIES** | | | | | | | | | | | |
| Bottom trawling | | | | | | | | | | | |
| Shell fishery/dredging | | | | | | | | | | | |
| Collection biogenic structures | | | | | | | | | | | |
| Pelagic fishery | | | | | | | | | | | |
| Seines, driftnet, line fisheries | | | | | | | | | | | |
| Set nets | | | | | | | | | | | |
| | | | | | | | | | | | |
| **MINING/DREDGING** | | | | | | | | | | | |
| Sand mining | | | | | | | | | | | |
| Gravel mining | | | | | | | | | | | |
| Channel dredging | | | | | | | | | | | |
| | | | | | | | | | | | |

Appendix 3 illustrates several examples of the technique of the use of matrices as a management tool for decision making in a Natura 2000 marine protected area.

## 5.9. Human activities in marine Natura 2000 sites

Human activities in marine Natura 2000 sites are regulated by the same provisions of the Habitats Directives as for the terrestrial areas. The provisions of Article 6 of the Habitats Directive apply if the effect of an activity, or a combination of them is likely to be significant.

The Communication from the Commission to the Council and the European Parliament of 24 October 2005, "Thematic strategy on the protection and conservation of the marine environment"[72] is also a relevant policy document in which different pressures to the marine environment are identified.

This communication takes into account the environmental quality of the seas and oceans, giving a summary and a more extensive description of the situation. It highlights that the marine environment is under a series of pressures. These include loss or degradation of biodiversity, changes in the ecosystem structure, loss of habitats, contamination by dangerous substances and nutrients, and the potential consequences of climate change.

Related pressures include commercial fishing, oil and gas exploration, shipping, water-borne and atmospheric deposition of dangerous hazardous substances and nutrients, waste dumping including dumping of dredged contaminated sediments, under water noise pollution and physical degradation of habitats due to dredging and extraction of sand and gravel.

Without being comprehensive, some possible effects of human activities on the marine environment are illustrated in the following paragraphs.

### *5.9.1. Alien Species*

Invasive alien species are identified as one of the key causes of loss in biodiversity for the EU and the world at large. Alien species can deteriorate natural habitats and disturb natural species found locally, changing natural conditions that can drive to significant economic and social impacts. In some cases, possible effects of alien species will have to be considered by competent national authorities when establishing management measures for a Natura 2000 site or planning future developments. Effectively, provisions of the Habitats Directive state that Member States are responsible:

- to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the area has been designated (Art 6.2),

- to agree to plans or projects only after having ascertained that they will not adversely affect the integrity of the Natura 2000 site (Art 6.3)

A relevant provision in this area is Article 22 of the Habitats Directive, which requires Member States to ***"ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction"***. However, the accidental, non-deliberate introductions and the introductions into non-wild environments would benefit from a more specific legislation.

Furthermore, under the Habitats Directive difficulties might arise if a species protected under a directive is native in one part of the Community but harmful or potentially problematic

[72] [COM(2005)504] http://europa.eu/scadplus/leg/en/lvb/l28164.htm

elsewhere. This was not envisaged when the Habitats Directive was adopted in 1992, but it could be an issue within the enlarged EU.

Ballast water from shipping, species travelling stuck to ship hulls, aquaculture activities are some of the most significant vectors for introduction of alien species in the marine environment.

**Ballast water:** The International Maritime Organization has adopted in February 2004 the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("Ballast Water Convention"). This Convention is open for signature by Member States from June 2004. Parties to this convention are required to prevent, minimize, and ultimately eliminate the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments.

The Convention provides an international framework for the management of ballast water and sediments, while allowing for regional interests to introduce additional measures to meet specific standards or requirements, consistent with international law. All ships designed to carry ballast water will be obliged to implement a Ballast Water Management Plan approved by the Administration (Flag State) and taking into account Guidelines to be developed by the IMO. By July 2005, three Member States (Finland, The Netherlands and Spain) have signed the Ballast Water Management Convention. More information can be found on the website: http://globallast.imo.org/index.asp.

**Aquaculture:** In the framework of the Biodiversity Action Plan for fisheries, (COM(2001)162, Vol. IV[73]), the Commission has taken initiatives to evaluate the potential impact of non-indigenous species in aquaculture. It supports the application of the International Council for the Exploration of the Sea (ICES) Code of Practice on introductions and transfer of marine organisms and the European Inland Fisheries Advisory Commission (EIFAC) Code of Practice and Manual of procedures for consideration of introductions and transfers of marine and freshwater organisms.

The Commission has prepared a proposal for management rules on the introduction of alien species in aquaculture in the framework of the Strategy for the sustainable development of European Aquaculture (COM(2002)511)[74], which takes into account the above mentioned considerations. This proposal for a Council Regulation (COM (2006) 154[75]) aims to introduce a permit system to regulate the movement tin aquaculture of alien and locally absent species (absent from a zone within the species' natural range). This proposal is expected to be adopted by the Council in the first half of 2007.

### *5.9.2. Pollution (including noise)*

Pollution of the seas is one of the biggest global threats to the marine environment and biodiversity conservation. It may also be a significant threat at local level. Therefore, the Authority responsible for the conservation status of the Natura 2000 site has to deal with this issue when establishing the necessary conservation measures for the site. In most of the cases, this will imply the involvement of external administrations responsible for management of continental waters, maritime traffic…

[73] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0162(04):EN:NOT
[74] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0511:EN:NOT
[75] http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0154en01.pdf

In the European environment, most pollution from the sea derives from land-based sources. Therefore, the implementation of the provisions of the Water Framework Directive will play a major role in enhancing the conservation status of the marine environment. This directive deals with all continental, transitional, and coastal water bodies. The global objective of EU Water Policy is to get polluted waters clean again, and to ensure that clean waters are kept in this state. More detailed information can be found on the website of the Commission[76].

Several relevant regional seas conventions, like the OSPAR, Helsinki Convention, Barcelona or Bucharest Convention, have developed strategies to reduce pollution in the sea. These strategies (e.g: Hazardous Substances Strategy adopted by OSPAR) set the objective of preventing pollution of the maritime area by continuously reducing discharges, emissions and losses of hazardous substances.

***Pollution types and causes***

Pollution can be categorized as ***(i)*** organic, ***(ii)*** microbiological, ***(iii)*** chemical, ***(iv)***nutrients ***(v)*** radioactive and ***(vi)*** physical (waste disposal, noise pollution…).

Pollution of the sea, the coastal zone and its wetlands by solid and liquid domestic/industrial products is a major problem in many countries as the lack of appropriate treatment is still common among Member States and third riparian countries sharing the same sea with the EU27. In particular, chemical and petrochemical industries concentrated around major coastal cities are a major source of pollution. Agricultural pollution from run-off containing high concentrations of nutrients -fertilizers-, pesticides and other agrochemicals also needs to be taken in consideration. Their combined impact on the health of habitats and on species can be extremely high in some marine areas. However, it should be noted that this is not always an irreversible effect, and biodiversity can be re-established to a considerable degree after the removal of the sources of pollution.

The Commission provides further information on the ***Europa*** web site[77] on the different pieces of water legislation (and related policies) in the European Community.

The International Convention for the Prevention of Pollution from Ships (MARPOL)[78] is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The MARPOL Convention was adopted on 2 November 1973 at IMO covering pollution by oil, sewage, garbage, chemicals and harmful substances in packaged form.

When planning future management measures, it may be relevant in some cases to address some pollution problems from shipping activities. In such a case, site managers may consider some useful tools provided by the London Convention (the Convention on the Prevention of Marine Pollution by Dumping of Wastes, 1972). The purpose of this Convention is to control all sources of marine pollution and prevent pollution of the sea through the regulation of dumping of waste materials. A so-called "black- and grey-list" approach is applied for waste, which can be considered for disposal at sea according to the hazard presented to the environment. For the blacklisted items dumping is prohibited. Dumping of the grey-list materials requires a special permit from a designated national authority to be undertaken under strict control and only after certain conditions are met. Other materials or substances can be

[76] http://ec.europa.eu/environment/water/water-framework/overview.html

[77] http://ec.europa.eu/environment/water/index.html

[78] http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#1

dumped after a general permit has been issued. However, this approach, adopted in 1973, will be replaced by the 1996 Protocol (pending four more signatories) which has no such differentiation. This revision is guided by the precautionary approach generally assuming that dumping of any substances could be harmful, unless proven otherwise. The 1996 Protocol has already been signed by many European coastal states. (see http://www.londonconvention.org/; http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf )

Dumping is a human activity that may be considered as a plan or project. Therefore, ad-hoc permits would have to be delivered in accordance with the provisions of article 6 (3) and (4) of the Habitats Directive if it is likely that such a plan or project would have a significant effect on a Natura 2000 site.

***Noise pollution***

For the United Nations Convention on the Law of the Sea [UNCLOS, Art.1.1(4)] "pollution of the marine environment" means ***the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities***. Noise is therefore to be considered as a form of pollution, being an energy, which is introduced in the environment.

Noise in the marine environment may be defined as the deliberate or incidental introduction of acoustic energy into the water column, from point sources or from those of diffuse origin.

There is a growing body of evidence that noise represents a significant pressure in the marine environment. Scientists affirm that low-frequency ambient marine noise levels have increased in the northern hemisphere by more than a hundred times over the last 60 years.[79] Undersea noise pollution comes from a variety of sources including propeller noise of ships, underwater exploration (hydro-acoustic methods), mining seismic operations, underwater constructions (piling, etc.), and various sonar techniques. Some of the key sources of anthropogenic undersea noise are activities in the following areas:

- Oil and gas research and exploitation: e.g Seismic airgun surveys (or similar techniques) to find fossil fuel deposits
- Active sonar systems for military or civilian purposes (e.g.: loud, medium, and low-frequency sounds produced by sonar devices that can travel for hundreds of miles).
- Supertankers cruise the oceans creating a sound pulse of 190 decibels or more at or below the 500Hz range; smaller boats such as tugs and ferries typically create a soundwave of 160-170 decibels[80]

[79] (a) low-frequency (< 1000 Hz) ambient noise levels that have increased in the northern hemisphere by two orders of magnitude over the last 60 years (3dB/decade). http://www.iwcoffice.org/_documents/sci_com/SCRepFiles2004/56SCrep.pdf. DOLMAN, S.J. and SIMMONDS, M.P. Note of some recent developments in the field of marine noise pollution, including controlled exposure experiments.

[80] Supertankers generate sound pressures of 190 dB relative 1 uPa at 1 meter. Decibels (dB) are always relative to a reference (Values in water cannot be compared directly to values in air, and the reference value should always be included to avoid confusion).

- So called "pingers" are devices that emit a shrill sound to scare away marine mammals (and other species) from fishing gears and aquaculture installations.

The above-mentioned different activities need to be regulated in accordance with the provisions of article 6 (3) and (4) of the Habitats Directive if they are likely to have a significant effects on protected features at a Natura 2000 site. Furthermore, the provisions of article 12 of the Habitats Directive, which includes an obligation to avoid deliberate disturbance, are also particularly relevant in such situation, as all cetaceans' species, being listed in Annex IV, benefit from a strict protection regime under the Habitats Directive.

Four zones of influence are commonly adopted in all work on impact of noise on marine animals[81]. This zonation may be relevant when planning the authorisation of some human activities in relation to Natura 2000 sites:

**Zone of audibility**

This zone is the largest and covers the area over which the noise source can be heard by a particular species. The fact that a sound is audible does not in itself imply that the animal is influenced by the noise. The zone of audibility is often used as a first approximation in determining possible impact, as it can be calculated with reasonably good accuracy, in contrast to the three other zones. However, this approach is likely to considerably overestimate the impact of the noise.

**Zone of behavioural disturbance**

This zone is the area where behaviour of a particular species is altered by the noise. The change in behaviour can be negative (avoidance), positive (attraction) or neutral (e.g. change of own sounds to reduce influence from noise). This zone is very difficult to estimate, as behavioural reactions (or lack of) may depend greatly on context and individual differences. It is often in this zone, that the significant impact on the animals are found, e.g. deterrence from important resources. It is thus critical to get good estimates of this zone for relevant species and relevant types of noise.

**Zone of masking**

Masking is a process where the addition of noise to the ever present background noise makes it more difficult for the particular animal to detect a particular sound (communication sounds, echolocation sounds, sounds from prey or predators etc.). Inside the zone of masking communication distances among individuals of a certain species may be smaller than outside the zone.

**Zone of physical injury**

This zone is only relevant for very high intensity sound sources, such as seismic air guns, explosions, pile driving, and sonars

In general, there is agreement on three main sources of noise in the ocean on a global/regional scale: motorized shipping, seismic exploration and the use of sonar devices for military or civilian purposes (not listed by priority). On a local scale, many other sources may be more significant than the three big ones. It is fundamental to realize that especially low frequency

[81] Richardson et al (1995). Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Hazard Investigations in Washington State [Federal Register: February 7, 2002 (Volume 67, Number 26)] [Page 5792-5796] http://www.epa.gov/fedrgstr/EPA-IMPACT/2002/February/Day-07/i2998.htm.

sound travels very well in water and that loud low-frequency sounds may be audible to animals over very large areas (up to the scale of entire ocean basins).

This may have important implications in relation to management of protected areas, as noise sources imposing significant negative impact on animals inside the protected area could be located tens or hundreds of kilometers away.

### *5.9.3. Exploration and extraction of Oil and Gas resources*

Member States and regional seas conventions have been working for many years regulating oils and gas extraction activities in order to minimise any adverse effects on the marine environment. In June 1988 the then Paris Commission adopted guidelines for monitoring methods to be used in the vicinity of platforms in the North Sea. These guidelines were based on the overall objective of environmental monitoring, namely to assess the effects and extent of discharges of oil-based drilling fluids made at that time.

Since then, the use and discharge of oil-based drilling fluids, the discharge of drill cuttings containing drilling fluid and the discharge of produced water have all been regulated. New field developments have occurred and new production technologies have been introduced. Some installations have turned into biologically diverse and productive reefs, both in terms of biomass and fish. A coordinated chemical and biological effects monitoring programme is essential in identifying the nature and extent of potential environmental impacts.

Several monitoring studies have been carried out and published at national level. Some regional organisations have also developed useful documents providing Guidance for Monitoring the Environmental Impact of Offshore Oil and Gas Activities (e.g.: OSPAR[82]).

For the Mediterranean Sea, it is relevant to note that the Barcelona Convention has given rise to the ***Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*** (Pending ratification, not yet in force)[83]

As for other sectoral activities, the effects of new programmes or projects related to oil and gas sector developments need to be evaluated in accordance with the Article 6 provisions of the Habitats Directive. Article 6 (3) and (4) of the Directive provide a balanced framework to ensure that the development of the oil and gas sector activities takes place in a framework which is compatible with the protection needs of the Natura 2000 network. Therefore, the inclusion of a site into the network Natura 2000 does not, a priori, exclude its future economic use.

Negative potential effects of visual impact, noise, disposal of waste material, etc. need to be taken into consideration. Effects of noise produced during research activities also need to be addressed in an appropriate way. Paragraph 5.1 above provides more detailed information related to these provisions of the Habitats Directive.

### *5.9.4. Fisheries.*

In March 2001 the Commission produced a Communication [COM(2001) 143 final] to the Council and the European parliament presenting relevant Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy.[84]

---

82 http://www.ospar.org/eng/html/welcome.html

83 http://www.unepmap.org/Archivio/All_Languages/WebDocs/BC&Protocols/BCP_originals/ProtocolOffshore94_Eng.pdf

84 http://eur-lex.europa.eu/lex/LexUriServ/site/en/com/2001/com2001_0143en01.pdf

This document illustrates how different fishing activities, including aquaculture, interact with the marine environment in various ways:

- directly, by removing both target and by-catch species, which may lead to an unfavourable conservation status of some of them, possibly leading to their extinction or local extirpation;
- indirectly, by modifying the energy flow through the food web, which may affect the conservation status of other species of the ecosystem (e.g.: the removal of prey items may pose conservation problems to predatory species);
- directly (e.g. bottom trawling) or indirectly (e.g.: sediments or waste from some aquaculture installations) by modifying the physical environment and threatening the diversity of habitats which may in turn have an effect on their potential to host both commercial and non-commercial species;
- environmental changes, either due to natural causes or to human intervention, which in turn affect the productivity of marine ecosystems and hence fisheries.

Many examples of these effects illustrate why there is a need for full integration of environmental considerations into fisheries management. Beyond the legal obligation derived from the Treaty, there is an ethical obligation to ensure that these effects do not become large, unmanageable, or irreversible[85]. The effects of aquaculture may also include:

- Impact related to the transfer of anti-biotic and anti-fouling substances, excess organic matter, nutrients and pathogens between aquaculture facilities and the wild.
- Introduction in the wild of individuals as escapees which are genetically different from the local populations of the same species.

### *5.9.5. Shipping*

The greater part of the world's trade by volume is carried by ships. Shipping is one of most energy efficient and least environmentally damaging forms of commercial transport[86]. Nonetheless, when major shipping casualties occur these can have extremely damaging consequences to the marine environment. Worldwide, there have recently been serious incidents involving oil tankers the ***Nakhodka*** (1997), ***Erika*** (1999) and ***Prestige*** (2002). To deal with such eventualities, States can prepare themselves to protect the waters for which they are responsible by taking a range of actions in advance:

- preparing national contingency plans, consistent with the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention)[87]. These contingency plans should include protection measures to prevent/ minimise effects of oil pollution in marine protected areas, in line with the provisions of Art 6.(1) and (2) of Habitats Directive;
- participating in international assistance and co-operation arrangements of a bipartite (e.g. the Manche plan, which is a joint maritime contingency arrangement involving France and the UK), multipartite or regional nature (e.g. the Bonn Agreement, which

[85] http://eur-lex.europa.eu/lex/LexUriServ/site/en/com/2001/com2001_0143en01.pdf, Point 2.
[86] Considering the unitary impact on the environment (e.g.: environmental effects of transporting 1m3 for 1km by ship in relation to rail, road or air transport)
[87] http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=682

is the regional co-operation agreement of the States bordering the North Sea), again consistent with the OPRC Convention Routing measures;

- achieving agreement in the forum of the International Maritime Organization (IMO) on ships' routing measures to reduce the risk of groundings or collisions;[88]
- establishing shore-based stations to monitor vessel traffic,
- ensuring that powerful tug boats ("emergency towing vessels") are available, so that they can go out and assist vessels which lose motive power; establishing arrangements under which a ship which requires assistance, and whose condition needs to be stabilised, can be brought in to a place of refuge.

All of these actions are valuable as a means of reducing the risk of pollution from a major shipping casualty. Such major accidental ship-source pollution incidents are mercifully rare. However, there are a number of small pollution incidents of an operational nature that are statistically more significant. The key actions that States can take to prevent operational pollution are:

- ensuring that, in their ports, reception facilities are available for the types of waste which are generated on board ship – thereby leaving no excuse for ships to resort to illegally discharging their waste at sea;
- carrying out surveillance (either aerial or satellite) to identify ships carrying out acts of pollution;
- having an effective enforcement regime in place, so that ships identified as carrying out acts of pollution are prosecuted.

The impact on marine life from oil pollution goes beyond the visible effects, such as oiled birds and beaches. Some areas act as spawning or nursery grounds for fish or as harvesting grounds for wildlife populations and human economic activities. By oiling marine and coastal habitats, even temporarily, there can be a significant impact on fish stocks, migratory birds and local human communities that depend on fishing and tourism.

Several maritime areas in Europe [e.g. the Danish straits, Baltic Sea, the English Channel (including the Brittany coast), the Galician coasts, the Straits of Gibraltar and the Aegean Sea] have some of the densest maritime traffic in the world. During recent decades the levels of shipping traffic have not only increased, but the nature of the traffic has also changed. The number of tankers has increased and their size has grown.

There will be areas of overlap between marine Natura 2000 sites and dense maritime traffic areas (some already designated sites are there). In such cases, Member States will have to pay particular attention to ensuring the necessary measures are taken to protect these sites from potentially damaging activities linked to shipping, through preventive programmes and emergency action plans to minimise the negative effects in case of accidental or deliberate ship-source oil spills.

[88] For IMO, creating the conditions in which international shipping can operate safely, securely and with a minimal impact on the global environment remains the Organization's mission.

**HELCOM launches the Maritime Accident Response Information System (MARIS)**



The MARIS system is used to display available data on response, emergency and aerial surveillance capacities; on the sensitivity of the coastline to oil pollution; on ship traffic and other relevant issues.

MARIS is considered to be a useful tool for the collection and display of information, as well as for risk assessment in the response field. The system can be used to view different oil spill risks and response related datasets over a common background map and indifferent combinations. MARIS also allows officials and other experts in each country to make accurate assessments of maritime risks and response resources in their own areas, based on their knowledge and expertise of local conditions MARIS is now available through the HELCOM web site

(http://www.helcom.fi/gis/maris/en_GB/main/).

Courtesy: HELCOM Press office

In these areas, it may also be appropriate to regulate vessel traffic. In such cases, Member States should ask the International Maritime Organization (IMO[89]) to consider designating a "Particularly Sensitive Sea Area" (PSSA) to include this Natura 2000 site (or group of sites) thus decreasing the harmful effects of international shipping.

A Particularly Sensitive Sea Area (PSSA) is an area that needs special protection through designation by IMO because of its significance for recognized ecological, socio-economic or scientific reasons and which has been demonstrated to be vulnerable to damage by international maritime activities. PSSA status can be used to protect valuable marine and coastal habitats as well as marine wildlife, and to improve maritime safety. Guidelines on designating a "particularly sensitive sea area" (PSSA) are contained in IMO resolution A.927(22). ***Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas***.[90]

A significant policy measure taken by the European Community to increase the marine security has been the establishment in March 2004 of the European Maritime Safety Agency[91].

This Agency will provide Member States and the Commission with technical and scientific assistance in the field of accidental or deliberate pollution by ships and provide additional support, on request, to the pollution response mechanisms of Member States, without prejudice to the responsibility of coastal States to have appropriate pollution response mechanisms in place and respecting existing cooperation between Member States in this field.

---

89 The International Maritime Organization (IMO) is the international UN body regulating commercial shipping and maritime trade. The United Nations Convention on the Law of the Sea affirms the rights of a coastal State to take measures on the high seas to prevent mitigate or eliminate danger to its coastline from a maritime casualty.

90 http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10469/927.pdf

91 Regulation (EC) No 724/2004 of the European Parliament and of the Council of 31 March 2004 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency (Text with EEA relevance) Official Journal L 129 , 29/04/2004 P. 0001 – 0005. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0724:EN:NOT

### *5.9.6. Electricity power generation at sea: Wind farms and other infrastructure types*

Electricity power generation at sea has already been studied for decades in European waters. After some initial experiences on coastal energy generation techniques, based on intertidal energy[92], there is now a growing interest in the development of offshore wind-power installations. Experiments are also underway on wave-power and undersea marine current generators.

Wind energy is an important potential source of energy in the context of the EU's target, under Directive 2001/77/EC[93], to ensure that the increase of the overall share of renewable energy in electricity generation rises from 14% in 2000 up to 21% in 2010.

For wind farm development projects, efforts are focused on finding convenient sites with sufficient wind energy and low human population. Wind-power generation is generally cost-effective when average wind speeds exceed 5 – 6 m/s. Problems with this technology include the space required as well as visual and noise impacts[94]. In addition, there may also be the risk to biodiversity specially to birds from collisions, arising from such installations. Some countries (e.g.: Denmark, Spain, Portugal…) have also developed a significant number of terrestrial wind farms some of which are built in coastal areas.

There are plans in several countries to construct offshore wind parks. Denmark, Germany, the Netherlands, UK, Spain and other Member States have significant programmes in this area (with up to 400 turbines per farm) to be built within the next five years.

The effects of these infrastructures need to be properly evaluated in accordance with the provisions of Article 6 of the Habitats Directive for any potential significant effect on species and habitats of Natura 2000 sites. Potential effects, including visual impact, collision, noise, electro-magnetic consequences need to be taken into account.

At present, there is no evidence that noise levels coming from existing wind farms have a significant effect on seals and porpoises (Madsen et al, 2005), but future taller and larger turbines could be noisier. However, important noise intensity levels may be reached during wind farm construction activities. They are of the same nature as those from other off-shore construction activities and are thus not specifically linked to the wind turbines as such.

An ***ad hoc*** working group on Wind energy and biodiversity has been set up by DG Environment and DG Energy and Transport Commission services with the view to produce a guidance document to help ensure that wind energy developments are compatible with the nature conservation requirements of the EU and other relevant international nature legislation applicable in Europe.

### *5.9.7. Military activities*

Some military activities may significantly effect the marine environment. The most widespread current concerns are about the impact of sonar activities on marine mammals. The military technological sector is developing more and more sophisticated and powerful active sonar systems to identify the increasingly silent submarines. The sound produced by lower frequencies can travel hundreds of kilometres under water. As cetaceans (dolphins and whales) have very sensitive audition, echolocation and vascular systems, the utilisation of

---

92 An example of tidal power station (240 MW) is located on the Rance estuary, near St Malo in Brittany; it commenced operation in 1967.

93 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. Official Journal L 283 , 27/10/2001 P. 0033 - 0040

94 Kruckenberg and Jaene, 1999. (Zucco and Merck, Ökologischer Effekt von Offshore-Windkraftanlgen, 2004)

powerful sonar systems can be harmful for these species. These sonar sounds may also have an impact on fish and fish behaviour.

All cetacean species, listed in Annex IV of the Habitats Directive, benefit from a strict protection regime under Community legislation in European waters. Therefore, the provisions of article 12 apply to the protection of cetaceans, including the obligation to avoid deliberate disturbance in all EU waters (inside and outside Natura 2000 sites). Different Member State navies have developed policy initiatives for the use of military sonar taking into account the need to minimise potential environmental effects. Several precautionary actions have been carried out on this issue, launching appropriate studies and creating precautionary zones where use of these sonar activities[95] is restricted**.**

In relation to the protection of Natura 2000 sites, it is to be considered that for new military plans or projects that might have significant negative effects on them, Article 6 (3) and (4) of the Habitats Directive provides a balanced framework to solve possible conflicts of interest between military activities and nature protection issues.

The relevant duties for Member States when applying the Birds and Habitats Directives in the sea are covered in section 2.6.2 and 5.1 above.

Actions to protect the marine environment should be carried out respecting existing international legislation mainly regulated under the UNCLOS framework. This includes specific provisions in relation to particular rights and obligations of warships. Some legal aspects of this section are complex and go beyond the purpose of this document.

LIFE-Nature has financed two large projects where management planning in areas subject to military activities is being developed in a strategic manner and with Natura 2000 in mind. More information on this topic can be found on
http://europa.eu.int/comm/environment/life/infoproducts/lifeandmilitary_en.pdf

### *5.9.8. Coastal developments. Integrated Coastal Management*

Compared with other continents, Europe has a large continental shelf and a relatively long coastline (89 000 km) in comparison to its land area. More than 50% of the European population live within 100km from the coast. Large parts of the coastal zone of Europe have been (or are now being) rapidly converted from a natural to an urbanised state, through housing expansion, construction of economic/recreational and other facilities, and technical infrastructure, such as harbours, airports and road networks.

This results in total destruction and fragmentation of valuable habitats. Most of the constructed and planned infrastructures are devoted to supplying facilities requested by the tourist industry. However, this degrades the very resource on which they rely: the beauty and attraction of a pristine natural environment. In addition, unregulated land use changes generate further problems of conflict with tourist activities.

These infrastructures cause the modification of sedimentary coastal dynamics, affecting the marine environment. This can result in the destruction of large areas of valuable marine coastal habitats, such as ***Posidonia oceanica*** meadows and maërl beds. Special mention should be made to some unregulated sand extraction activities for the needs of civil works or to build artificial beaches; the potential deleterious effects of this on sensitive marine ecosystems have been repeatedly demonstrated in the Mediterranean littoral. Another case of

[95] (German Symposium on noise disturbance -June 2003; Spain Defence Ministry and Canary Athorities agreement for avoidance of noise disturbance/behaviour modifications of Cuvier's beaked whale -***ziphius cavirostris***- OJ 102 27/04/2004, page16.643 ***http://www.boe.es/boe/dias/2004-04-27/pdfs/A16643-16645.pdf*** ).

the physical alteration of the sea bottom is the effect of installing pipelines and sewage discharge outfalls.

The EU Recommendation on integrated coastal zone management (ICZM) recognises the threat posed to Europe's coastal zones by increasing urbanisation and invites Member States to control additional urbanisation and to ensure that exploitation of the non-urban areas respects the natural features of the coastal environment. In more general terms, the EU ICZM recommendation introduces principles and strategic aspects upon which coastal management should be based. These include:

- the protection of the coastal environment, based on an ecosystem approach and preserving its integrity and functioning, and sustainable management of the natural resources of both the marine and terrestrial components of the coastal zone;

- working with natural processes and respecting the carrying capacity of ecosystems, which will make human activities more environmentally friendly, socially responsible and economically sound in the long run[96].

In relation to tourism in particular, carrying capacity assessment has been developed as a tool to contain development within sustainable limits[97]. Environmental assessment constitutes a major tool to achieve integration of environment concerns into specific development projects, programmes or plans. Coastal zones are among the sensitive areas specified by the Environmental Impact Assessment Directive (Annex III) which need to be taken into account in determining whether project must undergo EIA. The Strategic Environmental Assessment Directive comprises in its scope plans and programmes relating to spatial and land-use planning, tourism, transport, energy, industry and fisheries.[98]

Appropriate assessment and the EIA and SEA Directives are tools in which interference with sedimentary processes can be addressed. The pan-European project ***EUrosion*** provided for guidance on EIA and coastal erosion.[99]. This Shoreline Management Guide is an initiative that aims at providing coastal managers at the European, National and - most of all - regional and municipal levels with a state-of-the-art of coastal erosion management solutions in Europe. It is based on the review of 60 case studies, deemed to be representative of the European coastal diversity. It illustrates some of the major issues that may be encountered in deciding which coastal erosion management design is best suited to an area.

### *5.9.9. Dredging. Gravel and sand extraction*

Dredging of shipping lanes or extraction of gravel and sands for construction or beach nourishment purposes are human activities that need to be assessed, as regards the possible impacts on and near the place of operations and, in some cases, also as regards possible coastal erosion aspects.

Dredging is recognised as having the potential for significant environmental impact. Whether in the dredging operation or in the disposal stage, care must be taken to minimise disturbance to marine life. Also, the dredged material should not be regarded simply as waste. Consideration has to be given to the potential beneficial use of the material in some cases. With increasing environmental awareness and tightening legislative control, finding a suitable site to relocate the dredged material can be a major constraint on the implementation of a dredging project.

---

96 2002/413/EC, OJ L 148, 6.6.2002, p.6 ; Chapter I (a), Chapter II (e), Chapter IV.3 b(i).

97 http://ec.europa.eu/environment/iczm/home.htm ; http://www.pap-thecoastcentre.org/publications.html

98 http://ec.europa.eu/environment/eia/home.htm

99 http://ec.europa.eu/environment/iczm/home.htm; www.eurosion.org

As many of the European ports are located in estuaries that are protected under Natura 2000 there is particular interest in the issue of developing guidance on the management of dredging activities and conservation of this habitat type. The Commission services have undertaken work with Member States and key stakeholder groups to help reconcile these objectives.

In relation to the Natura 2000 network, it is to be considered that possible effects of these human activities need to be properly evaluated in accordance with provisions of Article 6 of the Habitats Directive for their potential significant effect on species and habitats in Natura 2000 sites.

In the last decade, advice by HELCOM, OSPAR and ICES was given on sustainable extraction practices, environmental impact assessment, monitoring and restrictions for the granting permits in sensitive areas. In 1998 HELCOM adopted Recommendation 19/1 on marine sediment extraction in the Baltic Sea (BSEP No. 76, 1999). The ICES working group on the effects of marine sediment extraction (WG EXT) recommended a code of practice, which was updated in 2001 (ICES Coop. Res. Rep No. 247, 2001). The contracting parties of OSPAR agreed in 2003 to adopt the ICES guidelines (OSPAR 03/17/1, reference number: 2003-15).

The Barcelona Convention has adopted in 1994 a ***Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil***. [100]

### *5.9.10. Tourism, recreational navigation, maritime sports, diving…*

More than 200 million tourists per year visit the European coasts (most of them the Mediterranean Sea), leading to huge and often uncontrolled development of recreational activities, mainly in coastal areas and shallow water, in particular during summer.

Over-exploitation by tourists of natural, well-conserved sites constitutes a real problem in some coastal plains by their action of trampling, noise, lighting, etc., or more specific issues, such as disturbing turtle nests due to off-road 4x4 vehicles…. In the marine environment, the main problems are the destruction of intertidal and shallow subtidal bottoms, and the presence of divers at unsustainable levels, causing erosion of sensitive ecosystems, such as coral reefs, or the modification of fish behaviour due to feeding practices.

In recent years, the growing success of sea-watching activities is becoming a potential source of impact for whale and other cetacean populations and such activities need to be carefully managed. More information and references may be found in a guidance document published by ACCOBAMS ***"Guidelines for commercial cetacean-watching activities in the ACCOBAMS area"*** [101].

| **Tourism and marine nature conservation. Good practices example:**<br><br>**Whalewatching in Ireland.** |
|---|
| Irish waters are among Europe's richest for cetaceans, with |

[100] http://www.unepmap.org/homeeng.asp

[101] See the "Guidelines for commercial cetacean-watching activities in the ACCOBAMS area" (available at http://www.accobams.mc/).

24 species recorded to date.



Whalewatching is one of the fastest growing tourism industries in the word and the potential in Ireland is considered hugely under-developed.

The Irish Whale and Dolphin group (IWDG) supports the development of responsible whalewatching in Irish waters.

Whalewatching can bring economic benefits to coastal communities and can enhance the conservation status and public awareness of whales and dolphins. However, as all whale and dolphin species in Ireland are protected (by national and Community legislation), thus in order to achieve the development of responsible whalewatching, which brings positive benefits to people and whales and dolphins, a development plan is necessary.

Whalewatching is one of the most rapidly expanding tourism products in the world and Ireland with its rich diversity and great abundance of whales and dolphins is well placed to exploit this new tourism product.

The IWDG are encouraging national, regional, and local tourism and development agencies to embrace the opportunities for whalewatching and ensure it is developed sustainably and has a positive impact on whales and dolphins as well as coastal communities. A relevant whalewatching policy document may be downloaded in http://www.iwdg.ie/downloads/WWPolicyDocument_final.pdf

## 6. LINKS BETWEEN COMMUNITY POLICY ON FISHING AND THE *"HABITATS"* AND *"BIRDS"* DIRECTIVES.

In response to a request of the Fisheries Council, a Communication from the Commission [COM (2002) 186 final[102]] was issued in May 2002, setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy (CFP). This Action Plan defines guiding principles, management measures and provides a work programme, aimed at promoting sustainable development. It identifies several priority management actions; a number of which support objectives and requirements of the Habitats and Birds Directives. (e.g.: reducing incidental bycatch, impact on habitats…)

This Communication also encourages Member States to fulfil their obligations under the nature protection Directives within the shortest possible period, in particular those relating to the designation and management of marine sites forming part of the Natura 2000 network.

The EC Regulation for conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (CFP[103]) provides an important tool to improve the protection of nature in the marine environment and the attainment of objectives of the Birds and Habitats Directive. Section 2 above covers other relevant instruments of environmental policy for the improving of the marine environment. These include the Water Framework Directive[104], Environmental Impact Assessment Directive (EIA)[105]…

### 6.1. The Common Fisheries Policy

Since 1 January 2003, the European Union has a new Common Fisheries Policy. The principal text is Council Regulation (EC) N° 2371/2002 of 20/12/2002 mentioned above. The integration of environmental protection requirements into the Fisheries Policy, pursuant to Article 6 of the EC Treaty, was one of the major objectives of the Community legislator while adopting this Regulation.

The aim of the new Common Fisheries Policy (CFP) is to ensure exploitation of living aquatic resources in a way that provides sustainable economic, environmental, and social conditions. For this purpose, the precautionary principle is introduced, the progressive implementation of an eco-system approach to fisheries management is foreseen[106], as well as the need for the adoption of coherent measures concerning the limitation of the environmental impact of fishing.[107]

In the context of this legal framework, a number of measures have been taken to improve the conservation status of habitats and species in the marine environment during the last few years. These include:

In 2003, the Council adopted the shark finning Regulation ((EC) 1185/2003). It is intended to prevent catches of sharks for the sole purpose of trading the fins.

---

102 http://ec.europa.eu/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_186_en.pdf

103 CFP: Council Regulation (EC) N° 2371/2002 of 20/12/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L358, p. 59 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R2371:EN:NOT

104 http://ec.europa.eu/environment/water/index.html

105 http://ec.europa.eu/environment/eia/home.htm

106 Article 2 (1) of Regulation 2371/2002.

107 Article 1 (2), point b of Regulation 2371/2002.

- The three-year sandeel closure in force off the Firth of Forth (Scotland) since 2000 was renewed in 2003 following an expert consultation meeting convened by DG FISH. A study had been completed suggesting that the closure be extended for three more years until new evidence is gathered on the effects of the fishery on the survival of predator populations (birds, marine mammals, large fish).

- In 2003 and 2004 the Commission adopted under the emergency procedure two Commission Regulations ((EC) 1475/2003 and 263/2004) on the protection of deep- water coral reefs from the effects of trawling in the Darwin Mounds (North West of Scotland). These measures were made permanent in 2004 (Council Regulation ((EC) 602/2004)

- In 2004 legislation was put in place on incidental catches of cetaceans in fisheries (Regulation No 812/2004) including compulsory use of acoustic deterrent devices in certain gear and setting up a Community observer programme designed to provide data on by-catch in a large number of fisheries.

- In 2005 legislation was adopted to protect vulnerable habitats such as coral reefs, thermal vents and carbonate mounds from the effects of fishing around the Macaronesian Isles (Council regulation (EC) No 1568/2005). An amendment to the 2004 TAC and Quota Regulation was approved to ensure temporary protection of these habitats in the meantime.

- In 2006 the Council adopted the Mediterranean Regulation ((EC) 1967/2006) which includes measures to protect sensitive habitats such as Posidonia beds and coral aggregations and to ban fishing practices that may damage the physical environment, such as the use of explosives and pneumatic hammers. It includes new technical measures on fishing gear, protection zones and minimal sizes.

- Legislation regulating the use of driftnets in Community fishing vessels (Council Regulations (EC) No 894/97 as amended by Regulation (EC) No 1235/98, (EC) No 812/2004, (EC) No 2187/2005)

- Legislation implementing fisheries restrictive areas to protect vulnerable deep sea habitats in the Mediterranean and in the North East Atlantic is included in Council Regulation (EC) No 41/2006 .

(All the above legislation may be consulted in detail at http://eur-lex.europa.eu/en/index.htm )

The current CFP allows for better integration of environmental protection requirements into fisheries management. It therefore contributes directly to the achievement of the objectives of both the Birds and Habitats Directives. Furthermore, it provides for a system of protection for marine habitats and species from the harmful effects of fishing activities even in cases where the provisions of Natura 2000 do not apply. This is particularly relevant in situations such as the following:

a.) For the protection of nature features not listed in Annexes of the Habitats Directive

b.) For the protection of features that are listed in the Annexes, but occur in areas outside the jurisdiction of Member States.

c.) For the protection of those listed features, located in marine areas under the jurisdiction of Member States but not included in a SCI/SAC (because they are located out of a SCI or waiting for a proposal/designation)

As shown above, the CFP allows for the implementation of fisheries management measures for the protection of the marine environment may already be taken under CFP provisions..

They may be aimed at the protection of sites that are qualified to be designated as SACs or SPA. Fisheries measures may be decided regardless of the stage in which the site designation process would be, as they are not necessarily linked to the implementation of the Habitats or Birds Directives.

However, pressures on the marine environment do not only come from fisheries. Subsequently, designation of Natura 2000 sites is necessary to ensure a global and coherent protection scheme to address the effects produced by other human activities (some of them illustrated in section 5.9.)

| | |
|---|---|
| Council Regulation (EC) No 1967/2006 of 21 December 20061626/94 of 27 June 1994 lays down certain technical measures for the conservation of fisheries resources in the Mediterranean. This is another example of Community action taken in the context of the Common Fisheries Policy to achieve environmental objectives.<br><br>Article 43.3 of this Regulation prohibits the use of bottom trawls, seines or similar nets above the Posidonia beds (***Posidonia oceanica***) or other marine phanerogams (it includes some derogations). Posidonia beds are listed as a "priority" habitat type under Annex I of the Habitats Directive |  |
| Full text of the Council Regulation in Eur-Lex: http://europa.eu.int/eur-lex/en/search/search_lif.html<br><br>Image Courtesy from WWF/ES. More details in: http://www.wwf.es/descarga/informe_posidonia.pdf | |

The above examples show how the use of provisions of Common Fisheries Policy plays an important role in marine nature protection, addressing relevant environmental concerns.

Member States have agreed to delegate their national responsibilities in fisheries management to the Community establishing the Common Fisheries Policy as an exclusive Community competence. Therefore, there is a legal obligation to implement measures under the CFP whenever fishing restriction measures at EU level are required in order to address important conservation problems in the marine environment. This is a significant advantage as such measures for conservation purposes may be addressed by a single EU level decision.

A decision taken at Community level will be more efficient than the addition of separate national decisions that would otherwise need to be taken. However, the adoption of Community legislation requires enhanced coordination between Member States, the Commission, and the Council.



Image from WWF

Taking into account considerations that include relevant provisions of 1) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, and 2) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Council regulation (EC) No 812/2004 laid down measures concerning incidental catch of cetaceans in fisheries.

This regulation sets out that driftnet fishing will be phased out in the Baltic as from 1 July 2004 until a total gear ban enters into force on 1 January 2008.

At the same time, the regulation lays down measures aimed at mitigating by-catch. It advocates the use of acoustic devices and at-sea observer schemes as well as providing technical specifications and conditions of use.

Full text of the Council Regulation: http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_150/l_15020040430en00120031.pdf

More details in: http://www.panda.org/about_wwf/where_we_work/europe/where/baltics/threats/fishing.cfm

## 6.2. Fisheries management measures

The process of establishment, monitoring and conservation status assessment of Natura 2000 has been developed in previous chapters. The assessment of monitoring data may show, in some cases, the necessity to regulate certain fishing activities in order to avoid the deterioration of the site[108]. In such cases, given that fisheries is an exclusive Community competence**,** fisheries management measures should be decided in the context of the Common Fisheries Policy and according to its rules. The basic rules are enshrined in the Regulation 2371/2002.

Fisheries management measures must be taken in consultation with stakeholders and, in particular, with the Regional Advisory Councils (RACs) which are becoming an essential instrument of the CFP.

Fishery management measures under the CFP could also be implemented in marine areas once the MS (or MSs) has proposed the relevant area as Site of Community Importance and is waiting for the area to be declared as Natura 2000 site after adoption of appropriate Commission's decision. In such cases, MSs must provide the necessary information justifying the need for temporary protection of the area.

To ensure consistency, non discrimination, and best implementation of regulatory measures, whenever possible, MSs sharing a vulnerable marine feature should coordinate and make proposals of Sites of Community Importance covering the entire valuable feature at the same time. In line with the Habitats Directive, the approach should be regional and not national: the final objective is the establishment of a coherent ecological network of protected areas by marine regions that often extend across several Member States. In order to avoid displacement

[108] 92/43 Directive: Art 6.2***: Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive***. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:NOT

of fishing effort to neighbouring areas, management measures should be the same for the entire marine region.

MSs shall ensure effective control inspection and enforcement of the rules of the CFP. Therefore, fisheries management measures proposed in Natura 2000 areas must be controllable in a cost-effective way and should be accompanied by the relevant monitoring and control measures as well as an estimation of the cost of controlling such areas. VMS is the more efficient monitoring tool in the EEZ. Small and scattered areas are very difficult to monitor and should be avoided.

The definition of possible measures regulating fishing activities in a particular site will depend on the combination of many different parameters such as the number and nature of the features to be protected, their conservation status, time scales, the location of the marine site, etc. By combining these parameters, it is possible to find a large number of different nature conservation cases needing some regulation of fisheries activities.

For this reason, it is not possible to develop in this document an exhaustive catalogue of all possible actions to be taken under the CFP, which need to be determined on a case by case basis for which specific technical and legal advice would be required. The information contained here is therefore of general nature.

On the basis of article 37 of the EC Treaty, it is for the Council, based on a proposal from the Commission, to adopt measures regulating fisheries. This applies also to measures regulating fishing activities in order to protect a Natura 2000 site. Measures under the CFP are non discriminatory and permanent and are therefore the best option. However, Articles 8, 9 and 10 of Regulation 2371/2002 delegate some limited powers to the Member States to regulate fisheries.

More specifically, Article 8 allows Member States to take emergency measures, the maximum duration of which is 3 months, if there is evidence of a serious and unforeseen threat to the marine ecosystem resulting from fishing activities. However, due to their limited duration such measures will only exceptionally be considered in the framework of establishment of conservation measures addressing an environmental concern of a more permanent character.

On the basis of Article 9, Member States can take non-discriminatory measures to minimise the effect of fishing on the conservation of the marine ecosystems within 12 nautical miles of their coast if the Community has not adopted measures specifically for this area. If these measures are liable to affect the vessels of another Member State, a consultation procedure with the Commission, other Member States and Regional Advisory Councils concerned is necessary before the adoption of the measures.

Finally, Member States can take measures in waters under their sovereignty or jurisdiction if they apply solely to their fishing vessels (Article 10).

In cases where a Member State considers that a fishing activity has to be regulated in order to protect a Natura 2000 site, but it has not the competence to do so on the basis of the Regulation 2371/2002, it is for the Community to finally take fisheries measures. In practice, the Member State concerned will provide the data at its disposal to the Commission, indicating the measures that it considers appropriate. However, neither the Commission's right of initiative in proposing fisheries measures, nor the Council's broad legislative discretion in adopting such measures, can be legally restricted by the request of the Member State. Nevertheless, the Commission and the Council while exercising their legislative discretion in the fisheries sector have to comply with article 6 of the EC Treaty obliging the integration of environmental protection requirements in all Community policies.

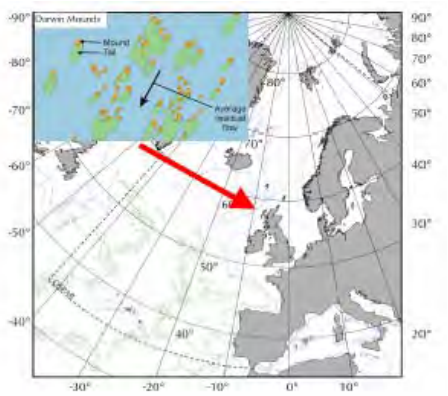
As indicated above, measures taken in the framework of the Common Fisheries Policy (CFP) are decided in a coordinated manner at Community level, which should enhance their coherence and effectiveness.

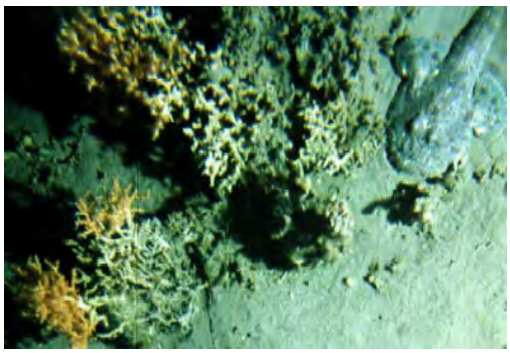
**The Darwin Mounds** is a deep cold coral reef formation, discovered in 1998, in the offshore waters of North Scotland. The United Kingdom has declared its intention to propose this area as a future Special Area of Conservation in fulfilment of its obligation under the Habitats Directive.

With this intention in mind, and en response to a request from the UK, the European Community adopted a Regulation [(EC) No 602/2004 of 22 March 2004] to prohibit the use of bottom trawls and similar gear, in order to avoid damage to corals, in the area surrounding the Darwin Mounds.

This is an example of Community action taken in the context of the Common Fisheries Policy (CFP) aimed at achieving environmental objectives. Integration of environmental protection requirements into the CFP has spurred this Community measure to be taken in anticipation of future SCI/SAC designation

(Details in Annex 5, EC press release on http://ec.europa.eu/fisheries/press_corner/press_releases/archives/com03/com03_36_en.htm )



Lophelia Pertusa colonies and associated bentic fauna photographed on the Darwin Mounds

(Courtesy of WWF/ DEEPSEAS Group, © Southampton Oceanography Centre).

In February 2006, ICES initiated a new project entitled "Environmentally Sound Fishery Management in Protected Areas" to develop fisheries management plans for each of the ten German NATURA 2000 areas[109]. For each of the ten pSCI/SPA the central questions to be answered are:

- To what extent do the fishing activities in the MPA represent a significant interference with the NATURA 2000 concept and objectives?
- To what extent do the fisheries activities need to be regulated?
- How can such regulations provide a balance between the requirements of NATURA 2000 and fisheries?

[109] See http://www.ices.dk/marineworld/protectedAreas.asp

The answers to these questions will be based on existing and, where appropriate, newly collected data – in particular from cooperation with fishers and the fishing industry. The project intends to significantly improve the data used for evaluation of the potential conflicts between fisheries and nature conservation interests in German waters and will require an analysis of fishing activities of all fishing vessels operating in (and around) the MPAs.

**Appendix 1.** **Marine Habitat types definitions. Update of "Interpretation Manual of European Union Habitats".**

**Appendix 2.** **Lists of existing marine Habitat types and Species for different Member States**

**Appendix 3.** **Examples of the technique of the use of matrix as a management tool for decision making.**

**Appendix 4.** **Good experiences and examples of implementation of Natura 2000 in the marine environment, including Life-fund projects.**

**Appendix 5.** **Bibliography**

# Appendix 1

**Marine Habitat types definitions.**

**Update of “Interpretation Manual of European Union Habitats”**

# COASTAL AND HALOPHYTIC HABITATS

## *Open sea and tidal areas*

---

## 1110 Sandbanks which are slightly covered by sea water all the time

PAL.CLASS.: 11.125, 11.22, 11.31

**1. Definition:**

Sandbanks are elevated, elongated, rounded or irregular topographic features, permanently submerged and predominantly surrounded by deeper water. They consist mainly of sandy sediments, but larger grain sizes, including boulders and cobbles, or smaller grain sizes including mud may also be present on a sandbank. Banks where sandy sediments occur in a layer over hard substrata are classed as sandbanks if the associated biota are dependent on the sand rather than on the underlying hard substrata.

"Slightly covered by sea water all the time" means that above a sandbank the water depth is seldom more than 20 m below chart datum. Sandbanks can, however, extend beneath 20 m below chart datum. It can, therefore, be appropriate to include in designations such areas where they are part of the feature and host its biological assemblages.

**2. Characteristic animal and plant species**

**2.1. Vegetation:**

North Atlantic including North Sea:

***Zostera*** sp**.**, free living species of the ***Corallinaceae*** family. ***On many sandbanks macrophytes do not occur.***

Central Atlantic Islands (Macaronesian Islands):

***Cymodocea nodosa*** and ***Zostera noltii***. On many sandbanks free living species of ***Corallinaceae*** are conspicuous elements of biotic assemblages, with relevant role as feeding and nursery grounds for invertebrates and fish. ***On many sandbanks macrophytes do not occur.***

Baltic Sea:

***Zostera*** sp**.,** ***Potamogeton*** spp.**,** ***Ruppia*** spp., ***Tolypella nidifica***, ***Zannichellia*** spp., carophytes. ***On many sandbanks macrophytes do not occur.***

Mediterranean:

The marine Angiosperm ***Cymodocea nodosa***, together with photophilic species of algae living on the leaves (more than 15 species, mainly small red algae of the ***Ceramiaceae*** family), associated with ***Posidonia*** beds. ***On many sandbanks macrophytes do not occur.***

**2.2. Animals:**

North Atlantic including North Sea:

Invertebrate and demersal fish communities of sandy sublittoral (e.g. polychaete worms, crustacea, anthozoans, burrowing bivalves and echinoderms, ***Ammodytes*** spp., ***Callionymus*** spp., ***Pomatoschistus*** spp., ***Echiichtys vipera, Pleuronectes platessa, Limanda limanda***).

Central Atlantic Islands (Macaronesian Islands):

Fish, crustacean, polychaeta, hydrozoan, burrowing bivalves, irregular echinoderms.

Baltic Sea:

Invertebrate and demersal fish communities of sandy sublittoral (fine and medium grained sands, coarse sands, gravely sands), e.g. polychaetes: ***Scoloplus armiger, Pygospio elegans, Nereis diversicolor, Travisia*** sp**.**, e.g. bivalves: ***Macoma balthica***, ***Mya arenaria, Cerastoderma*** sp., e.g. crustaceans: ***Crangon crangon, Saduria entomon, e.g. fish species: Platichthys flesus, Nerophis ophidion, Pomatoschistus*** spp., ***Ammodytes tobianus***.

Mediterranean:

Invertebrate communities of sandy sublittoral (e.g. polychaetes). Banks are often highly important as feeding, resting or nursery grounds for sea birds, fish or marine mammals.

**3. Corresponding categories:**

French classification ZNIEFF-MER:

"Biocénose des sables fins de haut niveau", "Biocénose des sables fins bien calibrés".

German classification:

"Sandbank der Ostsee (ständig wasserbedeckt)(040202a)", "Sandbank der Nordsee (ständig wasserbedeckt)(030202a)".

Barcelona Convention:

"Biocenosis of fine sands in very shallow waters (III. 2. 1.) with facies with ***Lentidium mediterraneum*** (III. 2. 1. 1.)", "Biocenosis of well sorted fine sands (III. 2. 2.) with associations with ***Cymodocea nodosa*** on well sorted fine sands (III. 2. 2. 1.) and with ***Holophila stipulacela*** (III. 2. 2. 2), the latter considered determinant habitat in C. B.", "Biocenosis of coarse sands and fine gravels mixed by the waves (III. 3. 1.) with association with rhodolithes (III. 3. 1. 1), considered determinant habitat in the C. B.", "Biocenosis of coarse sands and fine gravels under the influence of bottom currents (also found in the Circalittoral) (III. 3. 2.). It is possible to find a facies and an association which are determinant habitats for C. B.: the maërl facies (= Association with ***Lithothamnion corallioides*** and ***Phymatoliton calcareum***), also found as facies of the biocenosis of coastal detritic (III. 3. 2. 1), and the association with rhodolithes (III. 3. 2. 2.)", "Biocenosis of infralittoral pebbles (III. 4. 1.) with facies with ***Gouania wildenowi*** (III. 4. 1. 1.), small teleostean which lives among pebbles."

Nordic classifications:

Vegetationstyper i Norden, Påhlsson (ed.) 1994:

> ***"Zostera marina***-typ (4.4.1.1)", ***"Ruppia maritima***-typ (4.4.1.2)", "Chara-typ (6.3.3.1)", "Potamogeton pectinatus (6.3.2.2)".

Kustbiotoper i Norden, Nordiska Ministerrådet 2001:

> "Sandbottnar (7.7.1.2; 7.8.1.2; 7.8.4.2; 7.8.5.2; 7.8.6.7; 7.8.6.8; 7.8.6.9; 7.8.7.9; 7.8.7.10; 7.8.7.11; 7.9.1.1.; 7.9.2.1; 7.9.3.1; 7.9.4.1)."

HELCOM classification:

> "Sublittoral gravel bottoms. Banks with or without macrophyte vegetation (2.4.2.3)", "Sublittoral sandy bottoms. Banks with or without macrophyte vegetation (2.5.2.4)".

The National Marine Habitat Classification for Britain and Ireland Version 03.02:
Relevant types within "Sublittoral coarse sediments (SCS), Sublittoral sands (SSA) and Sublittoral macrophytes communities (SMP)".

EUNIS classification:
Relevant types within "A4.4, A4.55, A4.1, A4.2, A4.51, A4.5, A4.53, A4.1, A4.2, A4.51, A4.5, A4.53, A4.4, A4.55, A7.32, A4.51, A4.53, A4.552, 4.521, A4.521, A4.513, A6.22, A4.51, A4.141, A4.13, A8.13".

**4. Associated habitats:**

Sandbanks can be found in association with mudflats and sandflats not covered by seawater at low tide (1140), with Posidonia beds (1120) and reefs (1170). Sandbanks may also be a component part of habitat 1130 Estuaries and habitat 1160 Large shallow inlets and bays.

**5. Literature:**


**AUGIER H. (1982).** Inventaire et classification des biocénoses marines benthiques de la Méditerranée. Publication du Conseil de l' Europe, Coll. Sauvegarde de la Nature, 25, 59 pages.

**DYER KR & HUNTLEY DA (1999)**. The origin, classification and modelling of sand banks and ridges. Continental Shelf Research 19 1285-1330

**CONNOR, D.W., ALLEN, J.H., GOLDING, N., LIEBERKNECHT, L.M., NORTHEN, K.O. & REKER, J.B. (2003).** The National Marine Habitat Classification for Britain and Ireland Version 03.02. Internet version. Joint Nature Conservation Committee, Peterborough. **(www.jncc.gov.uk/marine/biotopes/default.htm)**

**ERICSON, L. & WALLENTINUS, H.-G. (1979).** Sea-shore vegetation around the Gulf of Bothnia. Guide for the International Society for Vegetation Science, July-August 1977. ***Wahlenbergia*** 5:1 – 142.

**EUROPEAN ENVIRONMENT AGENCY (2002).** EUNIS habitat classification. Version 2.3. Copenhagen, EEA (Internet publication: **http://eunis.eea.europa.eu/habitats.jsp** )

**HAROUN, R.J., GIL-RODRÍGUEZ, M.C., DÍAZ DE CASTRO, J. & PRUD'HOMME VAN REINE, W.F. (2002).** A check-list of the marine plants from the Canary Islands (Central Eastern Atlantic Ocean). ***Botanica Marina***. 45: 139-169.

**HELCOM (1998).** Red List of Biotopes and Biotope Complexes of the Baltic Sea, the Belt Sea and the Kattegat. Baltic Sea Environment Proceedings No. 75.: 126pp.

**KAUTSKY, N. (1974).** Quantitative investigations of the red algae belt in the Askö area, Northern Baltic proper. ***Contrib. Askö Lab. Univ. Stockholm*** 3: 1-29.

**LAPPALAINEN, A., HÄLLFORS, G. & KANGAS, P. (1977).** ***Littoral benthos of the northern Baltic Sea.*** IV. Pattern and dynamics of macrobenthos in a sandy bottom Zostera marina community in Tvärminne.

**NORDHEIM, H. VON, NORDEN ANDERSEN, O. & THISSEN, J. (EDS.) (1996).** Red Lists of Biotopes, Flora and Fauna of the Trilateral Wadden Sea Area 1995. Helgol. Meeres-untersuchungen. 50 (suppl.): 136 pp.

**NORDISKA MINISTERRÅDET (2001).** Kustbiotoper i Norden. Hotade och representativa biotoper. TemaNord 2001: 536. 345 pp.

**OULASVIRTA, P., LEINIKKI, J. & REITALU, T. (2001).** Underwater biotopes in Väinameri and Kõpu area, Western Estonia. The Finnish Environment 497.

**PAVÓN-SALAS, N., HERRERA, R., HERNÁNDEZ-GUERRA, A. & HAROUN R. (2000).** Distributional pattern of sea grasses in the Canary Islands (Central-East Atlantic Ocean). ***J. Coastal Research***, 16: 329-335.

**PÅHLSSON, L. (ED.) (1994).** Vegetationstyper i Norden. TemaNord 1994: 665. 627 pp.

**PERÈS J. M. & PICARD J. (1964).** Nouveau manuel de bionomie benthique de la mer Méditerranée. ***Rec. Trav. St. Mar. Endoume*** 31 (47): 5-137.

RAVANKO, O. (1968). MACROSCOPIC GREEN, BROWN AND RED ALGAE IN THE SOUTH-WESTERN ARCHIPELAGO OF FINLAND. ***ACTA BOT. FENNICA*** 79: 1-50.

**RIECKEN, U., RIES, U. & SSYMANK, A. (1994).** Rote Liste der gefährdeten Biotoptypen der Bundesrepublik Deutschland - Schriftenreihe für Landschaftspflege und Naturschutz. 41: 184 pp.

## 1120 * Posidonia beds (*Posidonion oceanicae*)

PAL.CLASS.: 11.34

**1)** Beds of ***Posidonia oceanica*** (Linnaeus) Delile characteristic of the infralittoral zone of the Mediterranean (depth: ranging from a few dozen centimetres to 30 - 40 metres). On hard or soft substrate, these beds constitute one of the main climax communities. They can withstand relatively large variations in temperature and water movement, but are sensitive to desalination, generally requiring a salinity of between 36 and 39‰.

**2)** Plants: ***Posidonia oceanica***.
Animals: Molluscs- #***Pinna nobilis***; Echinoderms- ***Asterina pancerii, Paracentrotus lividus***; Fish- ***Epinephelus guaza***, ***Hippocampus ramulosus***.

**5)** **Belsher, T. *et al* (1987).** ***Livre rouge des espèces menacées de France - tome 2, espèces marines et littorales menacées***, Ed. F. de Beaufort. Museum National d'Histoire Naturelle - Paris.

## 1130 Estuaries

PAL.CLASS.: 13.2, 11.2

**1)** Downstream part of a river valley, subject to the tide and extending from the limit of brackish waters. River estuaries are coastal inlets where, unlike 'large shallow inlets and bays' there is generally a substantial freshwater influence. The mixing of freshwater and sea water and the reduced current flows in the shelter of the estuary lead to deposition of fine sediments, often forming extensive intertidal sand and mud flats. Where the tidal currents are faster than flood tides, most sediments deposit to form a delta at the mouth of the estuary.
Baltic river mouths, considered as an estuary subtype, have brackish water and no tide, with large wetland vegetation (helophytic) and luxurious aquatic vegetation in shallow water areas.

**2)** Plants: Benthic algal communities, ***Zostera*** beds e.g. ***Zostera noltii*** (***Zosteretea***) or vegetation of brackish water: ***Ruppia maritima*** (= ***R. rostellata*** (***Ruppietea***)); ***Spartina maritima*** (***Spartinetea***); ***Sarcocornia perennis*** (***Arthrocnemetea***). Both species of fresh water and brackish water can be found in Baltic river mouths (***Carex*** spp., ***Myriophyllum*** spp., ***Phragmites australis***, ***Potamogeton*** spp., ***Scirpus*** spp.).
Animals: Invertebrate benthic communities; important feeding areas for many birds.

**3)** Corresponding categories
German classification : "D2a Ästuare (Fließgewässermündungen mit Brackwassereinfluß u./od. Tidenhub eingeschlossen werden", "050105 Brackwasserwatt des Ästuare an der Nordsee", "050106 Süßwasserwatt im Tideeinfluß des Nordsee".

**4)** An estuary forms an ecological unit with the surrounding terrestrial coastal habitat types. In terms of nature conservation, these different habitat types should not be separated, and this reality must be taken into account during the selection of sites.

**5)** **Brunet, R. et al.** ***Les mots de la géographie-dictionnaire critique***. Ed. Reclus.
**Gillner, W. (1960).** Vegetations- und Standortsuntersuchungen in den Strandwiesen der schwedischen Westküste. ***Acta Phytogeogr. Suec***. 43:1-198.

## 1140 Mudflats and sandflats not covered by seawater at low tide

PAL.CLASS.: 14

**1)** Sands and muds of the coasts of the oceans, their connected seas and associated lagoons, not covered by sea water at low tide, devoid of vascular plants, usually coated by blue algae and diatoms. They are of particular importance as feeding grounds for wildfowl and waders. The diverse intertidal communities of invertebrates and algae that occupy them can be used to define subdivisions of 11.27, eelgrass communities that may be exposed for a few hours in the course of every tide have been listed under 11.3, brackish water vegetation of permanent pools by use of those of 11.4.
Note: Eelgrass communities (11.3) are included in this habitat type.

## 1150 * Coastal lagoons

PAL.CLASS.: 21

**1)** Lagoons are expanses of shallow coastal salt water, of varying salinity and water volume, wholly or partially separated from the sea by sand banks or shingle, or, less frequently, by rocks. Salinity may vary from brackish water to hypersalinity depending on rainfall, evaporation and through the addition of fresh seawater from storms, temporary flooding of the sea in winter or tidal exchange. With or without vegetation from ***Ruppietea maritimae, Potametea, Zosteretea*** or ***Charetea*** (CORINE 91: 23.21 or 23.22).

- Flads and gloes, considered a Baltic variety of lagoons, are small, usually shallow, more or less delimited water bodies still connected to the sea or have been cut off from the sea very recently by land upheaval. Characterised by well-developed reedbeds and luxuriant submerged vegetation and having several morphological and botanical development stages in the process whereby sea becomes land.
- Salt basins and salt ponds may also be considered as lagoons, providing they had their origin on a transformed natural old lagoon or on a saltmarsh, and are characterised by a minor impact from exploitation.

**2)** Plants: ***Callitriche*** spp., ***Chara canescens, C. baltica, C. connivens, Eleocharis parvula, Lamprothamnion papulosum, Potamogeton pectinatus, Ranunculus baudotii, Ruppia maritima, Tolypella n. nidifica***. In flads and gloes also ***Chara*** ssp.(***Chara tomentosa***), ***Lemna trisulca***, ***Najas marina***, ***Phragmites australis***, ***Potamogeton*** ssp., ***Stratiotes aloides***, ***Typha*** spp.
Animals: Cnidaria- ***Edwardsia ivelli;*** Polychaeta- ***Armandia cirrhosa***; Bryozoa- ***Victorella pavida***; Rotifera - ***Brachionus*** sp.; Molluscs- ***Abra*** sp., ***Murex*** sp.; Crustaceans- ***Artema*** sp.; Fish- ***Cyprinus*** sp., ***Mullus barbatus***; Reptiles- ***Testudo*** sp.; Amphibians- ***Hyla*** sp.

**3)** Corresponding categories
German classification : "0906 Strandsee", "240601 Brackwassersee im Ostseeküstenbereich".

**4)** Saltmarshes form part of this complex.

**5)** **Bamber et al. (1992).** On the ecology of brackish lagoons in Great Britain. ***Aquatic conservation: marine and freshwater ecosystems***, 2, 65-94.
**Barnes, R.S.K. (1988).** The faunas of landlocked lagoons: chance differences and problems of dispersal. ***Estuarine and Coastal Shelf Science***, 26, 309 - 18.
**Munsterhjelm, R. (1995).** The aquatic macrophyte vegetation of flads and gloes, S coast of Finland. ***Acta Bot. Fennica*** (in print).
**Palmer, M.A., Bell, S.L., Butterfield, I. (1992).** A botanical classification of standing waters: Applications for conservation and monitoring. ***Aquatic conservation: marine and freshwater ecosystems***, 2, 125-143.

## 1160 Large shallow inlets and bays

PAL.CLASS.: 12

**1)** Large indentations of the coast where, in contrast to estuaries, the influence of freshwater is generally limited. These shallow [1] indentations are generally sheltered from wave action and contain a great diversity of sediments and substrates with a well developed zonation of benthic communities. These communities have generally a high biodiversity. The limit of shallow water is sometimes defined by the distribution of the ***Zosteretea*** and ***Potametea*** associations.
Several physiographic types may be included under this category providing the water is shallow over a major part of the area: embayments, fjards, rias and voes.

**2)** Plants: ***Zostera*** spp., ***Ruppia maritima***, ***Potamogeton*** spp. (e.g. ***P. pectinatus***, ***P. praelongus***), benthic algae.
Animals: Benthic invertebrate communities.

**3)** Corresponding categories
German classification : "B31 naturnaher Boddengewässerkomplex", "B32 Boddengewässerkomplex, geringe Belastung", "A2a Flachwasserzonen der Nordsee (Meeresarme u. -buchten, incl. Seegraswiesen)".

**5)** **Luther, (1951).** Verbreitung und Ökologie der höheren Wasserpflanzen im Brackwasser der Ekenäs-Gegend in Süd-Finnland. I. Allgemeiner Teil. ABF 49, 1-232. II Spezieller Teill. ABF 50, 1-370.

[1] National experts consider inappropriate to fix a maximum water depth, since the term 'shallow' may have different ecological interpretations according to the physiographic type considered and geographical location.

## 1170 Reefs

PAL.CLASS.: 11.24, 11.25

**1. Definition of the habitat:**

Reefs can be either biogenic concretions or of geogenic origin. They are hard compact substrata on solid and soft bottoms, which arise from the sea floor in the sublittoral and littoral zone. Reefs may support a zonation of benthic communities of algae and animal species as well as concretions and corallogenic concretions.

Clarifications:

- ***"Hard compact substrata"*** are: rocks (including soft rock, e.g. chalk), boulders and cobbles (generally >64 mm in diameter).
- ***"Biogenic concretions"*** are defined as: concretions, encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.
- ***"Geogenic origin"*** means: reefs formed by non biogenic substrata.
- ***"Arise from the sea floor"*** means: the reef is topographically distinct from the surrounding seafloor.
- ***"Sublittoral and littoral zone"*** means: the reefs may extend from the sublittoral uninterrupted into the intertidal (littoral) zone or may only occur in the sublittoral zone, including deep water areas such as the bathyal.
- Such hard substrata that are covered by a thin and mobile veneer of sediment are classed as reefs if the associated biota are dependent on the hard substratum rather than the overlying sediment.
- Where an uninterrupted zonation of sublittoral and littoral communities exist, the integrity of the ecological unit should be respected in the selection of sites.
- A variety of subtidal topographic features are included in this habitat complex such as: Hydrothermal vent habitats, sea mounts, vertical rock walls, horizontal ledges, overhangs, pinnacles, gullies, ridges, sloping or flat bed rock, broken rock and boulder and cobble fields.

**2. Examples for typical reef species**

**2.1 Reef vegetation:**

North Atlantic including North Sea and Baltic Sea:

A large variety of red, brown and green algae (some living on the leaves of other algae).

Atlantic (Cantabric Sea, Bay of Bizcay): ***Gelidium sesquipedale*** communities associated with brown algae (***Fucus***, ***Laminaria***, ***Cystoseira***), and red algae (Corallinaceae, Ceramiceae, Rhodomelaceae).

Central Atlantic Islands (Macaronesian Islands) and Mediterranean:

***Cystoseira***/***Sargassum*** beds with a mixture of other red algae (***Gelidiales, Ceramiales***), brown algae (***Dictyotales***) and green algae (***Siphonales, Siphonacladales***).

**2.2. Examples for typical reef animals:**

**2.2.1 Examples for animals forming biogenic reefs:**

North Atlantic including North Sea:

Polychaetes (***e.g. Sabellaria spinulosa***, ***Sabellaria alveolata***, ***Serpula vermicularis***), bivalves (e.g. ***Modiolus modiolus, Mytilus sp.***) and cold water corals (e.g. ***Lophelia pertusa***).

Atlantic (Gulf of Cádiz): Madreporarians communities: ***Dendrophyllia ramea*** community (banks), ***Dendrophyllia cornigera*** community (banks); white corals communities (banks), (***Madrepora oculata*** and ***Lophelia pertusa*** community (banks). ***Solenosmilia variabilis*** community (banks). Gorgonians communities: Facies of ***Isidella elongata*** and ***Callogorgia verticillata*** and ***Viminella flagellum***; Facies of ***Leptogorgia*** spp.; Facies of ***Elisella paraplexauroides***; Facies of ***Acanthogorgia*** spp. and ***Paramuricea*** spp. ***Filigrana implexa*** formations.

Central Atlantic Islands (Macaronesian Islands):

Warm water corals (***Dendrophilia, Anthiphates***), serpulids, polychaetes, sponges, hydrozoan and briozoan species together with bivalve molluscs (***Sphondillus, Pinna***).

Baltic Sea: Bivalves (e.g. ***Modiolus modiolus, Mytilus*** sp***., Dreissena polymorpha).***

Mediterranean: Serpulid polychaetes, bivalve molluscs (e.g. ***Modiolus sp. Mytilus sp.*** and oysters). Polychaetes (***e.g. Sabellaria alveolata).***

South-West Mediterranean: Dendropoma ***petraeum*** reefs (forming boulders) or in relation with the red calcareous algae ***Spongites*** spp or ***Litophyllum lichenoides***. ***Filigrana implexa*** formations. Gorgonians communities: Facies of holoaxonia gorgonians (***Paramuricea clavata*** "forest", ***Eunicella singularis*** "forest"), mixed facies of gorgonians (***Eunicella*** spp, ***P. clavata***, ***E. paraplexauroides***, ***Leptogorgia*** spp). Facies of ***Isidella elongata*** and ***Callogorgia verticillata***; Facies of scleroaxonia gorgonians (***Corallium rubrum***). Madreporarians communities: ***Cladocora caespitosa*** reefs, ***Astroides calycularis*** facies. Madreporarians communities: ***Dendrophyllia ramea*** community (banks); ***Dendrophyllia cornigera*** community (banks); white corals communities (banks): ***Madrepora oculata*** and ***Lophelia pertusa*** community (banks).

West Mediterranean: Polychaetes (exclusively ***Sabellaria alveolata).***

**2.2.2 Examples for non reef forming animals:**

North Atlantic including North Sea:

In general sessile invertebrates specialized on hard marine substrates such as sponges, anthozoa or cnidaria, bryozoans**,** polychaetes, hydroids, ascidians, molluscs and cirripedia (barnacles) as well as diverse mobile species of crustaceans and fish.

Central Atlantic Islands (Macaronesian Islands):

Gorgonians, hydrozoans, bryozoan and sponges, as well as diverse mobile species of crustacean, molluscs (cephalopoda) and fish.

Baltic Sea: Distribution and abundance of invertebrate species settling on hard substrates are limited by the salinity gradient from west to east. Typical groups are: hydroids, ascidians, cirripedia (barnacles), bryozoans and molluscs as well as diverse mobile species of crustaceans and fish.

Mediterranean: Cirripedia (barnacles), hydroids, bryozoans, ascidians, sponges, gorgonians and polychaetes as well as diverse mobile species of crustaceans and fish.

**3. Corresponding categories:**

German classification:

„Benthal der Nordsee mit Hartsubstrat (010204)“, “Riffe der Nordsee (010204a)“, „Benthal der Flachwasserzone der Nordsee mit Hartsubstrat, makrophytenarm (030204)“, „Benthal der Flachwasserzone der Nordsee mit Hartsubstrat, makrophytenreich (030206)“, “Miesmuschelbank des Sublitorals der Nordsee (030207)“, “Austernbank des Sublitorals der Nordsee (030208)“, “Sabellaria-Riff des Sublitorals der Nordsee (030209)”, „Felswatt der Nordsee (050104)“, “Miesmuschelbank des Eulitorals der Nordsee (050107)“;

“Benthal der Ostsee mit Hartsubstrat (020204)“, “Riffe der Ostsee (020204a)“, „Benthal der Flachwasserzone der Ostsee mit Hartsubstrat, makrophytenarm (040204)“, „Benthal der Flachwasserzone der Ostsee mit Kies- und Hartsubstrat, makrophytenreich (040206)“, „Miesmuschelbank des Sublitorals der Ostsee (040207)“, „Vegetationsreiches Windwatt mit Hartsubstrat (060203) (Ostsee)“.

Barcelona Convention:

“Biocenosis of supralittoral rock (I.4.1.)”, “Biocenosis of the upper mediolittoral rock (II.4.1.)”, “Biocenosis of the lower mediolittoral rock (II.4.2.)”, “Biocenosis of infralittoral algae (III.6.1.)”, “Coralligenous (IV.3.1.)”, “Biocenosis of shelf-edge rock (IV.3.3 )”, “Biocenosis of deep sea corals present in the Mediterranean bathyal (V.3.1.)”.

The National Marine Habitat Classification for Britain and Ireland Version 03.02:

“Littoral rock and other hard substrata (biotopes beginning with LR)”, “Infralittoral rock and other hard substrata (biotopes beginning with IR)”, “Circalittoral rock and other hard substrata (biotopes beginning with CR)”, “Littoral biogenic reefs (biotopes beginning with LBR)” and “Sublittoral biogenic reefs (biotopes beginning with SBR)”.

EUNIS classification :

Relevant types within “A1.1, A1.1/B-ELR.MB, A1.2, A1.2/B-MLR.MF, A1.3, A1.3/B-SLR, A1.4, A1.5, A1.6, A2.8, A3.1, A3.2, A3.2/M-III.6.1.(p), A3.2/H-02.01.01.02.03, A3.2/H-02.01.02.02.03, A3.3, A3.4, A3.5, A3.6, A3.6/B-MCR.M, A3.7, A3.8, A3.9, A3.A, A3.B, A3.C, A4.6, A5.1, A5.6”, A6.2, A6.3.

HELCOM classification:

"Sublittoral soft rock reefs of the photic zone with little or no macrophyte vegetation (2.1.1.2.3)", "Hydrolittoral soft rock reefs with or without macrophyte vegetation (2.1.1.3.3)", "Sublittoral solid rock reefs of the photic zone with or without macrophyte vegetation (2.1.2.2.3)", "Hydrolittoral solid rock reefs with or without macrophyte vegetation (2.1.2.3.3)", "Sublittoral stony reefs of the photic zone with or without macrophyte vegetation (2.2.2.3)", "Stony reefs of the hydrolittoral zone with or without macrophyte vegetation (2.2.3.3)".

Trilateral Wadden Sea Classification (von Nordheim et al. 1996):

"Sublittoral (old) blue mussel beds (03.02.07)", "Sublittoral oyster reefs (03.02.08)", "Sublittoral sabellaria reefs (03.02.09)", "Eulittoral (old) blue mussel beds (05.01.07)", "Benthic zone, stony and hard bottoms, rich in macrophytes, incl. artificial substrates (03.02.06)", "Benthic zone, stony and hard bottoms, few macrophytes (03.02.04)".

Nordic classification (Kustbiotoper i Norden, Nordiska Ministerrådet 2001):

"Klippbottnar (7.7.1.3; 7.7.2.3; 7.7.3.3; 7.7.4.3; 7.7.5.3; 7.8.1.3; 7.8.2.3; 7.8.3.4; 7.8.4.3; 7.8.5.3; 7.8.6.13; 7.8.7.16)", "Sublittorale samfund på sten- och klippebund (7.9.1.2)", "Sublittorale samfund på stenbund (7.9.2.2; 7.9.3.2)".

**4. Associated habitats:**

Reefs can be found in association with "vegetated sea cliffs" (habitats 1230, 1240 and 1250) "sandbanks which are covered by sea water all the time" (1110) and "sea caves" (habitat 8830). Reefs may also be a component part of habitat 1130 "estuaries" and habitat 1160 "large shallow inlets and bays".

**5. References:**


**AUGIER H. (1982).** Inventaire et classification des biocénoses marines benthiques de la Méditerranée. Publication du Conseil de l' Europe, Coll. Sauvegarde de la Nature, 25, 59 pages.

**BALLESTEROS E. (1988).** Estructura de la comunitad de ***Cystoseira mediterranea*** Sauvageau en el Mediterraneo noroccidental. ***Inv. Pesq***. 52 (3): 313-334.

**BALLESTEROS E. (1990).** Structure and dynamics of the ***Cystoseira caespitosa*** (Fucales, Phaeophyceae) community in the North-Western Mediterranean. ***Scient. Mar***. 54 (2): 155-168.

**BELLAN-SANTINI D. (1985).** The Mediterranean benthos: reflections and problems raised by a classification of the benthic assemblages. In: J.E. Treherne (Ed.) "Mediterranean Marine Ecosystems" pp. 19-48.

**BIANCHI, C.N., HAROUN, R., MORRI, C. & WIRTZ, P. (2000).** The subtidal epibenthic communities off Puerto del Carmen (Lanzarote, Canary Islands). ***Arquipélago, Sup.2 (Part A)***: 145-155.

**BORJA, A., AGUIRREZABALAGA, F., MARTÍNEZ, J., SOLA, J.C., GARCÍA-**

**ARBERAS, L., & GOROSTIAGA (2003).** Benthic communities, biogeography and resources management. In: Borja, A. & Collins, M. (Ed.). Ocenaography and Marine Environment of the Basque Country, Elsevier Oceanography Series n. 70: 27-50.

**BOUDOURESQUE C.F. (1969).** Etude qualitative et quantitative d'un peuplement algal à ***Cystoseira mediterranea*** dans la région de Banyuls sur Mer. ***Vie Milieu*** 20: 437-452.

**CONNOR, D.W., ALLEN, J.H., GOLDING, N., LIEBERKNECHT, L.M., NORTHEN, K.O. & REKER, J.B. (2003).** The National Marine Habitat Classification for Britain and Ireland Version 03.02. Internet version. Joint Nature Conservation Committee, Peterborough. (**www.jncc.gov.uk/marine/biotopes/default.htm**)

**EUROPEAN ENVIRONMENT AGENCY (2002).** EUNIS habitat classification. Version 2.3. Copenhagen, EEA (Internet publication:

**http://mrw.wallonie.be/dgrne/sibw/EUNIS/home.html**)

**GIACCONE G. & BRUNI A. (1972-1973).** Le Cistoseire e la vegetazione sommersa del Mediterraneo. ***Atti dell' Instituto Veneto de Scienze*** 81: 59-103.

**GIL-RODRÍGUEZ, M.C. & HAROUN R.J. (2004).** Litoral y Fondos Marinos del Parque Nacional de Timanfaya. En: ***Parques Nacionales Españoles.*** MMA/Ed. Canseco, Madrid (en prensa).

**HAROUN, R. Y HERRERA R. (2001).** "***Diversidad Taxonómica Marina***" En: J.M. Fernández-Palacios y J.L. Martín Esquivel (Eds.), ***Naturaleza de las Islas Canarias. Ecología y Conservación***, Ed. Turquesa, S/C de Tenerife, pp. 127-131.

**HELCOM (1998).** Red List of Biotopes and Biotope Complexes of the Baltic Sea, the Belt Sea and the Kattegat. Baltic Sea Environment Proceedings No. 75.: 126pp.

**HOLT, T.J., REES, E.I., HAWKINS, S.J. & SEED, R. (1998).** Biogenic Reefs (volume IX). An overview of dynamic and sensitivity characteristics for conservation management of marine SACs. Scottish Association for Marine Science (UK Marine SACs Project), 170 pp. (**www.ukmarinesac.org.uk/biogenic-reefs.htm**)

**KAUTSKY, N. (1974).** Quantitative investigations of the red algae belt in the Askö area, Northern Baltic proper. ***Contrib. Askö Lab. Univ. Stockholm*** 3: 1-29.

**MONTESANTO B. & PANAYOTIDIS P. (2000).** The ***Cystoseira*** spp. communities from the upper the Aegean Sea. J. mar. biol. Ass., U.K. 80:357-358.

**von NORDHEIM, H., NORDEN ANDERSEN, O. & THISSEN, J. (EDS.) (1996).** Red Lists of Biotopes, Flora and Fauna of the Trilateral Wadden Sea Area 1995. Helgol. Meeresuntersuchungen. 50 (suppl.): 136 pp.

**NORDISKA MINISTERRÅDET (2001).** Kustbiotoper i Norden. Hotade och representativa biotoper. TemaNord 2001: 536. 345 pp.

**MEDINA, M., HAROUN, R.J. y WILDPRET, W., (1995).** Phytosociological study of the Cystoseira abies-marina community in the Canarian Archipelago. ***Bull. Museu Mun. Funchal, Sup.*** 4: 433-439.

**PANAYOTIDIS P., DIAPOULIS A., VARKITZI I. & MONTESANTO B. (2001).** ***Cystoseira spp.*** used for the typology of the NATURA-2000 code 1170 ("reefs") at the Aegean Sea (NE Mediterranean). Proceedings of the first Mediterranean Symposium on Marine Vegetation. Ajaccio 3-4 October 2000, pages 168-172.

**PERÈS J. M. & PICARD J. (1964).** Nouveau manuel de bionomie benthique de la mer Méditerranée. ***Rec. Trav. St. Mar. Endoume*** 31 (47): 5-137.

**RAVANKO, O. (1968).** Macroscopic green, brown and red algae in the south-western archipelago of Finland. ***Acta Bot. Fennica*** 79: 1-50.

**RIECKEN, U., RIES, U. & SSYMANK, A. (1994).** Rote Liste der gefährdeten Biotoptypen der Bundesrepublik Deutschland - Schriftenreihe für Landschaftspflege und Naturschutz. 41: 184 pp.

# 1180 Submarine structures made by leaking gases

PAL.CLASS.: 11.24

## 1. Definition of the habitat

Submarine structures consist of sandstone slabs, pavements, and pillars up to 4 m high, formed by aggregation of carbonate cement resulting from microbial oxidation of gas emissions, mainly methane. The formations are interspersed with gas vents that intermittently release gas. The methane most likely originates from the microbial decomposition of fossil plant materials.

The first type of submarine structures is known as “bubbling reefs”. These formations support a zonation of diverse benthic communities consisting of algae and/or invertebrate specialists of hard marine substrates different to that of the surrounding habitat. Animals seeking shelter in the numerous caves further enhance the biodiversity. A variety of sublittoral topographic features are included in this habitat such as: overhangs, vertical pillars and stratified leaf-like structures with numerous caves.

The second type are carbonate structures within “pockmarks”. “Pockmarks” are depressions in soft sediment seabed areas, up to 45 m deep and a few hundred meters wide. Not all pockmarks are formed by leaking gases and of those formed by leaking gases, many do not contain substantial carbonate structures and are therefore not included in this habitat. Benthic communities consist of invertebrate specialists of hard marine substrata and are different from the surrounding (usually) muddy habitat. The diversity of the infauna community in the muddy slope surrounding the “pockmark” may also be high.

## 2. Characteristic species:

“Bubbling reefs”

Plants: If the structure is within the photic zone, marine macroalgae may be present such as ***Laminariales***, other foliose and filamentous brown and red algae.

Animals: A large diversity of invertebrates such as Porifera, Anthozoa, Polychaeta, Gastropoda, Decapoda, Echinodermata as well as numerous fish species are present. Especially the polychaete ***Polycirrus norwegicus*** and the bivalve ***Kellia suborbicularis*** are associated species of the “bubbling reefs”.

“Pockmarks”

Plants: Usually none.

Animals: Invertebrate specialists of hard substrate including Hydrozoa, Anthozoa, Ophiuroidea and Gastropoda. In the soft sediment surrounding the pockmark Nematodae, Polychaeta and Crustacea are present.

## 3. Associated habitats:

“Bubbling reefs” can be found in association with the habitat types ”sandbanks, which are covered by sea water all the time (1110)” and “reefs (1170)”.

**4. Geographical distribution and regional varieties:**

Shallow water examples of "bubbling reefs" colonised by macroalgae and/or animals are observed in Danish waters in the littoral and sublittoral zone from 0 to 30 m water depth. They are present in the northern Kattegat and in the Skagerrak and follow a NW SE direction parallel to the Fennoscandian fault line.

"Pockmarks" are found in many areas of the European shelf seas. Deep water examples of pockmarks with benthic fauna communities exists at approximately 100 m water depth in the UK part of the North Sea as depressions in areas of predominantly muddy seabed. Examples of extensive areas with pockmarks are found on the Galician coast (Spain) at the bottom of Rias at a more shallow water depth compared to the pockmarks in the North Sea. Present emission of gas has been reported, as well as other inactive pockmarks filled by more modern sediments. Another difference with the "bubbling reefs" of the Danish coast is that gas stocks are closer to the present bottom surface.

**5. Corresponding categories:**

HELCOM classification:

All subtypes under "Bubbling reefs (2.10)"

EUNIS:

Relevant types under A3.C.

**6. Literature :**


**JENSEN, P. ET AL. (1992)**. "Bubbling reefs" in the Kattegat: submarine landscapes of carbonate-cemented rocks support a diverse ecosystem at methane seeps. ***Mar. Ecol. Prog. Ser., vol. 83:103-112***

**DANDO, P.R. ET. AL. (1991).** Ecology of a North Sea Pockmark with an active methane seep. ***Mar. Ecol. Prog. Ser., vol. 70: 49-63***.

**HANSEN, J.M. (1988).** Koraller i Kattegat, kortlægning. ***Miljøministeriets, Skov- og Naturstyrelsen***.

**HOVLAND M. & JUDD A.G. (1988).** Seabed Pockmarks and seepages: Impact on Geology, Biology and the Marine Environment. ***Graham & Trotman, London. 245pp.***

**JENSEN, P. ET AL. (1992).** "Bubbling reefs" in the Kattegat: submarine landscapes of carbonate-cemented rocks support a diverse ecosystem at methane seeps. ***Mar. Ecol. Prog. Ser., vol. 83:103-112***.

**JOHNSTON, C. J., TURNBULL, C. G. & TASKER, M. L. (2002).** Natura 2000 in UK Offshore Waters: Advice to support the implementation of the EC Habitats and Birds Directives in UK offshores waters. JNCC Report 325.

**JØRGENSEN, N.O. ET AL (1989).** Holocene methane-derived dolomite-cemented sandstone pillars from Kattegat, Denmark. ***Mar. Geol., vol. 88: 71-81***.

**JØRGENSEN, N.O. ET AL (1990).** Shallow hydrocarbon gas in the nothern Jutland-Kattegat region, Denmark. ***Bull. Geol. Soc., vol. 38: 69-76***.

**LAIER, T. ET AL. (1991).** Kalksøjler og gasudslip i Kattegat, seismisk kortlægning af området nordvest for Hirsholmene. ***Miljøministeriet, Danmarks Geologiske Undersøgelse***.

# *Other rocky habitats*

## 8330 Submerged or partially submerged sea caves

PAL.CLASS.: 12.7, 11.26, 11.294

**1)** Caves situated under the sea or opened to it, at least at high tide, including partially submerged sea caves. Their bottom and sides harbour communities of marine invertebrates and algae.

# Appendix 2

**Lists of existing marine Habitat types and Species**

**for different Member States**

# MARINE HABITATS

| Habitats type | | Distribution | Belgium | | Denmark | | Finland | | France | | Germany | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1110 | Sandbanks | Baltic sea | | | P | ? | P | ? | | | P | P |
| | | Atlantic / North sea | P | P | P | P | | | P | P | P | P |
| | | Mediterranean sea | | | | | | | P | ? | | |
| 1120 | Posidonia Beds | Mediterranean sea | | | | | | | P | A | | |
| 1130 | Estuaires | Baltic sea | | | P | | P | | | | P | |
| | | Atlantic / North sea | P | | P | | | | P | | P | |
| | | Mediterranean sea | | | | | | | P | | | |
| 1140 | Mudflats and sandflats not covered by sea water at low tide | Baltic sea | | | P | | P | | | | P | |
| | | Atlantic / North sea | P | | P | | | | P | | P | |
| | | Mediterranean sea | | | | | | | P | | | |
| 1150 | Coastal Lagoons | Baltic sea | | | P | | P | | | | P | |
| | | Atlantic / North sea | A | | P | | | | P | | P | |
| | | Mediterranean sea | | | | | | | P | | | |
| 1160 | Large shallow inlets and bays | Baltic sea | | | P | | P | | | | P | |
| | | Atlantic / North sea | A | | P | | | | P | | P | |
| | | Mediterranean sea | | | | | | | P | | | |
| 1170 | Reefs | Baltic sea | | | P | ? | P | ? | | | P | P |
| | | Atlantic / North sea | A | A | P | A | | | P | P | P | P |
| | | Mediterranean sea | | | | | | | P | P | | |
| 1180 | Submarine structures made by leaking gases | Baltic sea | | | P | ? | A | A | | | A | A |
| | | Atlantic / North sea | A | ? | A | ? | | | A | | A | A |
| | | Mediterranean sea | | | | | | | A | ? | | |
| 8330 | Submerged or partially submerged caves | Baltic sea | | | P | ? | A | ? | | | A | A |
| | | Atlantic / North sea | A | ? | A | ? | | | P | ? | A | A |
| | | Mediterranean sea | | | | | | | P | ? | | |

P= Habitat PRESENT

A= Habitat ABSENT

? = No data

# MARINE HABITATS

| Habitats type | | Distribution | Greece | | Ireland | | Italy | | Netherlands | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1110 | Sandbanks | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | P | | | P | P |
| | | Mediterranean sea | P | ? | | | P | ? | | |
| 1120 | Posidonia Beds | Mediterranean sea | P | A | | | P | A | | |
| 1130 | Estuaires | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | | | | P | |
| | | Mediterranean sea | P | | | | P | | | |
| 1140 | Mudflats and sandflats not covered by sea water at low tide | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | | | | P | |
| | | Mediterranean sea | P | | | | P | | | |
| 1150 | Coastal Lagoons | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | | | | A | |
| | | Mediterranean sea | P | | | | P | | | |
| 1160 | Large shallow inlets and bays | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | | | | P | |
| | | Mediterranean sea | P | | | | P | | | |
| 1170 | Reefs | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | P | | | A | A |
| | | Mediterranean sea | P | ? | | | P | P | | |
| 1180 | Submarine structures made by leaking gases | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | A | ? | | | A | ? |
| | | Mediterranean sea | A | ? | | | A | ? | | |
| 8330 | Submerged or partially submerged caves | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | P | ? | | | A | ? |
| | | Mediterranean sea | P | ? | | | P | ? | | |

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

# MARINE HABITATS

**TABLE 1**

| Habitats type | | Distribution | Portugal | | Spain | | Sweden | | United Kingdom | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1110 | Sandbanks | Baltic sea | | | | | P | ? | | |
| | | Atlantic / North sea | P | P | P | ? | | | P | P |
| | | Mediterranean sea | | | P | ? | | | ? | |
| 1120 | Posidonia Beds | Mediterranean sea | | | P | A | | | ? | |
| 1130 | Estuaires | Baltic sea | | | | | P | | | |
| | | Atlantic / North sea | P | | P | | | | P | |
| | | Mediterranean sea | | | P | | | | A | |
| 1140 | Mudflats and sandflats not covered by sea water at low tide | Baltic sea | | | | | P | | | |
| | | Atlantic / North sea | P | | P | | | | P | |
| | | Mediterranean sea | | | P | | | | ? | |
| 1150 | Coastal Lagoons | Baltic sea | | | | | P | | | |
| | | Atlantic / North sea | P | | P | | | | P | |
| | | Mediterranean sea | | | P | | | | ? | |
| 1160 | Large shallow inlets and bays | Baltic sea | | | | | P | | | |
| | | Atlantic / North sea | P | | P | | | | P | |
| | | Mediterranean sea | | | P | | | | ? | |
| 1170 | Reefs | Baltic sea | | | | | P | ? | | |
| | | Atlantic / North sea | P | P | P | P | | | P | P |
| | | Mediterranean sea | | | P | P | | | P | |
| 1180 | Submarine structures made by leaking gases | Baltic sea | | | | | A | ? | | |
| | | Atlantic / North sea | A | ? | ? | ? | | | A | ? |
| | | Mediterranean sea | | | ? | ? | | | ? | |
| 8330 | Submerged or partially submerged caves | Baltic sea | | | | | P | ? | | |
| | | Atlantic / North sea | P | ? | P | ? | | | P | ? |
| | | Mediterranean sea | | | P | ? | | | ? | |

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

# MARINE HABITATS

**TABLE 1**

| Habitats type | | Distribution | Estonia | | Latvia | | Lithuania | | Poland | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1110 | Sandbanks | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1120 | Posidonia Beds | Mediterranean sea | | | | | | | | |
| 1130 | Estuaires | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1140 | Mudflats and sandflats not covered by sea water at low tide | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1150 | Coastal Lagoons | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1160 | Large shallow inlets and bays | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1170 | Reefs | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1180 | Submarine structures made by leaking gases | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 8330 | Submerged or partially submerged caves | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

# MARINE HABITATS

**TABLE 1**

| Habitats type | | Distribution | Malta | | Slovenia | | Cyprus | |
|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1110 | Sandbanks | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1120 | Posidonia Beds | Mediterranean sea | | | | | | |
| 1130 | Estuaires | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1140 | Mudflats and sandflats not covered by sea water at low tide | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1150 | Coastal Lagoons | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1160 | Large shallow inlets and bays | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1170 | Reefs | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1180 | Submarine structures made by leaking gases | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 8330 | Submerged or partially submerged caves | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Belgium | | Denmark | | Finland | | France | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | | | A | A | A | A | | |
| | | Atlantic / North sea | P | P | P | P | | | P | P |
| | | Mediterranean sea | | | | | | | P | P |
| 1351 | Phocoena phocoena | Baltic sea | | | P | P | A | A | | |
| | | Atlantic / North sea | P | P | P | P | | | P | P |
| | | Mediterranean sea | | | | | | | A | A |
| 1364 | Halichoerus grypus | Baltic sea | | | P | P | P | P | | |
| | | Atlantic / North sea | P | P | P | P | | | P | P |
| 1365 | Phoca vitulina | Baltic sea | | | P | P | A | A | | |
| | | Atlantic / North sea | P | P | P | P | | | P | P |
| 1366 | Monachus monachus | Atlantic / North sea | A | A | A | A | | | A | A |
| | | Mediterranean sea | | | | | | | A | A |
| 1938 | Phoca hispida bottnica | Baltic sea | | | A | ? | P | P | | |
| 1224 | Caretta caretta | Atlantic / North sea | A | A | A | A | | | P | ***P[1]*** |
| | | Mediterranean sea | | | | | | | P | P |
| 1095 | Petromyzon marinus | Baltic sea | | | P | ? | A | A | | |
| | | Atlantic / North sea | P | P | P | ? | | | P | P |
| | | Mediterranean sea | | | | | | | P | ***P[2]*** |
| 1099 | Lampetra fluviatilis | Baltic sea | | | P | ? | e | e | | |
| | | Atlantic / North sea | P | P | P | ? | | | P | ***A*** |
| | | Mediterranean sea | | | | | | | P | ***A[3]*** |
| 1100 | Acipenser naccarii | Mediterranean sea | | | | | | | A | A |
| 1101 | Acipenser sturio | Baltic sea | | | A | A | A | A | | |
| | | Atlantic / North sea | A | A | A | A | | | P | P |
| | | Mediterranean sea | | | | | | | A | A |
| 1102 | Alosa alosa | Baltic sea | | | P | ? | A | A | | |
| | | Atlantic / North sea | A | A | P | ? | | | P | ***A*** |
| | | Mediterranean sea | | | | | | | P | ***A[4]*** |
| 1103 | Alosa fallax | Baltic sea | | | P | ? | A | A | | |
| | | Atlantic / North sea | A | A | P | ? | | | P | ***A*** |
| | | Mediterranean sea | | | | | | | P | ***A[5]*** |
| 1151 | Aphanius iberus | Atlantic / North sea | A | A | A | A | | | A | A |
| | | Mediterranean sea | | | | | | | A | A |
| 1152 | Aphanius fasciatus | Mediterranean sea | | | | | | | P | ***A*** |
| 1153 | Valencia hispanica | Mediterranean sea | | | | | | | A | A |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | | | | | | | A | A |
| 1992 | Valencia letourneuxi | Mediterranean sea | | | | | | | A | A |

P=Specie PRESENT
A= Specie ABSENT

? = No data
e = except the Finnish and/or Sweden populations

[1] Il existe des données mais cette espèce n'est pas habituelle des zones. Source l'atlas des reptiles d'europe J. Lescure
[2] espèce démersale source fish base, les cahiers d'espèces et P Keith
[3] Sp d'eau saumâtre pas d'observation en dessous de 10 m (fish base) confirmée par P Keith et les cahiers d'sp.
[4] sp non rencontrée en dessous de 5 m (fish base)
[5] sp non rencontrée en dessous de 1 m (fish base)

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Germany (*) | | Greece | | Ireland | |
|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | A | A | | | | |
| | | Atlantic / North sea | P | P | | | P | P |
| | | Mediterranean sea | | | P | P | | |
| 1351 | Phocoena phocoena | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | P |
| | | Mediterranean sea | | | P | P | | |
| 1364 | Halichoerus grypus | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | P |
| 1365 | Phoca vitulina | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | P |
| 1366 | Monachus monachus | Atlantic / North sea | A | A | | | A | A |
| | | Mediterranean sea | | | P | P | | |
| 1938 | Phoca hispida bottnica | Baltic sea | A | A | | | | |
| 1224 | Caretta caretta | Atlantic / North sea | A | A | | | A | A |
| | | Mediterranean sea | | | P | P | | |
| 1095 | Petromyzon marinus | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | ? |
| | | Mediterranean sea | | | A | A | | |
| 1099 | Lampetra fluviatilis | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | ? |
| | | Mediterranean sea | | | A | A | | |
| 1100 | Acipenser naccarii | Mediterranean sea | | | A | A | | |
| 1101 | Acipenser sturio | Baltic sea | P | ? | | | | |
| | | Atlantic / North sea | A | A | | | A | A |
| | | Mediterranean sea | | | P | P | | |
| 1102 | Alosa alosa | Baltic sea | P | ? | | | | |
| | | Atlantic / North sea | P | ? | | | P | ? |
| | | Mediterranean sea | | | A | A | | |
| 1103 | Alosa fallax | Baltic sea | P | P | | | | |
| | | Atlantic / North sea | P | P | | | P | ? |
| | | Mediterranean sea | | | P | P | | |
| 1151 | Aphanius iberus | Atlantic / North sea | A | A | | | A | A |
| | | Mediterranean sea | | | A | A | | |
| 1152 | Aphanius fasciatus | Mediterranean sea | | | P | P | | |
| 1153 | Valencia hispanica | Mediterranean sea | | | A | A | | |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | | | A | A | | |
| 1992 | Valencia letourneuxi | Mediterranean sea | | | P | ? | | |

(*) Also, presence on inshore German Baltic waters of: 1355 Lutra lutra, 1149 Cobitis taenia, 1130 Aspius Aspius

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Italy | | Netherlands | | Portugal | |
|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | P | P | P |
| | | Mediterranean sea | P | P | | | | |
| 1351 | Phocoena phocoena | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | P | P | P |
| | | Mediterranean sea | A | A | | | | |
| 1364 | Halichoerus grypus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | P | A | A |
| 1365 | Phoca vitulina | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | P | A | A |
| 1366 | Monachus monachus | Atlantic / North sea | | | A | A | P | P |
| | | Mediterranean sea | P | | | | | |
| 1938 | Phoca hispida bottnica | Baltic sea | | | | | | |
| 1224 | Caretta caretta | Atlantic / North sea | | | A | A | P | P |
| | | Mediterranean sea | P | P | | | | |
| 1095 | Petromyzon marinus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | ? | P | ? |
| | | Mediterranean sea | P | ? | | | | |
| 1099 | Lampetra fluviatilis | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | ? | P | ? |
| | | Mediterranean sea | P | ? | | | | |
| 1100 | Acipenser naccarii | Mediterranean sea | P | ? | | | | |
| 1101 | Acipenser sturio | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | A | A | P | ? |
| | | Mediterranean sea | P | ? | | | | |
| 1102 | Alosa alosa | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | ? | P | ? |
| | | Mediterranean sea | ? | ? | | | | |
| 1103 | Alosa fallax | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | P | ? | P | ? |
| | | Mediterranean sea | P | ? | | | | |
| 1151 | Aphanius iberus | Atlantic / North sea | | | A | A | A | A |
| | | Mediterranean sea | A | A | | | | |
| 1152 | Aphanius fasciatus | Mediterranean sea | P | A | | | | |
| 1153 | Valencia hispanica | Mediterranean sea | A | A | | | | |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | P | A | | | | |
| 1992 | Valencia letourneuxi | Mediterranean sea | A | A | | | | |

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Spain | | Sweden | | United Kingdom | |
|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | | | A | A | | |
| | | Atlantic / North sea | P | P | | | P | P |
| | | Mediterranean sea | P | P | | | ? | |
| 1351 | Phocoena phocoena | Baltic sea | | | P | P | | |
| | | Atlantic / North sea | P | P | | | P | P |
| | | Mediterranean sea | P | P | | | ? | |
| 1364 | Halichoerus grypus | Baltic sea | | | P | P | | |
| | | Atlantic / North sea | A | A | | | P | P |
| 1365 | Phoca vitulina | Baltic sea | | | P | P | | |
| | | Atlantic / North sea | A | A | | | P | |
| 1366 | Monachus monachus | Atlantic / North sea | A | ? | | | A | A |
| | | Mediterranean sea | P | P | | | ? | |
| 1938 | Phoca hispida bottnica | Baltic sea | | | P | P | | |
| 1224 | Caretta caretta | Atlantic / North sea | P | P | | | A | A |
| | | Mediterranean sea | P | P | | | ? | |
| 1095 | Petromyzon marinus | Baltic sea | | | e | e | | |
| | | Atlantic / North sea | P | ? | | | P | P |
| | | Mediterranean sea | P | ? | | | ? | |
| 1099 | Lampetra fluviatilis | Baltic sea | | | e | e | | |
| | | Atlantic / North sea | A | A | | | P | P |
| | | Mediterranean sea | A | A | | | A | |
| 1100 | Acipenser naccarii | Mediterranean sea | A | A | | | A | |
| 1101 | Acipenser sturio | Baltic sea | | | A | A | | |
| | | Atlantic / North sea | A | A | | | A | A |
| | | Mediterranean sea | P | ? | | | A | |
| 1102 | Alosa alosa | Baltic sea | | | A | A | | |
| | | Atlantic / North sea | P | ? | | | P | P |
| | | Mediterranean sea | P | ? | | | ? | |
| 1103 | Alosa fallax | Baltic sea | | | A | A | | |
| | | Atlantic / North sea | P | ? | | | P | P |
| | | Mediterranean sea | P | ? | | | ? | |
| 1151 | Aphanius iberus | Atlantic / North sea | P | A | | | A | A |
| | | Mediterranean sea | P | A | | | ? | |
| 1152 | Aphanius fasciatus | Mediterranean sea | A | A | | | A | |
| 1153 | Valencia hispanica | Mediterranean sea | A | A | | | A | |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | A | A | | | A | |
| 1992 | Valencia letourneuxi | Mediterranean sea | A | A | | | A | |

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Estonia | | Latvia | | Lithuania | | Poland | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1351 | Phocoena phocoena | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1364 | Halichoerus grypus | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| 1365 | Phoca vitulina | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| 1366 | Monachus monachus | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1938 | Phoca hispida bottnica | Baltic sea | | | | | | | | |
| 1224 | Caretta caretta | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1095 | Petromyzon marinus | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1099 | Lampetra fluviatilis | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1100 | Acipenser naccarii | Mediterranean sea | | | | | | | | |
| 1101 | Acipenser sturio | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1102 | Alosa alosa | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1103 | Alosa fallax | Baltic sea | | | | | | | | |
| | | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1151 | Aphanius iberus | Atlantic / North sea | | | | | | | | |
| | | Mediterranean sea | | | | | | | | |
| 1152 | Aphanius fasciatus | Mediterranean sea | | | | | | | | |
| 1153 | Valencia hispanica | Mediterranean sea | | | | | | | | |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | | | | | | | | |
| 1992 | Valencia letourneuxi | Mediterranean sea | | | | | | | | |

P=Specie PRESENT
A= Specie ABSENT

# MARINE SPECIES

**TABLE 2**

| Species | | Distribution | Malta | | Slovenia | | Cyprus | |
|---|---|---|---|---|---|---|---|---|
| | | | Inshore | Offshore | Inshore | Offshore | Inshore | Offshore |
| 1349 | Tursiops truncatus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1351 | Phocoena phocoena | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1364 | Halichoerus grypus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| 1365 | Phoca vitulina | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| 1366 | Monachus monachus | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1938 | Phoca hispida bottnica | Baltic sea | | | | | | |
| 1224 | Caretta caretta | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1095 | Petromyzon marinus | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1099 | Lampetra fluviatilis | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1100 | Acipenser naccarii | Mediterranean sea | | | | | | |
| 1101 | Acipenser sturio | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1102 | Alosa alosa | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1103 | Alosa fallax | Baltic sea | | | | | | |
| | | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1151 | Aphanius iberus | Atlantic / North sea | | | | | | |
| | | Mediterranean sea | | | | | | |
| 1152 | Aphanius fasciatus | Mediterranean sea | | | | | | |
| 1153 | Valencia hispanica | Mediterranean sea | | | | | | |
| 1154 | Pomatoschistus canestrini | Mediterranean sea | | | | | | |
| 1992 | Valencia letourneuxi | Mediterranean sea | | | | | | |

A= Specie ABSENT

P=Specie RESENT

**TABLE 3**

## Seabirds and waterbird species for which SPAs should be considered.

PL – pelagic, large-scale dispersion offshore, e.g. feeding or migratory aggregations; PM – pelagic meso-scale dispersion offshore, e.g. feeding or migratory aggregations; CS – smaller scale, coastal dispersion outside or during the breeding season, e.g. feeding or roosting aggregations; CM – smaller to meso-scale (principally over time perhaps), coastal dispersion in the breeding season, e.g. aggregations of birds engaged in maintenance activities adjacent to breeding colonies.

Species may exhibit all scales of dispersion across or within seasons and these categories are not exclusive ones (see point 4.6 of the guidelines main text).

| Species | Annex I | Indicative scales of aggregation |
|---|---|---|
| | | |
| ***Gavia stellata*** | ✓ | CS |
| ***Gavia arctica*** | ✓ | CS |
| ***Gavia immer*** | ✓ | CS |
| ***Podiceps cristatus*** | | CS |
| ***Podiceps grisegena*** | | CS |
| ***Podiceps auritus*** | ✓ | CS |
| ***Podiceps nigricollis*** | | CS |
| ***Fulmarus glacialis*** | | PL, PM, CM |
| ***Pterodroma feae*** | ✓ | PL, PM |
| ***Pterodroma madeira*** | ✓ | PL, PM |
| ***Bulweria bulwerii*** | ✓ | PL, PM |
| ***Calonectris diomedea*** | ✓ | PL, PM |
| ***Puffinus griseus*** | | PL, PM |
| ***Puffinus assimilis*** | ✓ | PL, PM, CS |
| ***Puffinus puffinus*** | | PL, PM, CS |
| ***Puffinus mauretanicus*** | ✓ | PL, PM, CS |
| ***Puffinus yelkouan*** | ✓ | PL, PM, CS |
| ***Hydrobates pelagicus*** | ✓ | PL, PM |
| ***Oceanodroma leucorhoa*** | ✓ | PL, PM |
| ***Oceanodroma castro*** | ✓ | PL, PM |
| ***Pelagodroma marina*** | ✓ | PL, PM |
| ***Morus bassanus*** | | PL, PM, CS, CM |
| ***Phalacrocorax carbo*** | | CS, CM |
| ***Phalacrocorax aristotelis*** | | CS, CM |
| ***Phalacrocorax a. desmarestii*** | ✓ | CS, CM |
| ***Phalaropus lobatus*** | ✓ | PL |
| ***Phalaropus fulicarius*** | | PL |
| ***Aythya marila*** | | CS |
| ***Somateria mollissima*** | | CS |
| ***Polysticta stelleri*** | ✓ | CS |
| ***Melanitta nigra*** | | CS |
| ***Melanitta fusca*** | | CS |
| ***Clangula hyemalis*** | | CS |
| ***Bucephala clangula*** | | CS |
| ***Mergus serrator*** | | CS |
| ***Mergus merganser*** | | CS |
| ***Stercorarius skua*** | | PL, PM |
| ***Stercorarius pomarinus*** | | PL, PM |
| ***Stercorarius parasiticus*** | | PL, PM |
| ***Stercorarius longicaudus*** | | PL, PM |
| ***Larus genei*** | ✓ | PL, PM |
| ***Larus ridibundus*** | | CS |

| | | |
|---|---|---|
| ***Larus canus*** | | CS |
| ***Larus melanocephalus*** | ✓ | CS |
| ***Larus audouini*** | ✓ | CS |
| ***Larus marinus*** | | CS, CM |
| ***Larus fuscus*** | | CS |
| ***Larus argentatus*** | | CS, CM |
| ***Larus michahellis*** | | CS, CM |
| ***Larus hyperboreus*** | | PL, PM |
| ***Larus glaucoides*** | | PL, PM |
| ***Larus minutus*** | ✓ | CS |
| ***Rissa tridactyla*** | | PL, PM, CM |
| ***Sterna caspia*** | ✓ | CS |
| ***Sterna albifrons*** | ✓ | CS, CM |
| ***Sterna nilotica*** | ✓ | CS |
| ***Sterna sandvicensis*** | ✓ | CS, CM |
| ***Sterna paradiseae*** | ✓ | CS, CM |
| ***Sterna hirundo*** | ✓ | CS, CM |
| ***Sterna dougallii*** | ✓ | CS, CM |
| ***Cepphus grylle*** | | CS, CM |
| ***Fratercula arctica*** | | PL, PM, CM |
| ***Alle alle*** | | PL, PM |
| ***Alca torda*** | | PL, PM, CM |
| ***Uria aalge*** | | PL, PM, CM |
| ***Uria aalge ibericus*** | ✓ | PL, PM, CM |

# Appendix 3

**Examples of the technique of the use of matrix as a management tool for decision-making.**

# An example of the use of the matrix
# Site A (hypotetical)
**(see point 5.5 of the main texte)**

| **Users** | **Habitats** | | | **Species** | | | | **Other elements of conservation concerns but not listed in EC Directives** | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1110 sandbanks | 1170 reefs | 1180 leaking gasses | Cetaceans | Birds eating Fish | Birds eating Benthos | Phoca vitulina | Large fish | Large moluscs | Natural physical processes | selected species xx |
| **SPACE** | | | | | | | | | | | |
| windmills | | | | ? | ? | | | | | | |
| Harbours | | | | | | | | | | | |
| Art. islands | | | | | | | | | | | |
| Oil and gas exploration | | | | | | | | | | | |
| Oil and gas exploitation | | | | | | | | | | | |
| Shipping channels | | | | ? | | | | | | | |
| Pipelines/cables | | | | | | | | | | | |
| Military practice | | | | | | | | | | | |
| Tidal energy | | | | | | | | | | | |
| | | | | | | | | | | | |
| **FISHERIES** | | | | | | | | | | | |
| Bottom trawling | | | | | | | | | | ? | |
| Shell fishery/dredging | | | | | | | | | | | |
| Collection biogenic structures | | | | | | | | | | | |
| Pelagic fishery | | | | | | | | | | | |
| Seines, driftnet, line fisheries | | | | | | | | | | | |
| Set nets | | | | | | | | | | | |
| | | | | | | | | | | | |
| **MINING/DREDGING** | | | | | | | | | | | |
| Sand mining | | | | | | | | | | | |
| Gravel mining | | | | | | | | | | | |
| Channel dredging | | | | | | | | | | | |
| | | | | | | | | | | | |

**not relevant**
**no impact**
**easy regulation**
**zoning of activity**
**conflict -> regulation**



# Site B

| Users | Habitats | | Species | | | | Other elements of conservation concerns but not listed in EC Directives | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | reefs | leaking gasses | Cetaceans | Birds eating Fish | Birds eating Benthos | Phoca vitulina | Large fish | Large moluscs | Natural physical processes | Some other selected species |
| **SPACE** | | | | | | | | | | |
| windmills | | | | ? | | | | | | |
| Harbours | | | | | | | | | | |
| Art. islands | | | | | | | | | | |
| Oil and gas expl | | | | | | | | | | |
| Shipping channels | | | | | | | | | | |
| Pipelines/cables | | | | | | | | | | |
| Military practice | | | | | | | | | | |
| Tidal energy | | | | | | | | | | |
| | | | | | | | | | | |
| **POLLUTION** | | | | | | | | | | |
| Oil | | | | | | | | | | |
| Chemical | | | | | | | | | | |
| Eutrophication | | | | | | | | | | |
| | | | | | | | | | | |
| **FISHERIES** | | | | | | | | | | |
| Bottom trawling | | | | | | | | | ? | |
| Shell fishery/dredging | | | | | | | | | | |
| Collection biogenic structures | | | | | | | | | | |
| Collection manganese knolls etc | | | | | | | | | | |
| Pelagic fishery | | | | | | | | | | |
| Seines, driftnet, line fisheries | | | | | | | | | | |
| Set nets | | | | | | | | | | |
| Whaling | | | | | | | | | | |
| | | | | | | | | | | |
| **MINING/DREDGING** | | | | | | | | | | |
| Sand mining | | | | | | | | | | |
| Gravel mining | | | | | | | | | | |
| Channel dredging | | | | | | | | | | |
| | | | | | | | | | | |
| **DISTURBANCE** | | | | | | | | | | |
| Shipping | | | | | | | | | | |
| Sesmic surveys. | | | | | | | | | | |
| Pipelines | | | | | | | | | | |
| Cables (magnetic fields) | | | | | | | | | | |

**not relevant**
**no impact**
**easy regulation**
**zoning of activity**
**conflict -> regulation**

## Examples of possible outcomes after evaluation of the different impacts of human activities on the ecosystem of the sites “A” and “B”

### 1. Wind parks

Wind parks can be accommodated in SAC’s based on bottom biotopes. The pylons and bottom protection (mostly stone) will have an impact on the sediment, but the area impacted is so small compared to the distance the turbines are from each other (600 -750 m) that the impact in the specific natural values could be regarded as non-significant. Installation of wind parks will need implementation of safety measures that will need regulation of other uses such as dredging or bottom disturbing fisheries.
For the bottom biotopes of Site «A» and Site «B» spatial regulations may be required in order to place the structures outside the hotspots. Therefore the squares are marked yellow.

Apart from the sediment the Site «A» is designated because of the occurrence of the guillemots in late summer, when adult males with their young swim there coming from XXX for moulting and growing up of the chicks. The birds are not able to fly in that period, so there is no danger for collisions with the turbines. However the turbines have a disturbing impact on the birds. Thereby reducing the value as a bird habitat. The disturbing impact on feeding and moulting guillemots is not known, and has to be studied before permission for establishing a park can be granted. The matrix squares dealing with impacts on species are grey or yellow (with some question marks)
In case a SAC such as Site «A» would contain small reefs (biogenic such as oyster, mussel or sabellaria reefs, or rocky outcrops or large stones (Ice age relics)), zoning regulations within the SAC can be applied in order to prevent impacts on these areas which are relatively small compared to the whole Site «A». Therefore the matrix square is yellow.

### 2. Oil and gas exploration

For offshore platforms partly the same reasoning is adopted as for wind turbines. The space occupied is relatively small, so there is no significant impact on the bottom ecosystem. There may be disturbing impact on birds, but the number of platforms and the distance between them is not comparable to the much higher density of turbines. For migrating birds, among which there may be species listed in the Annexes of the directives, platforms may have a negative impact on some nights or with fog when birds are disoriented by light or flares. This impact will be prevented by mitigation measures.
For both Site «B» and Site «A», very strict safety regulations in order to prevent release of lipophilic substances (oil or detergents) to the sediment or water surface have to be implemented.

### 3. Oil pollution

Oil slicks occur everywhere where shipping occurs or where wrecks are still lying at the bottom. Frequency, timing and location are almost unpredictable. For both Site «B» and Site «A» floating slicks will have little impact on the bottom community. Combating slicks with dispersing agents has to be prevented because these cause the oil to disperse into the water column where the small globules may be more toxic, or cause the oil to coagulate and sink to the bottom.
Because the Site «A» has a specific value for floating and foraging birds it should be prevented that oil slicks reach the area, especially in the period between July and November, when high densities of guillemot and razorbill are present. Combatment plans should be implemented and equipment and specialized manpower ready for action.Matrix squares related to oil pollution are all red

### 4. Beam trawl fisheries

Beam trawl fishery is detrimental for bottom dwelling organisms and therefore not compatible with SAC’s that are implemented because of these organisms or bottom habitats. This type of fishery should not occur in a SAC. For fishermen this means loss of fishing ground, but not necessarily measurable loss of catch. Most commercial fish species are rather mobile and migrate over such distances that at some stage they will be caught outside the SAC. It has been calculated that closure of areas up to several ICES quadrants (each approximately 55 x 55 km) in the Dutch EEZ will not result in significant lower catches for the Dutch fisheries sector. Because regulatory actions for fishery in the open sea are the responsibility of the EU, international agreements will be necessary.

### 5. Gravel mining

Gravel does not occur in the Site «A». If small patches had occurred, prevention of mining would be sensible because the gain for the sector would be minimal.
In the Site «B» gravel mining is proposed. Because the gravel is the reason for SAC implementation, this activity should not be allowed. There are no direct financial losses for the sector because there is no extraction yet, but it will prevent future opportunities.

# An example of the use of the matrix

**Site name: xx. Code: nn**

| **Users** | **Habitats** | | | | | | | | | **Species** | | | | | **Other elements of conservation concerns but not listed in EC Directives** | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | mudflats | saegrasses | sandbanks | reefs | leaking gasses | marine caves | Shallowinlets | estuaries | lagoons | Cetaceans | Turtles | Birds eating Fish | Birds eating Benthos | Eco-engineers | Large fish | Large molusc s | Natural physical processes | Kselected species |
| **SPACE** | | | | | | | | | | | | | | | | | | |
| windmills | | | | | | | | | | ? | | ? | | | | | | |
| Harbours | | | | | | | | | | | | | | | | | | |
| Art. islands | | | | | | | | | | | | | | | | | | |
| Oil and gas expl | | | | | | | | | | | | | | | | | | |
| Shipping channels | | | | | | | | | | ? | | | | | | | | |
| Pipelines/cables | | | | | | | | | | | | | | | | | | |
| Military practice | | | | | | | | | | | | | | | | | | |
| Tidal energy | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | |
| **POLLUTION** | | | | | | | | | | | | | | | | | | |
| Oil | | | | | | | | | | | | | | | | | | |
| Chemical | | | | | | | | | | | | | | | | | | |
| Eutrophication | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | |
| **FISHERIES** | | | | | | | | | | | | | | | | | | |
| Bottom trawling | | | | | | | | | | | | | | | | | ? | |
| Shell fishery/dredging | | | | | | | | | | | | | | | | | | |
| Collection biogenic structures | | | | | | | | | | | | | | | | | | |
| Collection manganese knolls etc | | | | | | | | | | | | | | | | | | |
| Pelagic fishery | | | | | | | | | | | | | | | | | | |
| Seines, driftnet, line fisheries | | | | | | | | | | | | | | | | | | |
| Set nets | | | | | | | | | | | | | | | | | | |
| Whaling | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | |
| **MINING/DREDGING** | | | | | | | | | | | | | | | | | | |
| Sand mining | | | | | | | | | | | | | | | | | | |
| Gravel mining | | | | | | | | | | | | | | | | | | |
| Channel dredging | | | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | | | |
| **DISTURBANCE** | | | | | | | | | | | | | | | | | | |
| Shipping | | | | | | | | | | | | | | | | | | |
| Sesmic surveys. | | | | | | | | | | | | | | | | | | |
| Pipelines | | | | | | | | | | | | | | | | | | |
| Cables (magnetic fields) | | | | | | | | | | ? | | | | | | | | |

**not relevant**
**no impact**
**easy regulation**
**zoning of activity**
**conflict -> regulation**



# Appendix 4

**Good experiences and examples of implementation of Natura 2000 in the marine environment including LIFE fund actions in the marine environment**

# INDEX
## Good practices examples, positive experiences, contributions…


| Nº | Presented by | Contents | Page |
|---|---|---|---|
| ***Appendix 4.1 Examples provided by members of the Marine working group*** | | | |
| **1** | BirdLife | Towards the identification of marine IBA in the EU | **3** |
| **2** | ES | Good practices and positive experiences related to site selection process or management of designated sites | **23** |
| **3** | ES- BirdLife | Important Birds Areas for Seabirds in Spain | **26** |
| **4** | FIN | Proposal of good practices for SCI/SPA site selection process in Finnish marine offshore areas and experiences in protection of wide ranging species | **28** |
| **5** | SW | Swedish practices on selecting marine protected areas, including Natura 2000 sites | **30** |
| **6** | FR, IT, MC | PELAGOS: An international Marine mammal sanctuary in the North-Western Mediterranean sea | **34** |
| **7** | PT | Habitat restoration on Praia islet, Graciosa (Azores) | **37** |
| **8** | Wadden Sea (NL, D, DK ) | The Wadden Sea | **41** |
| **9** | FR | Overview of the measures included in the existing management plans of the French marine Natura 2000 sites | **53** |
| **10** | FR | Limitation to the negative interactions between dolphins and human activities (LINDA) Corsica, France | **55** |

***Appendix 4.2 LIFE and the Marine Environment.*** Publication of December 2006

# 1. Towards the identification of marine IBAs in the EU: an exploration by the Birds and Habitats Directives Task Force

This paper is meant as a first step towards a general approach to the identification of marine areas (i.e. those beyond the coastline) that are important for the conservation of birds in the Europe Union. It is based on current knowledge on how birds (mostly waterbirds) are distributed and make use of the marine environment. It concerns truly marine specialists that only approach land in order to breed. These are the so-called 'pelagic' species, the whereabouts of which are still insufficiently known for the proper identification of the areas of highest importance at the European level. Methodological criteria to identify and set the limits to those areas are currently under development, both within (notably in Spain and UK by SEO and RSPB, respectively) and beyond Europe by the Partnership of BirdLife International.

The current paper will focus on the species and IBA categories for which sufficient information is available to warrant an objective proposal by BirdLife International. A separate (second) part of this paper will deal with dispersed pelagic species when solid criteria have been developed and tested for EU waters.

## I. General introduction and coast related IBAs

1. In the last two decades, BirdLife International (and its forerunner ICBP) has been very successful in the identification of Important Bird Areas and subsequently getting general recognition that these sites represent prime sites for bird conservation. The European network of IBAs has formed an important scientific reference for the designation of special protection areas (SPAs) under the Wild Birds Directive of the European Union. It is now accepted BirdLife policy that in the EU, all IBAs should be classified as SPAs. Until now, the IBA programme of BirdLife International has been mainly focused on terrestrial and coastal habitats and the bird species using these habitats. Thanks to the increasing knowledge of the importance of inshore waters for waterbirds a number of inshore[1] sites have been identified particularly in the Baltic and North Sea area (note that many of these have been selected using different criteria to current IBAs). On the contrary, little attention has been paid so far to the identification of offshore areas important for predominantly marine species including pelagic species. Apart from lack of information this was due to the limited, if any, legal possibilities for site protection. IBA boundary selection guidelines say that an IBA should be an area which can in some way be managed. This has implications for the selection of areas at sea where ability to manage is severely curtailed.

2. The application of the Environmental Community law beyond territorial waters over which the MS exercises exclusive rights of exploitation and exploration of natural resources[2] was confirmed by a judgment of the European

[1] For practical reasons, inshore is here defined as the area of marine waters within 12 nm (about 22km) from the coastline, but excluding estuaries and intertidal mudflats; offshore concerns marine waters beyond 12 nm from the coastline. This distinction does not have an ecological meaning but is based on the maximum extent of territorial waters under UNCLOS (United Nations Common Law of the Sea, 1982).

[2] Other Member States have declared for this purpose Exclusive Economic Zones (EEZs) which extend at maximum 200 nautical miles from the coastline (the area may be limited by the presence of other countries)

Court of Justice (mainly Court case judgement C-6/04[3] ). Apart from the EU perspective other instruments like the OSPAR convention[4], the Helsinki Convention[5] and the Barcelona Convention[6] cover the protection of species and habitats in the marine environment. Therefore, there is an urgent need to adapt criteria and to establish guidelines for the identification of marine IBA's. This paper prepared by BirdLife international for the Birds and Habitats Directives Task Force is meant as a starting point for the preparation of such guidelines. It takes account of work that has already been done in this field and considers the possibilities to extend the IBA concept to the marine environment.

## 3. Marine habitats

Marine habitats are normally defined by relevant topographical or oceanographical features. The EUNIS Habitat Classification[7] makes in the first place a distinction according to strata: the sea bed and the water column. Next the sea bed is divided in littoral habitats and habitats that are permanently water-covered[8]. The latter is subdivided in continental shelf[9] and the deep sea. The shelf break occurs at variable depth, but is generally over 200 metres. Another useful contour line is the 20 m depth line. The waters between this and the coastline are generally known as coastal waters and are not always considered truly marine. In many cases, coastal waters have already been included in land-based IBAs (e.g. next to breeding colonies). In this paper "pelagic" refers to the open sea beyond coastal waters.

### Geographical scope

3. This paper is dealing with the identification of IBAs beyond the littoral zone in European Union waters although much may be applicable elsewhere in the Western Palearctic. It is mainly based on experience from the continental shelf (in particular Baltic Sea and North Sea) because few published data is available on seabird distribution patterns further away and elsewhere. The Birds and Habitats Directives are applicable where Member States claim sovereign rights or an EEZ (Exclusive Economic Zone) has been declared[10]. The latter consists of the continental shelf and the "superadjacent" waters up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured. Although the OSPAR and Barcelona Conventions covering the entire NE. Atlantic (up to Greenland) and the Mediterranean respectively require also the protection and conservation of ecosystems and the biological diversity of the maritime area, these requirements are less specific (and partly dependent on soft law) than those of EU law of which the compliance can be effectively enforced. As far as the implementation of the EU Birds Directive is concerned BirdLife should presumably focus its attention now on the territorial waters and EEZ's of the Member States, including major parts of the North Sea and the Baltic Sea.

[3] See Judgement articles 115-120 (http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[4] Convention for the Protection of the Marine Environment of the North-East Atlantic which entered into force in 1998 (threatened and declining species according to preliminary list indicated in table 3)

[5] Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992); entered into force in Jan 2000

[6] Convention for the Protection of the Mediterranean Sea against Pollution (1976) and its Protocol concerning Mediterranean specially protected areas (1982)

[7] A common European reference set of habitat units with a common description of all units and a common hierarchical classification. EUNIS is the European Nature Information System, developed and managed by the European Topic Centre for Nature Protection and Biodiversity (ETC/NPB in Paris) for the European Environment Agency (EEA) and the European Environmental Information Observation Network (EIONET).

[8] also referred to as pelagic waters: i.e. the open-water environment, or water column, as distinct from the bed or shore, inhabited by swimming marine or freshwater organisms.

[9] The gently seaward-sloping seabed surface that extends between the shoreline and the top of the continental slope at about 150 m depth. The average gradient of the shelf is between 1:500 and 1:1000 although it varies greatly, the average width is approximately 70km (North Sea and Baltic Sea are part of the continental shelf).

[10] Note that where EEZ's have not been declared (like in the Mediterranean) the application is restricted to the territorial zone which extends from 12 nm from the coastline.

**What are IBAs?**[11]

5. The aim of the Important Bird Areas (IBAs) programme is to identify and protect a network of sites at a biogeographic scale, critical for the long-term viability of naturally occurring bird populations, across the range of those bird species for which a site-based approach is appropriate. The network is considered the minimum essential to ensure the survival of these species. In essence it is BirdLife policy that, with some minor qualifications, all IBAs should be classified as SPAs under the Birds Directive. Four categories of species have been considered of which threatened and congregatory species concern the main categories (see table 6). To summarise, IBAs:

**Some characteristics of IBA's**

- are places of international significance for the conservation of birds at the global, regional or sub-regional levels;
- are practical tools for conservation;
- are chosen using standardised, agreed criteria applied with common sense;
- must, wherever possible, be large enough to support self-sustaining populations of those species for which they are important;
- must be amenable to conservation and, as far as possible be delimitable from surrounding areas;
- will preferentially include where appropriate, existing Protected Area Networks;
- are not appropriate for all bird species, and for some are only so in parts of their ranges; and
- should form part of a wider, integrated approach to conservation that embraces sites, species and habitat protection.

6. In addition to the above characteristics it also useful to refer to the definition of boundaries (underlined sentences that are problematic for marine areas):

**Defining the boundaries of an IBA (from IBA2000)**

- A site is defined so that, as far as possible, it:

i) is different in character or habitat or ornithological importance from the surrounding area;

ii) exists as an actual or potential protected area, with or without buffer zones, or is an area which can be managed in some way for nature conservation;

iii) is, alone or with other sites, a self-sufficient area which provides all the requirements of the birds (that it is important for) which use it during the time that they are present.

- Where extensive tracts of continuous habitat occur which are important for birds, only characteristics ii) and iii) apply. This definition is not applicable to migratory bottleneck sites.
- Practical considerations of how best the site may be conserved are the foremost consideration.
- Simple, conspicuous boundaries such as roads or rivers can often be used to delimit site margins, while features such as watersheds, ridge-lines and hilltops can help in places where there are no obvious discontinuities in habitat (transitions of vegetation or substrate). Boundaries of ownership are also relevant.
- There is no fixed maximum or minimum size for IBAs — the biologically sensible should be tempered with the practical. Neither is there a definitive answer on how to treat cases where a number of small sites lie near each other. Whether these are best considered as a series of separate IBAs, or as one larger site containing areas lacking ornithological significance, depends upon the local situation with regard to conservation and management.

## What has been done so far?

**Marine IBAs**[12]

7. The marine environment[13] is important for birds in Europe. European seas support over 60 species of bird that either have an unfavourable conservation status in Europe (Tucker & Heath 1994) or are marine specialists which are highly dependent upon the continuing integrity and quality of marine ecosystems (Tucker & Evans 1997). These species include four species that are globally threatened or near-threatened with extinction. Many of these species

[11] Paragraph taken from "Identification and demarcation of marine IBAs and their relationship to the Birds Directive" prepared by Duncan Huggett and presented for BirdLife International at various conferences (see references).

[12] Paragraphs 4-5 largely taken from Heath & Evans (2000), page 51 (abbreviated as IBA2000)

[13] i.e. marine habitats below the low-tide mark (Tucker & Evans 1997) thus excluding intertidal areas

congregate at certain times of the year, such as seabirds at breeding colonies or loons (divers) and seaducks at favourable feeding grounds in winter. Yet despite its importance for bird conservation, the marine environment has, until recently, received relatively little attention in terms of the identification of Important Bird Areas. This is due primarily to the difficulty of defining, identifying and delineating priority sites in areas of homogeneous appearance, coupled with the difficulty of stimulating international co-operation to establish integrated protection and management schemes for important sites outside national territorial waters. This inventory identifies 470 IBAs in Europe that have some marine habitat, including 147 IBAs that have more than 50% marine habitat cover and at least 25 IBAs are solely marine. Within the scope of IBA2000 no specific attempt has been made, to provide complete listings of marine areas important for birds in Europe (see for situation in a number of countries Appendix I).

**Previous inventories of marine areas that are internationally important for birds**

8. Three major publications have attempted to define, identify and delineate important areas for birds in European seas: ***Important bird areas for seabirds in the North Sea*** (Skov ***et al.*** 1995), ***Important marine areas for wintering birds in the Baltic Sea*** (Durinck ***et al.*** 1994) , and ***Important bird areas in the Baltic Sea*** (Skov ***et al.*** 2000).[14] In SW. Europe a first attempt has been made to describe the methodology and identify marine areas in Spain: ***Towards the identification of Important Bird Areas (IBAs) at sea -- Preliminary notes from Spain*** (Carboneras & Viada in prep.).

***North Sea*** The study area covered the entire North Sea, the Channel and the Kattegat, bounded by the coastlines of the United Kingdom, Norway, Sweden, Denmark, Germany, the Netherlands, Belgium and France (…). It included all territorial and international waters between the western Channel, the Northern Atlantic and the Kattegat. Data were analyzed from coastal and continental shelf seabird surveys during 1979–1994. The distribution of 30 species provided the basis for identifying important areas for birds. Twenty areas were identified as internationally important for birds in the area, of which the top six sites comprising less than 5 % of the region hold more than 80% of the cumulated sum of proportions for the species in question.

***Baltic Sea*** The study area encompassed the Baltic Sea, the Danish Straits and the Kattegat (Durinck ***et al.*** 1994, Skov ***et al.*** 2000). Data were presented for 30 species for which 1% or more of their biogeographic population winters in the Baltic Sea. Thirty-nine areas were identified as internationally important for wintering birds in the region, of which the top 10 sites, which cover less than 5% of the region, hold about 90% of the total estimated number of wintering birds.

***Spain*** The preliminary analysis by Carboneras & Viada (in prep.) was based on a number of physical and ecological characteristics which, when combined, helped identify important areas for seabirds in each of Spain's three distinct marine zones (Mediterranean, Atlantic and Macaronesia), and set their limits. They matched oceanographical criteria (topography, salinity, temperature, currents, upwellings, nutrients) against the regular use that seabirds made of those areas and obtained a preliminary list of 13 marine IBAs for seabirds in Spain. Their analysis mainly focused on birds which behave as strictly marine when they occur in Spanish waters (divers, petrels, shearwaters, storm-petrels, gannets, cormorants, skuas, gulls, terns and auks). The analysis was not only based on concentrations of seabirds but on the regular use that they made of certain areas, and the relevance of such areas for the conservation of seabird species. Thus, the identification of areas on which seabirds depend during part of their life cycle was key to the process. They included important foraging grounds, sites of importance along migration routes, waters where seabirds develop part of their breeding cycle as well as areas where significant aggregations occur (for resting, moulting, in winter, etc.).

9. The first three of those studies referred to above applied the so-called Marine Classification Criterion (MCC) that measures marine bird concentrations and their international significance. The methodology is dependent on having sufficiently large amounts of quantitative data available on bird distribution in marine areas. It enables the use of the 1%-threshold which is widely applied to waterbirds for the identification of wetlands of international importance under the Ramsar Convention (IBA criterion B1i). The MCC requires the quantification of three parameters (Skov ***et al.*** 2000):

- The size of the area based on the borders of a high-density aggregation of a waterbird or seabird species (parameter "A");
- The proportion of the total biogeographic or flyway population estimated to occur within the borders of the aggregation; and
- The degree of concentration displayed by the aggregation.

The border of the high-density aggregation has to be determined accurately by the use of robust and fine-scale interpolation techniques creating a minimum amount of false information. Important aggregations contain over 1% of

[14] Although two of these studies refer explicitely to "Important Bird Areas" standard data checking and validation procedures by the BirdLife Secretariat (Heath & Evans 2000: 10) were not adhered to (cf. critical review of Skov ***et al.*** 2000 and other reports, Ardea 89: 551-553).

the total biogeographic or fly-way population of the species in question. The degree of concentration is regarded as important where 1% or more of a population is concentrated in an area of no more than 3000 km$^2$. The application of the MCC requires the precise delineation of the borders of species aggregations by the use of standard GIS routines[15]. In the North Sea report all regularly occurring species were considered including divers, grebes, cormorants, fulmar, gannet, diving ducks, sea ducks, gulls, terns and auks. The Baltic Sea report (2000), which covers both inshore wetlands[16] and offshore marine areas, concerns mainly divers, grebes, cormorant, diving ducks, sea ducks, and auks (in relation to offshore areas).The areas considered of international importance for birds identified using the MCC method are shown for the North Sea in table 1 and figure 1 and for the Baltic in table 2 and figure 2.

**Seaward extensions of breeding colony IBAs**

10. When viewed together with the intensive use of coastal and continental shelf waters around some European coasts and the potential impacts of these activities on seabirds, it is clear that the conservation of seabirds needs actions to be targeted on both the terrestrial and marine environments. The Birds Directive provides the statutory incentive to establish marine protected areas for seabirds. RSPB has made a detailed study including specific recommendations on the extension of seabird colonies into the marine environment to include feeding areas (RSPB 2000, Huggett 2001).

11. The information brought together in that report confirms that while it would be desirable to have more information on how and where seabirds use the sea and on the significance of particular areas to seabirds, enough is known about seabird ecology to put forward some sound proposals on how the boundaries of SPAs could be extended to include marine feeding areas. It has been possible to develop and apply criteria to the SPAs holding seabird colonies in a way that conforms with the Birds Directive, is based on the importance of the areas to seabirds, is transparent, logical and systematic and which can be applied in spite of uncertainty or limited information. The following criteria were developed for the delimitation of boundaries of breeding seabird SPAs at sea:

- The boundary at sea should be drawn as a radius from points at the margins of the colonies and parallel to the shoreline where the colony extends along a stretch of coast.
- The distance to the seaward boundary should be determined on the basis of information on foraging range, feeding and surface use of breeding seabirds.
- The distance to the seaward boundary should be species-specific and refer to those breeding species at the site which fulfil the IBA criteria.
- When there is more than one breeding IBA species using the site, the highest recommended figure should be used to set the distance to the seaward boundary.
- Known and regularly used feeding areas adjacent to a recommended boundary should be incorporated within the site.
- Where known and regularly used feeding areas do not lie adjacent to recommended boundaries, these locations should be considered as sites in their own right.
- Where the recommended seaward boundaries of sites overlap they should be merged to form a single site for management purposes.

12. Three groups of seabird species have been identified suggesting boundaries 5, 15, and 40 km from the nesting colonies (table 3). This gives a reasonably detailed breakdown based on best interpretation of the data at the present time. A map of UK SPA's holding seabird colonies with suggested modifications taking into account of feeding areas is shown in figure 3. Species with extensive feeding ranges like Gannet, Fulmar and Storm Petrel, cannot be covered by this kind of seaward extensions of breeding colonies, although they will profit to a certain extent from extensions made for other seabird species.

[15] The numerical criteria applied for the drawing of the boundaries were not explained. The process is only described in technical terms: "In this inventory, the boundaries of Inshore and offshore IBAs were integrated and analysed by standard GIS routines. […] Delineation of the borders of species aggregations were defined by fine-scale linear interpolation (normal kriging) of corrected densities […].The boundaries were determined by density lines (polygons), which marked the plateau of higher densities following a density gradient" (Skov ***et al.*** 2000: 20).

[16] Note that the Ramsar definition of wetlands in the marine environment is restricted to "areas of marine water the depth of which at low tide does not exceed six metres" although designated sites may include "bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat".

13. In this approach generic, precautionary radii are defined for each species based on their known foraging ranges and then apply these to each of their colony IBAs. Its advantage is that it does not require a detailed assessment of sea use or colony-specific foraging ranges. It will be relatively robust to variations in marine distribution among colonies and across years. However, the draw-back of the radius-based approach is that it will often incorporate sea areas that seabirds seldom use. Ideally, site-specific radii should be estimated for each seabird species for which a site is designated at each of their colony IBAs, and the radius that encloses a certain proportion of the species' marine distribution selected as the outer boundary. However, reliable foraging radii are only available from a small number of colony IBAs in the UK and so site-specific criteria that encompass a given proportion of foraging trips for a species for which a site is designated, around each of it's colony IBAs, cannot be implemented. Obtaining this data would require considerable time and expenditure of limited conservation resources (Huggett 2001)[17].

## Which species?

14. Bird species in the marine environment can be divided into two categories: seabirds and waterbirds (IBA2000). The term 'waterbird' is used in the same sense as that used for 'waterfowl' under the Ramsar Convention, and includes (in Europe) marine bird species in the following families: Gaviidae (divers), Phalacrocoracidae (cormorants), Anatidae (ducks), and Laridae (gulls and terns). By this definition waterbirds include, for example, cormorants, gulls and terns, which some authors have more traditionally considered as seabirds. Most of these have an inland and/ or coastal distribution but some of them notably gulls and terns also occur commonly on the continental shelf[18]. Species like Audouin's Gull, Kittiwake, Sandwich Tern, and Roseate Tern are exclusively marine during their entire life cycle. The term 'seabird' covers, in Europe, all bird species in the following families: Procellaridae (fulmars, petrels, shearwaters), Hydrobatidae (storm-petrels), Sulidae (gannets), Stercoraridae (skuas) and Alcidae (auks). For the purpose of this paper gull and tern species that are largely dependent on the marine environment during part of their annual cycle (e.g. the non-breeding season) are considered seabirds ("seabirds+").

15. During the non-breeding season many seabird species are largely pelagic. It should be noted that some of these species feed hundreds of miles from the breeding colony, including Fulmar, Leach's Petrel, Storm Petrel, Manx Shearwater and Gannet.

16. For the selection of IBA's in Europe twenty IBA criteria have been developed. These allow the identification, based on a site's international importance for (table 6): Threatened bird species, Congregatory bird species, Assemblages of restricted range species, and Assemblages of biome-restricted species. The latter two categories do not concern marine areas, so these are not relevant for this purpose. Threatened bird species refer to three categories: globally threatened species (5), Species of European Conservation Concern categories 2 and 3 (26) and (sub-)species included in Annex I of the Birds Directive (29[19]) (37 subspecies or species in total; table 4). Twenty-three marine species and subspecies which are not considered threatened at the European level or listed in Annex I, are listed in table 5[20]. In total both categories concern 60 (sub)species occurring in EU waters of which 27 have a largely non-coastal/ pelagic distribution outside the breeding season. Some predominantly inland species have been excluded (e.g. Larus ridibundus). The majority of these species are covered by the habitat conservation requirements of the Birds Directive either as Annex I species or as migratory species not listed in Annex I.

17. Outside the breeding season not all the species listed in tables 4 and 5 are relevant for the identification of marine IBA's in Europe, because (a) they do not winter in European waters and passage occurs rapidly (most petrels and

[17] In respect of the generic foraging radii approach, it might be worth noting UK Government criticism of this approach: "One of the difficulties with employing a generic radius approach encountered during work carried out by JNCC on extensions to bird breeding colonies, is that feeding locations for birds from a particular breeding colony appear to be specific to that colony, rather than determined by a generic foraging distance for each species" (Johnston et al. 2002, page 140; see also page 123). Apparently it is the UK Government view that the approach is not that helpful as it is felt insufficient data exists to define radii and much unutilised sea would be included.

[18] defined as marine waters from 20 to 200 metres in depth (see also footnote 33)

[19] including Polysticta stellerii, Larus minutus, and Puffinus yelkouan, which will be added to Annex I with the accession of new Member States in May 2004 (the latter species is already included in Appendix II of the Bern Convention).

[20] The (total) list of marine species largely taken from Tucker & Evans (1997), chapter Marine habitats, Table 3

skuas), and (b) species with a low conservation interest (some gulls). The from a conservation point of view most relevant species for the identification of marine IBA's have been tentavily indicated in tables 4 and 5 (set in bold type).

## IBA2000 criteria

18. Seabirds are covered by the following IBA2000 criteria[21]:

A1. The site regularly holds significant numbers of a globally threatened species, or other species of global conservation concern
A4iii. The site is known or thought to hold, on a regular basis, ≥ 20,000 waterbirds or ≥ 10,000 pairs of seabird of one or more species

B1i. The site is known or thought to hold 1% or more of a flyway population or other distinct population of a waterbird species [includes global criterion A4i]
B1ii. The site is known or thought to hold 1% or more of a distinct population of a seabird species [includes global criterion A4ii]
B2. The site is one of the 'n' most important sites in a country for a species with an unfavourable conservation status in Europe (…), and for which the site-protection approach is thought to be appropriate.
B3. The site is one of the 'n' most important sites in a country for a species with a favourable conservation status in Europe but with its global range concentrated in Europe, and for which the site protection approach is thought to be appropriate.

C1. the same as criterion A1.
C2. The site is known to regularly hold at least 1% of the flyway or EU population of a species considered to be threatened in the EU.
C3. The site is known to regularly hold at least 1% of a flyway population of a migratory species that is not considered to be threatened in the EU.
C4. the same as criterion A4iii.
C6. The site is one of the five most important in the European region in question for a species or subspecies considered threatened in the European Union.

19. Within criterion category C (European Union importance) C2, C3 and C6 have been widely applied to identify breeding colonies of marine species. They could not be applied for non-migratory species which are not included on Annex I (e.g. Cepphus grylle and in temperate Europe, Larus argentatus). Outside the breeding season these criteria are less appropriate although the 1%-criterion has been applied for some waterbird species which winter in congregations like Melanitta nigra, Somateria mollissima, and Clangula hyemalis. However, the occurrence of such concentrations is dependent on shellfish banks (e.g. Spisula subtruncata) of which the locations may vary from year-to-year. IBA North Sea north of the Wadden Sea (Netherlands) along 150 km coast line[22] includes large concentrations of Melanitta nigra, but in some years the Spisula banks are located just south of this area. This example shows that even for highly congregatory seaducks the delimitation of marine sites may be difficult.

## Four types of marine IBAs

20. Four types of bird distribution patterns can be distinguished in the marine environment:
a) Seaward extensions of breeding colonies IBAs: such extensions used in particular for feeding, resting and social interactions can be small or large but the total area is limited by the feeding range of the breeding birds concerned. The extent of the area is species dependent; the maximum distance from the breeding colony varies from several kilometres to over 30 km. These same areas may be important for sedentary species around the year;

[21] Note that criterion C7 has been exclusively applied to retain existing IBAs which did not qualify under the C1-C6

[22] Total area 187,000 hectares, seaward extension to the 20 meter depth line (3-5 nm wide); the Special Protection Area (2000) has a seaward boundary of three nautical miles and covers about two thirds of the IBA.

b) Non-breeding waterbird concentrations: coastal areas, which hold feeding and moulting concentrations of waterbirds[23] in particular divers, grebes and benthos feeding ducks;
c) Migration hotspots: sites where, because of their geographical position, seabirds fly over in the course of their regular migrations. These sites normally correspond to special land features (headlands, straits) and are identified by the number of birds passing by. In some cases, the area also holds rich feeding grounds or is the site of important concentrations where birds stop during their migrations;
d) Important areas for pelagic species: This type concerns marine areas which are completely unconnected to the coastline (i.e. not offshore islands and rocks). This type includes sites which pelagic seabirds use regularly to feed. Very often, other marine animals use them too and important fisheries occur in the same areas. These areas tend to have specific oceanographic features and their biological productivity is invariably high. It concerns also sites where seabirds regularly gather in large numbers although not necessarily to feed. They can be moulting, resting or courting grounds, during the breeding season or outside it. These areas are identified by the high number of birds that use them on a regular basis.

Similar categories (a, b, d) have also been recognised by JNCC (Johnston et al. 2002) as "three main types of functional concentrations of seabirds to enable the identification of marine SPAs"[24]. The first three types refer to areas which are related to the coastline, and they may include coastal areas and wetlands. The next paragraphs of this paper will be confined to these so-called "marine IBA's related to the coastline". The fourth type, marine IBA's that are rich feeding for pelagic species, will be dealt with in a separate part II of this paper that will be finalised at a later stage.

## Towards marine IBA's related to the coastline

**Setting marine boundaries**

21. When it comes to defining the boundaries of a marine IBA, the guidelines given in para 6 need to be adapted to the particular characteristics of the marine environment. Any marine IBA should aim at covering the whole of the area that is regularly used by seabirds at critical moments of their lifetime. Those sites should, therefore, be homogeneous extensions of a given 'habitat' and be distinct from sorrounding areas. The identification of a marine 'habitat' is thus key to the process. Relevant oceanographic features which can be used to set the limits of marine IBAs are: the presence and extent of regular upwellings (upward currents that bring nutrient-rich bottom waters to the surface), sea currents, eddies, nutrient-outflows (such as rivers) and temperature / salinity anomalies (or disruptions), normally known as areas of convergence.

22. At the Natura 2000 in Offshore Waters seminar held in June 2002 (Turnbull et al. 2002) some general points were made. Boundaries need to be based on good science, focusing in the first place on the interest feature for sites. However, for all habitats (particularly extensive and patchy habitats, e.g. iceberg ploughmarks, cold water coral reef) boundaries should be wider rather than tight around habitats and should be pragmatic and bear in mind future management needs. Existing systems, e.g. ICES blocks, could be used so long as they are fully justified and appropriate. The precautionary principle should be used in setting boundaries around sites where uncertainty exists over the full extent of the interest feature. The management regime could be varied within the site and remain flexible to accommodate future information acquisition.

23. The common guidelines for defining the boundaries of IBAs need amendment (cf. para 6) having full regard to relevant European case law .The statement "Where extensive tracts of continuous habitat occur which are important for birds, only characteristics ii) and iii) apply" (see para 6) is very relevant for the marine environment. To which extent should the following characteristics be retained for marine IBAs:

ii) A site exists as an actual or potential protected area, with or without buffer zones, or is an area which can be managed in some way for nature conservation;
iii) A site is, alone or with other sites, a self-sufficient area which provides all the requirements of the birds (that it is important for) which use it during the time that they are present.

Condition iii) cannot apply to marine areas because sites not connected to land do not provide breeding sites during the breeding season. For some species they also not provide sheltered locations for roosting. Condition ii) does seem to be relevant for marine IBA's because we are aiming at "manageable" sites for which legal protection measures are

[23] note the definition of the term "waterbirds" in paragraph 11

[24] These have also been included in the "Concluding principles" of the European seminar "Natura 2000 in UK Offshore Waters: Implementation of the EC Habitats and Birds Directives in UK offshore waters" (Turnbull et al. 2002). The artificial split between inshore and offshore sites (category d confined to offshore waters, i.e. 15 km from the coastline and category b indicated as "coastal marine areas") was however not supported by BirdLife.

feasible. The general remark on the size of IBA's ("the biologically sensible should be tempered with the practical") is equally applicable for marine IBA's.

It is recommended to add the following guideline on defining boundaries of marine IBA's:

> In the case of marine areas beyond the sublittoral and inshore zones only characteristics i) and ii) apply. This definition is not applicable to migration hotspots.
> The guideline "where extensive tracts of continuous habitat occur …" should be confined to non-marine and inshore habitats.

**Seaward extensions of breeding colony IBAs**

24. The RSPB has developed an useful and simple methodology for defining boundaries of feeding areas around seabird colonies: the radius of the feeding range from points at the margins of the colonies and parallel to the shoreline where the colony extends along a stretch of coast (para 10-13). The minimum information necessary is an indication of the feeding ranges of the species for which the site was selected or designated. Feeding ranges differ widely from species to species and they may, to a lesser extent, also vary from colony to colony. If more precise data on feeding locations are available they should be used: this may lead to smaller or larger areas. Species which are feeding long distances away from the colony (like petrels) are less well protected but their dispersive nature and wide feeding range make them generally less vulnerable. Otherwise such areas have to be considered as "type d" areas (areas for pelagic species).

25. The main criticism refers to the risk of inclusion of areas which are not important for the birds concerned, so that unnecessary constraints are put on the human use (in particular fisheries) and new projects (e.g. oil exploration, wind parks) within such areas. However, the reverse situation (damage to SPA populations that should be protected) may result in a breach with the Directive and is equally unacceptable. In our view the precautionary principle should be applied, which in this particular case means that proof of evidence (important numbers of birds using the area or not) is moved from the designation process to the assessment procedures of article 6. In fact it really does not matter whether a certain marine area within the feeding range of a SPA designated for its colonial breeding seabirds is inside or outside the boundaries. In the latter case the obligation also exists to assess whether any human activity taking place or planned does not jeopardy the integrity of the SPA (including its seabird populations) concerned. If research indicates that the sea area concerned is not important for the SPA's seabirds the site's integrity is not affected and the human activity can continue (or started).

26. For this category of marine IBA's amendment or extension of the IBA2000 criteria is not necessary because it concerns only a methodology of delimiting the seaward boundaries of IBA's selected on the basis of the existing criteria (i.e. A4iii, Bii, C2, C3, C6).

**Non-breeding waterbird concentrations**

27. Some species of waterbirds stay in large numbers or even exclusively in shallow marine areas. These include benthos feeding ducks like Aythya marila, Melanitta nigra, Somateria mollissima, Clangula hyemalis and piscivorous species like Gavia stellata, Podiceps grisegena and Mergus serrator. In particular in the Baltic Sea quite a few other waterbird species are also using marine areas in important numbers: grebes Podiceps (3 species), swans Cygnus and geese Anser (6), dabbling ducks Anas (5), other ducks (9), and Coot Fulica atra (number of species refer to the German part, Gellermann et al. 2002). These species are not listed in tables 4 and 5 because they are not considered as species that are largely dependent on the marine environment during at least part of their annual cycle. Naturally this does not preclude their role in the selection and delimitation of marine IBA's.

28. Along the North Sea these species are mainly found close to the coastline[25] so that the seaward delimitation of IBAs can often be related to sea depth and is not too difficult. In the Baltic Sea such shallow areas are also found further from the coast because of the presence of banks separated from the coastline by deeper waters. Delimitation of such areas is more difficult than along the North Sea and the Marine Classification Criterion (MCC) might be an appropriate method to standardize site selection and delimitation. In any case the Baltic Sea report (Skov ***et al.*** 2000) provides data on 169 coastal and marine sites covering a relatively small proportion of the Baltic Sea and Kattegat. These sites could be considered IBA's as meant by BirdLife International. However, the problems noted in Appendix II apply also, although may be less prominent.

[25] A notable exception are the shallow waters of IBA Eastern German Bight (listed as DK123 only) which extend up to 40 nm from the coastline of Schleswig-Holstein

29. The term "European region" plays an important role in the application of criterion C6 (see para 18) because it determines the maximum number of sites that can be selected under this criterion. However, the division of EU NUTS regions used for this criterion is largely based on administrative boundaries on land and it does not cover the sea (except coastal zones). It is suggested that a division is made between Baltic Sea, North Sea, NE. Atlantic, SE. Atlantic and Mediterranean. The boundaries between these regions can be based on those used by the International Council for the Exploration of the Sea (ICES). The same division is used by the EU in the framework of the Common Fisheries Policy[26]. For most small countries this means one region (e.g. Portugal SE. Atlantic) and for large countries two regions (e.g. Germany: Baltic Sea and North Sea).

30. The application of the MCC for waterbirds at sea can be done under the existing set of criteria. It can fall within the scope of criteria B1i, C2, C3 and C6 as it is merely considered a tool to delimit sites with waterbird concentrations. If it is not possible to use the MCC methodology the delimitation of sites can also be made manually, in particular because most marine waterbird concentrations outside the Baltic Sea region are presumably more or less linearly distributed along coast lines.

**Migration hotspots**

31. The IBA2000 criteria include a separate criterion (B1iv) for migration bottlenecks for selected groups of terrestrial species: "The site is a 'bottleneck' site where over 5,000 storks, or over 3,000 raptors or cranes regularly pass on spring or autumn migration"[27]. The corresponding global criterion (A1iv) includes a threshold of 20,000 for all these species combined[28]. The most obvious European examples of bottleneck sites for seabird passage are the Strait of Gibraltar and the Bosporus (Turkey). These "hotspots" have been included in IBA2000 under criteria B1i/ B1ii and B1ii respectively[29]. Nevertheless the introduction of a separate criterion for "marine" bottleneck sites (or extension of the existing bottleneck criteria to cover marine birds) would be useful to distinguish these sites from breeding, wintering and staging areas. This may be also necessary because doubts can be raised whether the verb "to hold" applied in criteria B1i and B1ii covers also birds on passage at bottleneck sites.

32. The bottleneck criterion for seabirds could be similar to B1iv, for example:

> The site is a "migration hotspot" where at least x seabirds or 20,000 waterbirds regularly pass through a narrow strait or along a headland during spring or autumn migration.

Apart from narrow straits the criterion covers also headlands along which marine birds funnel during migration. The local topography of such sites needs further clarification[30]. The threshold for waterbirds equals the threshold in criterion A4iii. The threshold for seabirds has not yet been determined ("x"). Presumably the seabird threshold will be larger[31] than those for waterbirds and seabirds (10,000) in criterion A4iii. The thresholds need to be tested (and resident birds to be excluded) against site data to establish what is appropriate.

**References**


- Durinck J. ***et al.*** 1994. Important marine areas for wintering birds in the Baltic Sea. Ornis Consult, Copenhagen.


[26] see http://europa.eu.int/comm/fisheries/doc_et_publ/pub_en.htm#map

[27] The EU criterion C5 is the same except that the word "over" has been replaced by "at least" twice (as in A41iv!).

[28] The site is known or thought to be a 'bottleneck' site where at least 20,000 storks (Ciconiidae), raptors (Accipitriformes and Falconiformes) or cranes (Gruidae) regularly pass during spring or autumn migration.

[29] the same sites are also bottlenecks for migratory terrestrial species qualifying under criterion A1iv and/ or B1iv for storks and raptors

[30] The African IBA Book (Fishpool & Evans 2001) gives a helpful explanation of bottleneck sites used by terrestrial migrants (box 7, page 14).

[31] SEO has commented as follows: "The two most important migration hotspots in Spain hold incredibly big numbers: >150,000 Cory's Shearwaters through Straits of Gibraltar twice a year (plus many other species), >300,000 seabirds along Estaca de Bares (Galicia) each autumn. The figure of 20,000 is probably much too low: the Ebro delta population of Audouin's Gull, for example, numbers in excess of 28,000 birds and most of these migrate S along the coastline."

❑ Fishpool L.D.C. & Evans M.I. 2001. Important Bird Areas in Africa and Associated Islands. Priority Sites for Conservation. (BirdLife Conservation Series No. 11) Pisces Publications and BirdLife International, Newbury and Cambridge.

❑ Heath M. & Evans M.I. 2000., Important Bird Areas in Europe. Priority Sites for Conservation. Vol. I-II. (BirdLife Conservation Series No. 8) BirdLife International, Cambridge. [referred to as "IBA2000"]

❑ Huggett D. 2001. Identification and demarcation of marine IBAs and their relationship to the Birds Directive. ***In*** H. von Nordheim & D. Boedeker, Application of NATURA 2000 in the Marine Environment. Workshop at the International Academy for Nature Conservation (INA) on the Isle of Vilm (Germany) from 27 June to 1 July 2001, p. 56-62. Bundesamt für Naturschutz, Bonn. [available at http://www.noordzee.nl/natuur/bfn-skripten-1.pdf] [similar papers were presented to the Committee of North Sea Officials (CONSSO) in Oslo, September 2001 and to the Biodiversity Committee (BDC) of the OSPAR Convention in London, November 2001.]

❑ Johnston C.M., Turnbull C.G. & Tasker M.L. 2002. Natura 2000 in UK Waters: Advice to support the implementation of the EC Habitats and Birds Directives in UK offshore waters. (JNCC Report 325) JNCC, Peterborough. [available at http://www.jncc.gov.uk/marine/offnat]

❑ RSPB 2000. The development of boundary selection criteria for the extension of breeding seabird special protection areas into the marine environment. Discussion paper presented by BirdLife International to the Meeting of the Biodiversity Committee (BDC), OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, Vlissingen, 20-24 november 2000.

❑ Skov H., Durinck J., Leopold M.F. & Tasker M.L. 1995. Important Bird Areas for seabirds in the North Sea. BirdLife International, Cambridge. [Ornis Consult, Copenhagen.]

❑ Skov H. ***et al.*** 2000. Inventory of inshore and marine Important Bird Areas in the Baltic Sea. BirdLife International, Cambridge.[Ornis Consult, Copenhagen.]

❑ Tucker G.M. & Evans M.I. 1997. Habitats for Birds in Europe. A Conservation Strategy for the Wider Environment. (BirdLife Conservation Series No. 6) BirdLife International, Cambridge.

❑ Turnbull C., Audcent G., Baker H. & Johnston C. 2002. Natura 2000 in Offshore Waters: Note of the European Seminar on 17-18 June 2002 at Gatwick, UK, on the Implementation of the EC Habitats and Birds Directives in offshore waters and Concluding Principles. JNCC, Peterborough. [available at http://www.jncc.gov.uk/marine/offnat/pdf/meeting_0602.pdf]

**Document History**

First version completed 14 May 2002, circulated to participants of BirdLife's marine seminar, 24 May 2002
[Johnston et al. 2002 became only available after completion of this version]
Third version completed 26 July 2002, circulated to participants to BirdLife meeting to further discuss the identification of marine IBA's, 2 August 2002
Fourth version completed 13 October 2002 for discussion at the BHDTF meeting of 18 October 2002
Fifth version, part I completed 19 July 2003 for approval at the BHDTF meeting of 31 July 2003 (part II dealing with "rich feeding areas"not related to the coastline to be finalised at a later stage)
Sixth and final version completed 4 February 2004 (in this version amended according to comments by SEO/ BirdLife (31 July 2003), which were received after the completion of the 5th version)

Table 1. Areas considered of international importance for marine birds in the North Sea, Channel and Kattegat. Sum of proportions is the total percentage of populations occurring within the area in internationally important concentrations (from Skov ***et al.***1995).

| Area name (see figure 1) | Area size (ha) | Depth (m) | No. species | Sum of proportions |
|---|---|---|---|---|
| 1 Northern Kattegat | 1,100,000 | 0-60 | 10 | 96,7% |
| 2 Orkney – Shetland | 2,200,000 | 0-200+ | 7 | 93.0 |
| 3 Moray Firth – Aberdeen Bank - Tees | 4,900,000 | 0-100+ | 9 | 71.7 |
| 4 Skagerrak – Southwest Norwegian Trench | 4,850,000 | 20-400 | 6 | 47.3 |

| | | | | |
|---|---|---|---|---|
| 5 Eastern German Bight | 1,280,000 | 0-30+ | 6 | 47.3 |
| 6 Cap Gris Nez – Schiermonnikoog | 1,600,000 | 0-20+ | 7 | 35.4 |
| 7 Flamborough Head and the Hills | 1,600,000 | | 7 | 27.8 |
| Other 13 areas (total area estimated) | 2,400,000 | | 1 – 3 | 1.0 – 10.9 |
| **Total area of these 20 areas** | c. 20,000,000 | | | |
| **Total area of North Sea, Channel & Kattegat** | 75,000,000 | | | |

Table 2. Selected large marine IBA's in the Baltic and Kattegat (data from Skov ***et al.*** 2000).

| Code | Area name | Area (ha) | Depth (m) | Main species | Population | % Flyway |
|---|---|---|---|---|---|---|
| SE050 | Inshore area East Gotland | 152,500 | 0-40 | Long-tailed Duck | 164,000 | 3,6% |
| SE065 | Hoburgs Bank | 157,900 | 10-40 | Long-tailed Duck | 872,000 | 19,0% |
| SE066 | Northern Midsjö Bank | 85,760 | 10-40 | Long-tailed Duck | 65,000 | 1,4% |
| SE067 | Southern Midsjö Bank | 81,430 | 20-40 | Black Guillemot | 770 | 1,7% |
| SE072<br>DK129 | Lille Middelgrund | 126,000 | 10-50 | Kittiwake<br>Razorbill<br>Guillemot | 99,000<br>93,500<br>93,000 | 1,2%<br>6,9%<br>1,6% |
| FI045 | Merenkurkku Archipelago | 223,652 | 0-10 | Velvet Scoter<br>Long-tailed Duck | 100,000<br>100,000 | 10%<br>2,2% |
| EE049 | Irbe Strait | 378,900 | 0-50 | Long-tailed Duck<br>Black Guillemot | 700,000<br>3900 | 15,6%<br>8,7% |
| LV059 | Seashore at Palanga | 113,000 | | Steller's Eider | 1400-2300 | 4,7-7,7% |
| LT001<br>RU220 | Seashore at Nida | 77,000 | | Velvet Scoter<br>Long-tailed Duck | 80-160,000<br>68,000 | 8-16%<br>1,5% |
| PL080 | C. Polish Inshore waters | 272,500 | | Long-tailed Duck | 217,000 | 4,7% |
| DE040 | Pomaranian Bay | 623,500 | | Long-tailed Duck | 837,000 | 18,2% |
| DK083 | Hyllekrog - Rodsand and Fehmarn belt | 100,000 | | Tufted Duck<br>Red-br Merganser | 22,000<br>4100 | 2,2%<br>3,3% |
| DK128 | Northwestern Kattegat | 580,000 | | Common Scoter<br>Eider | 360,000<br>264,000 | 22,5%<br>19,6% |
| DK130 | Smålandsfarvandet | 135,300 | | Tufted Duck | 16,880 | 1,7% |

## Table 3. Marine boundaries around seabird breeding colonies for three categories of feeding ranges of species breeding in the British Isles (RSPB 2000).

| GROUP I | GROUP II | GROUP III |
|---|---|---|
| Radius 5 km | Radius 15 km | Radius 40 km |
| ***Stercorarius parasiticus*** | ***Puffinus puffinus*** (rafts only) | ***Catharactes skua*** |
| ***Sterna albifrons*** | ***Phalacrocorax carbo*** | ***Larus argentatus*** |
| ***Cepphus grylle*** | ***P. aristotelis*** | ***L. fuscus*** |
| | ***Larus canus*** | ***L. marinus*** |
| | ***Sterna paradiseae*** | ***Rissa tridactyla*** |
| | ***Sterna hirundo*** | ***Uria aalge*** |
| | ***Sterna sandvicensis*** | ***Alca torda*** |
| | ***Sterna dougalli*** | ***Fratercula arctica*** |

Table 4. Threatened bird species at the global level, in Europe (SPEC 1-3 and/ or in the European Union[32] which are wholly or partly dependent on the marine environment. This indicative list is confined to species that (may) regularly occur in EU waters in important numbers (thus excluding species largely confined to the Arctic). Species which may be most relevant for the identification of marine IBA's across European marine waters (thus excluding rare and localised species) tentavily set in bold type.

[32] Species that will be included in Birds Directive Annex I with the extension of the EU within parentheses

| Species | Globally | SPEC | Annex I | Non-breeding [33] | Where mostly in Europe [38] |
|---|---|---|---|---|---|
| ***Gavia stellata*** | | 4 | 4 | Coastal | NE. Atlantic, Baltic |
| ***Gavia arctica*** | | 4 | 4 | Coastal | NE. Atlantic, Baltic |
| ***Gavia immer*** | | P | 4 | Coastal | NE. Atlantic |
| ***Pterodroma feae*** | 4 | 4 | 4 | Pelagic | Macaronesian |
| ***Pterodroma madeira*** | 4 | 4 | 4 | Pelagic | Macaronesian |
| ***Bulweria bulwerii*** | | 4 | 4 | Pelagic | Macaronesian |
| ***Calonectris diomedea*** | | 4 | 4 | Pelagic | All, except Baltic |
| ***Puffinus puffinus* s.s.** | | 4 | | Pelagic | NE. Atlantic |
| ***Puffinus mauretanicus*** [34] | 4 | P | 4 | Pelagic | Mediterranean, NE. Atlantic |
| ***Puffinus yelkouan*** | | (4) | (4)[32] | Pelagic | Mediterranean, NE. Atlantic |
| ***Puffinus assimilis*** | | 4 | 4 | Pelagic | Macaronesian |
| **Pelagodroma marina** | | 4 | 4 | Pelagic | Macaronesian |
| **Hydrobates pelagicus** | | 4 | 4 | Pelagic | NE. Atlantic, Mediterranean |
| ***Oceanodroma leucorhoa*** | | 4 | 4 | Pelagic | NE. Atlantic |
| **Oceanodroma castro** | | 4 | 4 | Pelagic | Macaronesian |
| ***Morus bassanus*** | | 4 | | Pelagic | NE. Atlantic, Mediterranean |
| ***Phalacrocorax a. desmarestii*** | | [35] | 4 | Coastal | Mediterranean |
| ***Aythya marila*** | | 4 | | Coastal | Baltic, NE. Atlantic |
| ***Polysticta stellerii*** | 4 | 4 | (4) | Coastal | Baltic |
| ***Melanitta fusca*** | | 4 | | Coastal | Baltic, NE. Atlantic |
| ***Phalaropus lobatus*** | | P | 4 | ?[36] | NE. Atlantic |
| ***Larus minutus*** | | 4 | (4) | Coastal | All |
| ***Larus melanocephalus*** | | (4) | 4 | Coastal | Mediterranean, East Atlantic |
| ***Larus genei*** | | P | 4 | Coastal | Mediterranean |
| ***Larus audouinii*** | 4 | 4 | 4 | Coastal | Mediterranean, East Atlantic |
| **Larus fuscus fuscus** | | (4) | | Coastal | Baltic, Mediterranean |
| **Larus canus** | | 4 | | Coastal | Baltic, NE. Atlantic |
| **Sterna caspia** | | 4 | 4 | Coastal | Baltic, Mediterranean |
| **Gelochelidon nilotica** | | 4 | 4 | | Mediterranean |
| Sterna sandvicensis | | 4 | 4 | Coastal | NE. Atlantic, Mediterranean |
| **Sterna dougallii** | | 4 | 4 | Coastal | NE. Atlantic, Macaronesian |
| **Sterna hirundo** | | | 4 | Coastal | All |
| Sterna paradiseae | | P | 4 | Pelagic | Baltic, NE. Atlantic |
| **Sterna albifrons** | | 4 | 4 | Coastal | E. Atlantic, Mediterranean |
| **Cepphus grylle** | | 4 | | Coastal | NE. Atlantic, Baltic |
| ***Fratercula arctica*** | | 4 | | Pelagic | NE. Atlantic |
| ***Uria aalge ibericus*** | | P | 4 | ? | NE. Atlantic |

Table 5. Non-threatened bird species in Europe which are wholly or partly dependent on the marine environment (main occurrence not filled in for Black Sea). This indicative list is confined to species which (may) regularly occur in EU waters in important numbers. The most important candidate species for the identification of marine IBA's have been tentatively set in bold type.

[33] "coastal" refers to marine waters less than 20 m deep and "pelagic" to marine waters deeper than 20 m.
[34] named Puffinus puffinus mauretanicus in Annex I of the Birds Directive (also considered conspecific with yelkouan in Birds of Europe (1994) and IBA2000). BirdLife International has reviewed the taxonomic status of Puffinus mauretanicus, which is now listed, as Near-Threatened, in its Threatened Birds of the World 2000)
[35] Subspecies not assessed by Birds of Europe (1994)
[36] Pelagic in its tropical winter quarters.

| Species | SPEC[37] | Breeding | Non-breeding | Dispersion | Where mostly Europe [38] |
|---|---|---|---|---|---|
| Fulmarus glacialis | P | 4 | Pelagic | | NE. Atlantic |
| **Puffinus gravis** | P | | Pelagic | | NE. Atlantic, Macaronesian |
| ***Puffinus griseus*** | P | | Pelagic | | NE. Atlantic |
| ***Oceanites oceanicus*** | | | Pelagic | | NE. Atlantic |
| ***Phalacrocorax carbo carbo*** | | 4 | Coastal | | NE. Atlantic |
| ***Phalacrocorax carbo sinensis*** | | 4 | Coastal | | Baltic, Mediterranean [39] |
| ***Phalacrocorax aristotelis aristotelis*** | 4 | 4 | Coastal | | NE. Atlantic |
| ***Aythya fuligula*** | | 4 | Coastal | Congregatory | Baltic |
| ***Mergus serrator*** | P | 4 | Coastal | Congregatory | Baltic, NE. Atlantic |
| ***Clangula hyemalis*** | P | 4 | Coastal Pelagic | Congregatory | Baltic |
| ***Somateria mollissima*** | P | 4 | Coastal | Congregatory | Baltic, NE. Atlantic |
| ***Melanitta nigra*** | P | 4 | Coastal | Congregatory | Baltic, NE. Atlantic |
| ***Stercorarius parasiticus*** | P | 4 | Pelagic | | NE. Atlantic |
| ***Stercorarius longicaudus*** | P | | Pelagic | | NE. Atlantic |
| ***Catharactes skua*** | P | 4 | Pelagic | | NE. Atlantic |
| ***Larus argentatus*** | P | 4 | Coastal | | NE. Atlantic |
| ***Larus cachinans*** | | 4 | Coastal | | All, except Baltic |
| ***Larus marinus*** | 4 | 4 | Coastal | | Baltic, NE. Atlantic |
| ***Larus fuscus graelsii*** | 4 | 4 | Coastal | | NE. Atlantic |
| ***Rissa tridactyla*** | P | 4 | Pelagic | | NE. Atlantic |
| Uria aalge (excl. ssp. ibericus) | P | 4 | Pelagic | | NE. Atlantic, Baltic |
| ***Alca torda*** | 4 | 4 | Pelagic | | NE. Atlantic, Baltic |
| ***Alle alle*** | P | | Pelagic | | NE. Atlantic |

Table 6. Categories of species which are used to identify Important Bird Areas

| Category | Explanation | IBA criteria |
|---|---|---|
| Species of conservation concern | Species of global conservation concern<br>Species with an unfavourable conservation status in Europe<br>Species with a favourable conservation status in Europe, but concentrated in Europe<br>(Sub-)species listed in Annex I of the Birds Directive | A1, C1<br>B2<br>B3<br><br>C2, C6 |
| Congregatory species | | A4, B1, C3, C4, C5 |
| Assemblages of restricted range species | Species whose breeding distribution define an Endemic Bird Area or a Secondary Area [terrestrial in Europe] | A2 |
| Assemlages of biome-restricted species | Species whose breeding distribution are largely or wholly confined to one biom [terrestrial in Europe] | A3 |

Appendix I. Identification of marine IBA's, species and data availability in 11 European countries
(data provided by participants of BirdLife's seminar on marine issues, Brussels, 30 May 2002)

| Country | LV | DK | DE | NL | BE | UK | IE | FR | ES | PT | MT |
|---|---|---|---|---|---|---|---|---|---|---|---|
| ***Breeding seabirds*** | | | | | | | | | | | |
| Number of IBAs identified for | 0 | 1[40] | 1[40] | 7 | 1 | 46+ | c. 60 | 15 | 39[41] | c. | 3 |

[37] Species of Conservation Concern, category 4 (not threatened or declining but concentrated in Europe);
a "P" indicates non-SPEC priority species of marine habitats in Europe according to Tucker & Evans (1997)
[38] Division of NE.Atlantic (North and West European seas) and Macaronesian seas taken from Tucker & Evans (1997)
[39] Only small proportion at coastal sites in the East Atlantic
[40] excluding tern and gull colonies
[41] North Spain 6, Mediterranean 21, Canary Islands 11

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| breeding seabirds | | | | | | | | | | 23[42] | |
| Number of qualifying seabird species in these IBAs | 0 | 1 | C7[43] | 5 | 3 | 18 | 18 | 12 | 19 | 11-12 | 3 |
| Any data on feeding ranges? | n.a. | yes | ? | yes | ? | yes | yes[44] | no | yes | no[45] | no |
| ***Waterbird concentrations*** | | | | | | | | | | | |
| Number of nearshore IBAs identified for waterbirds | 7 | 6 [46] | 21 | 2 | 1 | ? | 0 | ? | 1 | 0 | 0 |
| Number of qualifying waterbird species in these IBAs | 8 | c. 20 | 4 | 4 | 1 | ? | 4 | ? | 1 | 0 | 0 |
| Completeness of inventory in this respect | no | yes | yes | yes | yes | yes? | no[47] | 90-95% | yes | 90% | 100% |
| Regular counts made? | no | yes? | yes | yes | ? | yes? | no[48] | yes | yes | no | no |
| ***Dispersed pelagic birds*** | | | | | | | | | | | |
| Number of IBAs identified for non-breeding seabirds | 0 | 2 | none | none | none | none | none | none | none | none | none |
| Any data available of non-breeding occurrence? | yes | yes | yes | yes | yes | yes | no? | yes? | yes[49] | ? | no |
| Any known seabird concentrations? | no | yes | no? | no? | ? | yes? | yes?[50] | yes | yes[51] | ? | no |
| Any attempts made to identify such IBA's? | yes | yes | yes | yes | yes | yes | no | no | yes[52] | no | no |

Appendix II. Drawbacks related to the application of the Marine Classification Criterion for pelagically distributed seabirds.

- The validity of setting maximum area (parameter "A") must be tested. It is likely that the total area of selected sites and the bird numbers covered depend on "A" (3,000 km$^2$ in the quoted MCC inventories[53]). It would be interesting to see the effects of different maximum areas (e.g. 1000 and 2000 km$^2$) on population coverage and total IBA area selected[54].

[42] Azores 14, Madeira 9, mainland coast 1
[43] site included under IBA criterion C7
[44] some data for birds feeding in breeding and post-breeding season (i.e. Roseate and Little Tern); some SPA's include 500 metre zone around breeding colonies
[45] only data on tern species feeding close to breeding colonies
[46] includes IBA #083 (100,000 ha), #118 (162,500 ha), #119 (870,000 ha; also Alca torda), IBA #120 (100,000 ha), #122 (120,000 ha), #123 (1,150,000 ha)
[47] distribution inshore/ offshore not well known
[48] any regular counts are from the Wetland Bird Survey which would pick up birds nearshore
[49] some data on movements of Puffinus yelkouan through the Strait of Gibraltar to the Cantabrian Sea for post-breeding concentrations and moulting. Offshore sites located there.
[50] some evidence of post-breeding concentrations of Little Gull and tern species on offshore banks
[51] yes, for other species than P. yelkouan but more data and scientific evidence needed
[52] yes, for P. yelkouan, that will probably coincide with feeding areas of other species
[53] This figure is based on the feeding range of Razorbills from their breeding colony. This appears to be a rather arbitrary choice and its logic is far from satisfactory: what is the relation between the feeding range of a particular species during the breeding season and the non-breeding dispersion of seabirds in general?

[54] Meanwhile it appears that this has been done and it is concluded that "the selection of the globally important areas for seabird species with clustered distributions is less sensitive to this parameter (within the range of 1000-3000km$^2$" (Draft: ***A quantitative method for evaluating the importance of marine areas for conservation birds;*** see also Appendix IV***).*** However, this refers to the number of sites selected; the effect on the total area of the sites selected is unclear. Furthermore, the data presented in Appendix IV show that this conclusion mostly refer to waterbirds; the numbers of sites selected for gannets and auks indicate a clear effect of reducing the maximum area size from 3000 to 1000 km$^2$.

- MCC uses very low densities of birds over wide areas to establish important areas (as low as 100 birds/km2). Questionable whether this constitutes a congregation or dispersed. Even without the C4 criterion, the areas selected are too large - not consistent with the IBA concept
- The methodology does not have regard to bird activity/ use of the site. An observed occurrence of birds may not be site specific. It requires repeat counts or behavioural observations to indicate site fidelity.
- Little is known to which extent the distribution patterns of seabirds vary from year-to-year. If the "concentrations" move in time this would be another factor that enlarge marine IBAs. Anyway the issue of seabird site fidelity is something BirdLife needs to look at more carefully because IBAs require areas to be regularly used.
- The approach to actually defining site boundaries is unclear. At least 5 'limitations' or variables are identified but the impact of changing these is not known.
- It is not clear on the basis of what criteria sites are combined (see discussion of IBA Northwestern Kattegat in Appendix III).
- Technique is too data hungry: it can only be properly applied with a vast amount of survey data that are only available from a very limited number of marine areas in the world.
- Technique is too complex, requiring specialists to employ it. Its application is complicated because of interpolation of census data and the necessity of a GIS software.
- The application of the criterion does not lead to consistent results as shown in the Ardea review of Skov ***et al.*** 2000 (see Appendix III and see Skov's reaction in Appendix IV).

SKOV H., VAITKUS G., FLENSTED K.N., GIRSHANOV G., KALAMEES A., KONDRATYEV A., LEIVO M., LUIGUJOE L., MAYR C., RASMUSSEN J.F., RAUDONIKIS L., SCHELLER W., SIDLO P.O., STIPNIECE A., STRUWE- JUHL B. & WELANDER B. 2000 - ***Inventory of coastal and marine important bird areas in the Baltic Sea*** - BirdLife International, Cambridge, 287pp. ISBN 9986-756-97-9, softback, mono-colour, 72 maps. Available from BirdLife Denmark, Copenhagen.

Birdlife International produced yet another report on Important Bird Areas (IBAs), this time again with emphasis on marine or coastal areas, and only in the Baltic Sea. BirdLife International has been rightly praised into heaven for its recent collations of data (e.g. Heath & Evans 2000; Stattersfield & Capper 2000). Their efforts should be acknowledged and their work is very important indeed. The present report is remarkable, however, because it is said to be complementary to Heath & Evans 2000, which was published as a two volume book at about the same time and which looked like the 'definitive' work for Europe, at least for the time being. Complementary means that the report identifies more IBAs in the Baltic than the book, while some "old ones" have had their boundaries altered. There must be a relationship with two earlier reports, not least because of the overlap in authors, one of which dealt with wintering areas for marine birds the Baltic (Durinck ***et al.*** 1994), and one of which referred to the North Sea (Skov ***et al.*** 1995). All publications have dealt with the Kattegat, so that a local manager will have to pick his choice. Does he get the same results in each? As a user, I checked one of the most important areas for consistency in each report.
Northern Kattegat is "an exceptionally important area for wintering seaduck and pelagic species (divers and auks). Seaduck are mainly within Danish watets, the pelagic species mainly in the Swedish parts." Moreover, "This is the most important wintering area in north-west Europe for ***Somateria mollissima***, ***Melanitta nigra***, and ***Alca torda***." (Heath & Evans 2000a). A comparison between the reports (see Table):

| | Durinck ***et al.*** 1994 | Skov ***et al.*** 1995 | Heath & Evans 2000 | Skov ***et al.*** 2000 |
|---|---|---|---|---|
| surface area | 10 500 km$^2$ | 11 000 km$^2$ | 10 500 km$^2$ | 5800 km$^2$ |
| period | 1988-93 | 1980-93 | [-] 1993 | 1987-93 |
| divers | 2900 | 1150 | 2900 | 2160 |
| Red-necked Grebe | 2350 | 1600 | 2350 | 1880 |
| Common Eider | 400 000 | 264 000 | 400 000 | 264 000 |
| Common Scoter | 495 000 | 396 000 | 495 000 | 360 000 |
| Velvet Scoter | 82 000 | 148 000 | 82 000 | 76 500 |
| Razorbill | 129 000 | 223 000 | 129 000 | not listed |

'Northern Kattegat' is the fourth most important area of the Baltic according to Durinck ***et al.*** 1994. Numbers of birds are average total winter- ing numbers based on' survey periods between 1988 and 1993', indicating that 13.3% of the north-western European wintering population of Common Eiders, 38.1% of Common Scoters and 10.8% of Razorbills occurred.
'Northern Kattegat' is the most important area of the North Sea and Kattegat according to Skov et at. 1995. Their area is slightly larger, however, while numbers of Common Eiders and scoters, divers and Red-necked Grebes are markedly smaller. The figures are averages again and are said to 'not represent the total number of birds within the area'. So be it, but Razorbills have, mysteriously, nearly doubled in numbers (22.5% of the biogeographic population).
'Northern Kattegat' is listed as Danish IBA 119 in Heath & Evans (2000a). The bird figures of Durinck et at. 1994 were copied rather than the update of Skov et at. 1995, although both reports were listed in the references. There is no clarification why the first and not the second report was adopted. Data were listed as from 1993, which is not true given Durinck et at. 1994 (average numbers over 1988-93), and the range for minimum-maximum population presented (using Durinck's averages for the lower and higher values) is an error. Skov et at. (1995)'s average of 223 000 Razorbills over 1980-93, "a concentration" that "has been observed every year since 1987", has gone.
In the present report, Northern Kattegat has been replaced by 'Northwestern Kattegat'. IBA 128 includes the 'old IBAs' 119 ('Northern Kattegat'), 002 (coast between Dokkedal and Lyngså), and 010, (south Læsø). The area is a lot smaller than previous publications (53% of the 'Northern Kattegat' of Skov et at. 1995), while it has identical numbers of Eiders but fewer seaduck, no Razorbills at all, and substantially more divers and Red-necked Grebes as in Skov et at. 1995, and higher densities of all species (except Razorbills) than in any earlier publication, except for Velvet Scoter, for which higher densities were reported in a two times larger area by Skov et at. 1995. Surveys used: 1987-93 for divers, 1980-93 for seaduck, so the same underlying data were used. In the text for Sweden (IBA 072) as well as in the

text for Denmark (IBA 129) we are now confronted with a 1260 km$^2$ area 'Lille Middelgrund', which is a new IRA "selected on the basis of information from offshore habitats", but that in fact used to belong to the 'Northern Kattegat' IBA. Here we find 93 500 Razorbills again (72% of the lowest figure produced earlier for 'Northern Kattegat'), but up come 93 000 Guillemots out of the blue, not mentioned in any of the earlier publications. Survey period for all these data: 1987-93...

So what has happened? Three out of four publications are from BirdLife International, Durinck et at. (1994) is a 'Report to the European Commission' by the National Environmental Research Institute and Ornis Consult in Denmark. All reports seem to have used the same data sets, constantly altering precise borders, occasionally altering total/ average or whatever bird numbers on the basis of which the areas have been given IBA status.

The report reviewed here states that a particular problem for marine IBAs is that there are no "obvious site boundary features" and it therefore promotes a system that could overcome that problem. Is that system different from previous site descriptions? So which report is the most authoritative? Is changing site definitions and numbers of birds within sites at an alarming rate based on the same underlying data an example of proper database analysis? Have we now left out major bird concentrations in comparison to the three earlier publications, or is the new method more conservative in the result? Northern Midsjö Bank (Sweden 066) is a new IBA "selected on the basis of information from offshore areas" (just an example). That data were collected 1992-93, so what's the explanation for the difference with the two-volume book!? The reports do not even try to give explanations for particularly high numbers of birds and why the borders of certain marine areas are where they were drawn. We simply have to rely on the authors, who seem to produce different results every time they're asked. If details are different but while the main conclusions are similar (IBAs are in urgent need for better legal protection), is it perhaps time to stop rewinding old data? Are we satisfied with a site description in which the underlying data are completely out of sight and with the text shortened as a list of facts with no reference to original work? Is it a signal that the present report has 16 authors and only 27 references (none of which is providing background infonnation for any of the data presented in this report)? Browsing through the lists of references in all reports and BirdLife books gives at least the impression that the authors have consulted only their own previous reports and copy (or sometimes mysteriously alter) the numbers of birds listed. Is the recruitment of local knowledge (and hence a long list of 'authors' or an immense, Acknowledgements' section) a guarantee for high quality data?

The present report is printed as an A4 size paperback in blue tones. The maps are ugly, typical computer generated GIS products with far too much detailed coastal contours and excessively detailed bathymetry. The shading of landmasses does not fit the coastal contours and crucial information is hidden in the same colours (blue tones) and shadings. Most maps are wider than they are high (giving latitudinal degrees the same distance as longitudinal degrees, which is wrong at 60° N), others, showing exactly the same part of the globe, are higher than wide but give a more traditional view of this part of the world. Figure 6 shows nine species-specific, but largely overlapping, IBA polygons as lines in different styles and tones of blue, so that, I guarantee, none could be reproduced in isolation without errors. The text template used is similar to that for descriptions of marine and coastal IBAs as in Heath & Evans 2000, but with no reference to sources of infonnation and therefore no help for anyone trying to work out how reliable the presented infonnation actually is.

My bookshelf is rapidly filling up with massive reports and even bigger books describing and, listing IBAs in Europe. 'Major challenges', milestones' and a 'tremendous effort' are terms that BirdLife managers and the authors themselves use to describe their work. I believe that, and I do see a need to identify areas important for birds, I do appreciate the importance of this work (which is the reason why I collect, keep and use these publications), ...but as a tool, not a goal. Understanding bird distribution and habitat requirements leading to effective bird conservation are important goals. Also, milestones should mark one-mile distances, not every one-hundred metres. What do we achieve by a repetition of the same (ca. 10-15 year old) data in different formats and with different figures in a series of glossy reports and book volumes? At least the impression has been given that we have stopped collecting data in marine areas in 1993, which is worrying given the far from fixed population levels and distribution patterns. I would recommend that future IBA overviews are more informative with respect to the original sources, more conservative with respect to boundaries chosen, and that only new, additional data were used to re-assess the status of a particular region. Four partly overlapping reviews, using different methods but the same underlying data, giving different results and abundance estimates, within a time span of only six years is a little over the top and arguably leads to confusion by the end-users.

[References not included]

***Kees (C.J.) Camphuysen,***
***Netherlands Institute for Sea Research,***
***P.O. Box 59, 1790 AB Den Burg, Texel***

## Recent development of the Marine Classification Criterion (MCC)

***Designation of marine EU Special Protection Areas***

The identification of marine IBAs by the use of the MCC in the North Sea (Skov et al. 1995) and the Baltic Sea (Skov et al. 2000) has created a framework for the current designation of marine SPAs by the involved member states. The first truly marine SPA will be the Hoburgs Bank (IBA no. 65), which was designated by Sweden earlier this year. Hoburgs Bank, which is of global importance to Long-tailed Ducks ***Clangula hyemalis***, is an offshore bank of about 1200 km$^2$ located 25-50 km from the Swedish coast. In general, however, the scale of the maps and the lack of a geo-statistical basis for the definition of IBA boundaries has made it difficult to use the IBA information in the 1995 North Sea report as more than general guidelines for the location of potential SPAs. The selection process by the individual member states is now refining the boundaries using the same techniques as in the Baltic 2000 report. As an example, Germany is just finalising the analyses of seabird data in their part of the Baltic and the North Sea, - the improved methods have resulted in a more fine-scale resolution of the core areas of high densities for the species in question.

***Critical size of an area supporting 1%***

The critical size of an area supporting 1% of a bio-geographic reference population was preliminarily set to 3000 km$^2$ based on the size of seabird concentrations in the North Sea and the Baltic and known feeding ranges of auks around colonies of international importance. Ideally it should be defined on the basis of estimations of marine habitat ranges for species with clustered distributions. With the present knowledge it is possible to model marine habitat ranges for most marine key species, - a priority activity for the team behind the MCC (Mark Tasker, Joint Nature Conservation Committee, Mardik Leopold, Alterra, Jan Durinck and myself from Ornis Consult).

The MCC team has just finalised tests of the effect of changing the critical size on the selection of IBAs as published in Skov et al. (1995) for the North Sea and in Skov et al. (2000) for the Baltic. The result (see table below) shows that of the pelagic species the total selection of IBAs for divers, grebes, seaducks and auks was affected moderately, while the selection of IBAs for gulls and gannets was strongly affected. Due to characteristic pattern of dispersal of the key marine bird species in the two seas, the selection of the more important IBAs is less sensitive towards the choice of the critical size. The major portion of the non-breeding populations of divers, grebes, seaducks and auks concentrate in relatively few, but large areas. Thus, the populations are in fact highly clustered when measured over the entire distribution range. Due to the high proportion of the biogeographic populations present within these concentrations, these areas will meet the MCC even if the critical size is reduced to 1000 km$^2$.

The table shows the number of areas selected for different groups of common seabirds occurring during winter in the Baltic Sea and the North Sea when different sizes for ***A*** is chosen.

**Baltic Sea**

| **Species group** | ***A* = 3000** | ***A* = 2000** | ***A* = 1000** |
|---|---|---|---|
| ***Divers*** | 11 | 11 | 8 |
| Grebes | 14 | 14 | 12 |
| Swans | 17 | 17 | 17 |
| ***Aythya*** ducks | 29 | 29 | 29 |
| Seaducks | 43 | 42 | 37 |
| Goldeneye and mergansers | 43 | 41 | 41 |
| Auks | 20 | 17 | 14 |

**North Sea**

| **Species group** | ***A* = 3000** | ***A* = 2000** | ***A* = 1000** |
|---|---|---|---|
| Divers | 14 | 13 | 13 |
| Grebes | 5 | 5 | 5 |
| Cormorants and shags | 6 | 6 | 5 |
| Gannets | 4 | 4 | 1 |
| Seaducks | 15 | 14 | 14 |
| ***Larus*** Gulls | 11 | 5 | 4 |

| | | | |
|---|---|---|---|
| Auks | 14 | 12 | 11 |

***Accurate delineation of concentrations of birds at sea***

Ornis Consult has developed the spatial IBA routines so that the definition of IBA boundaries at sea can now be described as a generic process involving a suite of linked GIS and geo-statistical routines. This means that defining IBA boundaries no longer introduces an element of subjectivity, - the characterisation of distribution patterns and the selection of contours marking the boundaries of an IBA are both computer-driven and can be reproduced by different teams. The application of spatial models has also involved the European Seabirds at Sea Database (ESASD) and we are now offering courses in the use of these techniques to colleagues (like in the case of SPA selection in Germany). As an important by-product of the geo-statistical basis for the mapping routines, the boundaries of IBAs can now be computed with confidence intervals, which will effectively pinpoint areas where boundary definitions are shaky, and where more data are needed.

***Application outside the Baltic and the North Sea***

It has still to be tested whether the results for the Baltic and parts of the North Sea are unique, - does the MCC apply equally well in the Mediterranean or the Biscay ?. However, the available data on seabird distribution at sea in these two regions is yet inadequate to carry out such tests. There is a great need to improve the ESAS (European Seabirds at Sea) database for these regions, and luckily new data are on the way for the Bay of Biscay. BirdLife International are recommend to push for the development of the knowledge of seabird distribution in these two regions.

***Response to a review (published in Ardea) by C.J. Camphuysen of 'Inventory of coastal and marine important bird areas in the Baltic Sea 2000'***

Although the review is covering the 2000 marine IBA report, the bulk of it is in fact a comparison between the three different published assessments of important marine bird areas in the Baltic. As such, this comparison is not too meaningful as methods used to select areas have changed significantly during the seven-year period between the first 'Important Marine Areas for Wintering Birds in the Baltic Sea' and the new report. I guess the reviewer can be excused due to the relatively short 'methods' sections available in the three reports, but his mistakes are great. The major differences between the reports can explain all the differences in estimated numbers of bird and area sizes listed. One major difference is the method used for delineation of important areas, which in the 1994 report for the Baltic and the 1995 report for the North Sea was b-spline approximation techniques, while the more rigorous geo-statistical method (kriging) was only used in the 2000 Baltic report. The benefit of applying geo-statistics in the 2000 report as compared to the other two reports is as mentioned above that extrapolation of high densities into poorly surveyed areas is minimised and a more accurate account of the boundary is produced. This explains the reduction in the size of many areas (and the split of the Northern Kattegat into two IBAs) and the increase in average densities within these areas in the 2000 report. Equally important, the databases used are not identical between the three reports, as different seasons are used (November-March in the 1994 report, variable and species-dependent in the two other reports) and more data were included in the 1995 account as compared to 1994 and more data again in 2000 as compared to 1995. In fact, the 2000 Baltic report is the first ever attempt to perform a basin-wide analysis of all coastal (and marine) bird data available and so, despite the meagre appearance (lay-out etc) it contains much more background data than the other two reports. Recent data (1995-2000) were also added to the data. On top of this, the MCC was not applied in the 1994 report, only in the two later studies, and correction factors for undetected birds in transect were only applied using line-transect theory and non-linear functions in the same two reports. Thus, in relation to the current discussion of the definition of IBAs the 1994 and the 1995 reports can only be used as rough indications of areas of importance and in case of the 1994 report estimated densities are generally too low. One can regret that we didn't wait publishing information about important bird areas until the MCC and the geo-statistical basis for delineation of boundaries of high-density areas was developed. However, the development of more fine-scale and statistically sound methods for mapping boundaries of IBAs is a process common to both terrestrial, coastal and marine IBAs. In fact, the boundary of many coastal IBAs in the Baltic Sea can now be regarded as less rigorous than the boundary of marine IBAs, as in many cases coastal counts cover large stretches of coastline with variable levels of densities of waterbirds, and often the boundary of the stretch counted can not be unambigously determined from the count database. During the production of the 2000 IBA report for the Baltic Sea it became clear that checking boundary errors and utilise GIS mapping routines should be an important part of the work for the coastal IBAs in the next European update. What is not clear to the reviewer is that the assessment of the importance of IBAs and the refinement of mapping techniques is an ongoing process. The rest of the review provides useful criticism of the obviously poor co-ordination between the European 2000 and the Baltic 2000 reports and the 'thin' presentation of methods and underlying data.

Henrik Skov 2002-07-25

## 2. GOOD PRACTICES EXAMPLES RELATED TO SITE SELECTION PROCESS OR MANAGEMENT OF DESIGNATED MARINE NATURA SITES

Relevant actions of the NGO, Spanish Cetacean Society, were the creation of a national database and standardized research protocols and the so-called Project: "Identification of Areas of Special Importance for the Conservation of Cetaceans in the West Mediterranean, in Spain" with the collaboration of the former Directorate General for Biodiversity, Ministry of Environment.

The results of three years of research carried out in the context of this Project, in addition of the previous monitoring programme on cetacean and sea turtle, it has highlighted the relevance of the special oceanography conditions of the Alboran Sea and its adjacent Mediterranean and Atlantic waters for the conservation of the three marine pelagic species present in Annex II of the Habitat Directive: ***Tursiops truncatus***, ***Phocoena phocoena*** and ***Caretta caretta***. Outcomes of this project were identified as proposals on Special Area for Conservation (SACs) - Habitat Directive - as well as on nominated areas as Specially Protected Area of Mediterranean Importance (SPAMIs) - Barcelona Convention -.

Furthermore Spanish Cetacean Society sets up the LIFE Nature Project: "Conservation of Cetaceans and Sea Turtles in Murcia and Andalusia" in order to provide a follow-up to the abovementioned Project, to contribute to the adequate inclusion of the region in the Natura 2000 network and to ensure the social acceptance of the proposed marine protected areas. Efforts are focused at three levels:

- Development of proposals on management and Conservation Plan for the three pelagic marine species included in Annex II of the Habitat Directive: ***Tursiops truncatus, Phocoena phocoena*** and ***Caretta caretta***;
- Development of cost efficient tools for the monitoring of cetacean and sea turtle populations;
- Identifying of management schemes and developing public awareness programmes.

Other global objectives established were identified as follows: to reduce the impact caused by fisheries interactions, maritime traffic and marine debris pollution on target species; to ensure the long-term socio-economic viability of the management and monitoring of these species and their habitats in the region; to create a monitoring GIS tool based on the development of a series cost-efficient long-term research programmes and on the compilation of opportunistic observations of target groups ***inter alia*** fishermen and maritime police, and on the existing databases from the environmental and fisheries regional and national authorities; to analyse sea turtle migration routes and habitat use; to optimise the sea turtle recovery centres network; and finally, to promote new "environmentally friendly" tourism activities through conservation strategies (whale watching, artisanal fisheries, environmentally friendly scuba-diving activities and water sports).

## POSITIVE EXPERIENCES IN RELATION TO FISHERIES TECHNIQUES TO REDUCE BIRD BY-CATCH

With regard to some positives experiences concerning to fisheries techniques to reduce bird by-catch, a competition of ideas was organised by SEO/BirdLife (BirdLife International partner organisation in Spain) as a contribution to the ***Save the Albatross*** campaign. The competition launches as well as the ideas received are part of a programme of considerable scope. It was officially launched in New Zealand (Southern Seabird Solutions) - Jul. '02; Hawaii (II International Fisher's Forum) - Nov. '02; Brazil (Projeto Albatroz) - Jan. '03; Spain (several events) - Mar. / Apr. '03.

Most albatrosses and several other seabird species are heading for extinction. They are being unintentionally drowned in large numbers by "longline" fishing boats. Longlining is the single greatest threat to the world's seabirds. BirdLife's Save the Albatross Campaign is trying to stop the needless slaughter of these magnificent birds by ensuring that relevant international agreements are implemented that will benefit both the birds and the legal fishing industry. Albatrosses and other seabirds often feed by scavenging for food behind fishing vessels and other boats, waiting for prey to be disturbed or scraps thrown overboard. When longlining, fishing boats set thousands of baited hooks on a fishing line to catch fish. Some birds swallow the hooks and are dragged underwater and drown. More than 300,000 seabirds are killed in this way each year. 26 species of seabird, including 17 species of albatrosses, are in danger of extinction because of the deaths caused by longlining. Once set, the hooks are too deep for the birds to reach. To stop birds being needlessly killed, it is essential to stop them having the opportunity to swallow the baited hooks before they have sunk. Many cheap and readily implemented solutions have been, and are being developed. Employing these will be of benefit to the fishermen themselves because the more bait eaten by birds, the smaller the catch of fish.

The initiative was widely publicized in many countries (particularly in New Zealand, US Pacific coast and South America) in magazines, listservers, newsletters, TV and radio. More than 3 months before the closing date (30 June 2003) for entries, over 20 requests from 8 countries were dealt with, and several innovative ideas were already put forward.

Some of the ideas submitted were identified as follows: Visual and sounding bird-scarer - new design of bird-scaring line with simple elements which reflects and sounds as it is towed on the water surface -; taste deterrent - mixing fish bait with simple materials that make it unpalatable for birds -; distraction (food) - system of offal (discards) disposal away from setting boat, to attract birds to a distant point -; visual bird-scarer - towing of simple element that reflects on water -.

Besides the ideas already submitted, it is known that various fishermen from New Zealand and Australia who are experimenting with new designs to increase the hooks' sinking rate. 87 ideas were submitted, 60 of them came from Spain, that means the great importance of the Spanish longline fisheries in the world. Several hundred fishermen have heard of it and, by so doing, have learnt more about the seabird bycatch problem. Fishermen and the specialised media alike, everyone was welcomed SEO/BirdLife's competition as it signals a new, collaborative approach to a serious problem that occurs

every day in the world's oceans. So the fishermen's competition was proving a tool for communication among the fishing community about the unwanted death of large numbers of seabirds in the world's oceans every year.

## POSITIVE EXPERIENCES IN RELATION TO OIL SPILL DAMAGE PREVENTION

Mid- and long-term proposals on impact studies due to oil spill damage have accomplished certain conservation measures for "wide ranging" species. Some of these proposals are synthesized as follows: Accurate monitoring on post-oil spill damage, studies deal with the deep knowledge of trend dynamic populations, considering mainly an assessment due to the impact as well as a final damage evaluation on species and habitats. Other proposals concerning conservation measures are not only focused on threatened species but on the most affected areas. Finally, strategies drafting will be carry out applied to target groups and others, and even with the purpose of developing activities related to tourism (i.e. the presence of bird watching tourism in the affected area).

Taking into account that an existing estimate of species affected by oil slick may collect and register from previous environment disaster, it might be implemented recovery measures for the affected species and habitats. The monitoring plan includes a monitoring, control and surveillance programme. Emergency Plan reports a detailed definitions of the recommendations, which are the basis of solving another similar cases that require the develop of appropriate corrective and preventive actions/ measures that can be taken to correct the near-term condition.

The Prevention Plan has been designed in response to a control process that relates to mitigate any potential oil spill damage. The preliminary stage of the proposed Plan has been endorsed for coastal areas. It has been determined that it will be considered as main part of an specific Investment Portfolio by the National Park Unit, and it has been approved yearly. To ensure its efficiency within the determined timeframe, the scope is the identification of preventive measures that could reasonably be expected to reduce or preclude any potential oil spill damage in three different areas: Islas Atlánticas National Park - Atlantic region -, Cabrera National Park -Mediterranean region -, and Timanfaya National Park – Macaronesian region -.

## 3. Important Bird Areas (IBAs) for seabirds in Spain

**Project reference:** LIFE2004NAT/ES/000049
**Project executor:** SEO/BirdLife

CONTEXT
The project focuses on the sea waters of Spain (including the Balearic and Canary islands) and seeks to identify Important Bird Areas (using scientifically-sound criteria) for the seabird species listed in Annex I of the Birds Directive with populations in Spain. This project contributes to the implementation of the Birds Directive in the marine environment and to the future designation of Special Protected Areas (SPAs) in coastal and pelagic waters.

Due to its geographical location and productive marine waters, Spain enjoys one of the richest and most varied seabird faunas in Europe, including species which are endemic to our country and are seriously threatened with extinction. From a biogeographical perspective, three distinct marine regions can be found around Spain: the endemic-rich Mediterranean Sea, the subtropical waters around the Canary islands and the highly productive Atlantic region between Galicia and the Bay of Biscay. All of these regions sustain important fisheries and all are subject to a heavy human pressure.

PROBLEMS TO BE SOLVED
In Spain, as in most other European Union countries, a reasonable network of SPAs protects seabirds on their nesting colonies, which are invariably on land. However, the current number, location and extension of marine SPAs is clearly insufficient to guarantee the survival of the Annex I species in the habitat where they feed, rest, migrate and spend most of their time, the sea.

It is essential to identify the areas of the sea that are most important for the conservation of seabirds. For those areas, all relevant threats need to be known and addressed, so that appropriate action can be taken towards the preservation of healthy ecosystems that can sustain viable populations of seabirds.

OBJECTIVES
- To carry out a complete and detailed inventory, with objective methodological criteria, of the Important Bird Areas (IBA) at sea for the seabird species listed in Annex I of the Bird Directive with populations in Spain.

- To include in the marine IBA inventory a characterisation of each IBA, with GIS geo-referenced cartography, a description of the main threats affecting it and a number of conservation measures proposed.

- To develop a standard methodology for the identification and delimitation of IBAs at sea and to disseminate the methodology so that it can be applicable to other countries.

ACTIONS TO BE UNDERTAKEN
**(a) map seabird distribution**
Create maps showing distribution at sea and use of space in the marine environment for seabird species listed in Annex I of the Birds Directive with populations in Spain. 2 types of analysis are carried out: specific monitoring (i.e., remote tracking) in the case

of bigger species for which it is technically feasible, and generic sampling of the most favourable areas in the case of smaller species.

Specific actions consist of:
→ satellite tracking of 40-44 ***Calonectris diomedea*** (***diomedea*** as well as ***borealis***) and 20-24 ***Larus audouinii***;
→ radio tracking of 26-30 ***Bulweria bulwerii***, 16-20 ***Puffinus assimilis***, 26-30 ***Oceanodroma castro*** from the Canaty islands, and 26-30 ***Phalacrocorax aristotelis desmarestii*** from the Mediterranean;
→ analysis and mapping of the 16.000 recoveries of ringed seabirds in Spain;
→ survey of coastal waters around ***Larus*** and ***Sterna*** breeding colonies in the Ebro delta and Albufera de Valencia (2000 hrs during breeding season), in order to establish the feeding radius for each species;
→ use of observers on board of fishing vessels (>300 days in various fisheries), to rpovide data on seabird use of fishing grounds as reliable feeding areas;
→ create and analyse a data base of oiled and other seabirds found dead on beaches

**(b) predict seabird distribution using oceanographic variables**
Identify and map the various factors (oceanographic: physical & biotic, and anthropic) that determine the distribution patterns of seabirds at sea. Using those data, (pre)identify areas of highest probability of holding significant concentrations of seabirds.

**(c) develop standard methodology**
Develop standard methodological criteria for the identification of marine IBAs:
→ organise a specialised workshop on identification of marine IBAs;
→ take part in 3 international meetings on marine IBAs;
→ formulate final document on standard methodology;
→ publish leaflet on identification of marine IBAs and distribute through BirdLife International network

**(d) characterise marine IBAs, identify threats, recommend conservation measures**
Select and define the limits of marine areas that fit the criteria to qualify as IBAs; characterise each IBA and identify threats, recommending set of conservation measures needed; publish detailed inventory "Important Bird Areas for Seabirds in Spain"

**CONCLUSIONS**
The present project seeks to identify those areas of the sea that are most important in terms of seabird conservation, and to propose ways of address their current threats and, therefore, to guarantee their preservation. This work is based on scientifically-sound criteria and methods, so that it can be applied objectively to other regions and species groups. The project is aimed at obtaining an inventory of areas of the ocean with high conservation value that warrant SPA designation. The ultimate goal is to have a network of marine SPAs in place that is representative and serves the purpose of conserving healthy seabird populations.

**CONTACT:**
Carles Carboneras, SEO/BirdLife, Melquiades Biencinto 34, 28053 - Madrid, Spain
Tel. (+34) 91 434 09 10; Fax (+34) 91 434 09 11
ccarboneras@seo.org

10 September, 2004, DG ENV, Brussels

Finland's communication to the Marine working Group of Habitats Committee

14.8.2004

# 4. Proposal of good practices for SCI/SPA site selection process in Finnish marine offshore areas and experiences in protection of wide ranging species

This document describes practices that are recommendable and conceivable in the offshore site selection process from Finland's point of view, informs WG2 about the legal circumstances and mapping situation of the Finnish offshore areas and measures taken to protect wide ranging species.

Occurrence of Annex I habitats (in practice sandbanks and reefs) and Annex II species of the Habitats Directive (in practice seals, porpoise and salmon) and Annex I species of the Birds Directive in Finnish offshore areas should be examined as soon as possible after enforcement of the Finland's Exclusive Economic Zone (EEZ). The Finnish government bill for the EEZ law is currently in debate in committee, and is expected to come into operation in late 2004.

Potential occurrence of Reefs (1170) can be first assessed based on bathymetric maps. Potential areas for occurrence of Sandbanks (1110) can be assessed from geological data in some in inshore parts of the Finnish marine areas, but no systematically collected data exists yet from offshore (future EEZ) areas. Areas where first hand assessments suggest presence of reef or sandbank habitat, more detailed inventories should be carried out using e.g. remote sensing by aerial photography, seismic and echolocation techniques, sediment sampling and underwater videography.

Offshore areas important for Annex II species of the Habitats Directive and Annex I of the Birds directive should be recognized based on long term records kept by national institutes. Whenever possible, these data should be supplemented by records collected by non-governmental organizations.

Finnish authorities and institutes have readiness to use all the mapping techniques brought up in the Marine Expert Group so far. Finland will take into account the procedural recommendations on the site selection process suggested by HELCOM in the Marine Expert Group.

It is desirable that the Finland's national submarine inventory programme launched in 2003 gained resources for and carried out marine habitat inventories in Finnish offshore areas in addition to its primary task, which is to generate comprehensive knowledge on occurrence of marine Annex I habitats in inshore areas and existing conservation areas. Completion of the programme will take up to ten years and it should enable evaluation of the conservation status of the marine Annex I habitats in Finland and ecological coherence of Finnish Marine SAC's. Site designation process in offshore areas should be based on scientific information regardless of the fact that decisions must likely be made prior to the inventory programme's full completion. Exchange of information and co-operation with neighboring Member States (Estonia, Sweden) and with Russia during the site selection process should be encouraged to ensure that selected sites contribute to ecologically coherent network of marine SAC's in the Baltic Sea.

Measures taken to protect wide ranging Habitats Directive Annex II species in Finland include establishment of sanctuaries in inshore seal resting areas and moving salmon fishery closure during migration to spawning rivers. However, yearly hunting/fishing quota system is in use for grey seal and salmon. Baltic salmon stock is supplemented by reared salmon, but fishing is not restricted to reared stock. Especially offshore fisheries exploit wild salmon relatively heavily. E.g. WWF Finland recommends total salmon fishery closure in Finnish offshore areas as means to ensure existence of the northern Baltic natural salmon stock. Such a measure was ideally taken in joint position with Sweden and Estonia.

# 5. Swedish practices on selecting marine protected areas, including Natura 2000 sites in the marine environment

The practice for selecting MPAs and marine Natura 2000 sites in Sweden is a modification of the system suggested by IUCN (Kelleher and Kenchington, 1992). The main categories of criteria are naturalness, bio-geographic importance, ecological importance, economic importance, social importance, scientific importance and international or national significance, and practicality/feasibility.

It should be noticed that so far there are only 8 designated marine nature reserves in Sweden, why our experiences are limited.

In the process of selecting MPAs/Natura 2000 sites criteria is used for two purposes:

1. Value criteria: used to evaluate sites
2. Priority criteria: used to set a list of priority among sites (to rank sites)

Marine biological systems are different in certain respects from systems on land, and therefore criteria for selecting MPAs/Natura 2000 sites may differ from those used to select areas for protection on land. Marine systems also tend to be more open than terrestrial systems, why marine protected areas tend to be directed more towards protecting habitats, biotopes or ecosystem functions, rather than individual species.

Marine sites selected for protection are mainly coastal sites, which to a large extent are influenced by natural processes and human activities occurring on land. For that reason the protection of a coastal site may need restrictive measures also for activities on land e.g. in a drainage area. On the Swedish west coast the Gullmarn nature reserve and Natura 2000 area is a fjord, where beside the ordinary restrictions in the drainage area certain additional restrictions have been introduced. In order to reduce the nutrient load to the fjord these restrictions cover sewage treatment plants and agricultural practices in different zones of the drainage area of the river Örekilsälven entering the fjord.

MPAs and marine Natura 2000 sites are usually not well known to the public, or have little aesthetic value. Therefore, the information to the public about these areas is of vital importance.

In the management of a MPA/Natura 2000 site zonation is a way to set management practices and regulations for different activities in different parts of a MPA. A zonation may encompass:

1. A core zone, where changes in present activities may be necessary, and where new uses should be avoided.

2. A buffer zone, where most present day activities are allowed, and where new activities can be allowed after careful evaluation of their effects on the environment.

3. A transition zone, where activities (new or old) can be allowed provided they do not negatively influence the biological values of the core and buffer zones.

The zonation is often easier to implement and control and it is suited for local participation. The alternative to zonation is to have the activities regulated in more detail and encompassing the whole MPA/Natura 2000 site.

Monitoring
Monitoring and investigations have to be carried out once a MPA/Natura 2000 site is declared. The management and the rules for a MPA should be possible to modify in accordance with changed needs and knowledge. The monitoring programme should be responsive to the users of the area as well as to the conservationists. However, a monitoring programme is costly. With scarce resources the monitoring programme should focus on the feature you want to protect. Therefore the monitoring programme should concentrate on the investigation of:

- that the values the MPA was set up to protect really are protected, and
- that the management practices implemented actually contribute to the protection.

The monitoring should start before the MPA is set up and repeated a number of times thereafter. Regulations and zonation of the MPA should then continuously be evaluated, based on the results from the monitoring programme.

***Fishing techniques to reduce bird by-catches***
Swedish experiences of measures to reduce bird by-catch in fisheries are so far very limited.
With regard to oil spill in the seas around Sweden it is already forbidden to disperse oil in the marine environment. The greatest problem we have with regard to oil spill is the illegal oil spills although the Baltic Sea is a Special Protected Area regarding oil. In order to better control the shipping in the area the Baltic Sea countries in an application to IMO have got the Baltic Sea classified as a PSSA area (april 2004). The Baltic riparian countries now have two years to provide IMO with the additional protective measures they want to introduce for the Baltic Sea PSSA.

## Management of marine Natura 2000 sites in Sweden – existing experience and ongoing developments

Sweden has several designated Natura 2000 sites in our coastal areas, most in the archipelago areas. Several of these areas have been selected based on already existing nature reserves, where the main reason for the protection is the terrestrial values and to which a water area has been added. Very few of the coastal sites are plain marine sites. Some of them have been investigated appropriately but for most of these sites there is a lack of scientific knowledge of their marine nature values, habitats and species. Basic more systematic inventories on the coastal marine Natura 2000 sites have been planned to start during 2005. With the increasing need to create an ecological coherent network of Natura 2000 sites and other marine protected areas habitat mapping has come up high on the agenda at the national as well as international level. The designation of MPAs/marine Natura 2000 sites demand scientifically based background information of the sites. Therefore it should be a joint interest of member states to co-operate as far as possible in habitat mapping activities, including methodological development, monitoring, quality assurance and surveillance. This joint work, independent of the financial sources, should be connected to/coordinated with the regional marine conventions such as HELCOM and OSPAR.

So far Sweden has designated three marine offshore Natura 2000 sites. These are Hoburgs Bank (outside the territorial boundary) in the Baltic Proper, Lilla Middelgrund (partly outside the territorial boundary) and Fladen (inside the territorial boundary) both in the Kattegat.

The Swedish government has commissioned the Swedish Environmental Protection Agency to start a general inventory of about 20 marine offshore areas all around the Swedish coast. The selected areas are areas, which have been announced being of interest for marine windmill establishments as well as areas that may be of certain interest for marine nature conservation. The inventory started in 2003 and will continue during 2004 and 2005. The results of the inventory will be presented to the government in the beginning of 2006.

The areas that will be investigated are sand banks and reefs down to 30 m. The inventory consists of four parts:

- Marine geology (SGU) – bottom conditions
- Hydrology (SMHI)– circulation and stratification
- Biology (Marine Research Centre of Göteborg, Stockholm and Umeå) - species abundance, coverage and habitat distribution
- Data handling and management (GIS consultant) – GIS application with GIS generalizations, pattern analysis and area estimations.

Implementing Natura 2000 sites as well as MPAs means management of conflicts between interests for protection and other users of coastal and marine resources. Fisheries management is in this respect an especially sensitive issue. The management of different marine user interests demands a more planned management than currently is the case in most countries. In this respect integrated coastal zone management (ICZM) has turned up as a useful tool in the spatial planning process. The concept of integration includes: interaction, involvement, participation, cooperation and co-management. The ICZM-work should provide the basic features of the aim of the management process and the expected achievements in terms of sustainability and quality of available environmental assets and socio-economic conditions.

Integrated coastal zone management is a planning tool not specifically adjusted to planning and management of marine protected areas but a tool for a more comprehensive planning and management in coastal and marine areas. However, the ICZM-process involving interaction, involvement, participation, cooperation and co-management can be used. In Sweden the Environmental Code is the legal instrument for protection of marine nature conservation sites independent of the area is a Natura 2000 site or a MPA. This act is valid in Swedish territorial waters as well as in the Swedish Exclusive Economic Zone (EEZ). The process for planning and management is independent of where a site is situated. However, the involved agencies are different. While the municipalities and County Councils are the main responsible actors inside the territorial boundary the government and central agencies are the main responsible actors in the EEZ. So far we have not made a management plan for a Natura 2000 site or a marine nature reserve in the EEZ. Therefore there are some uncertainties with regard to responsibilities among the central agencies. The Swedish Environmental Protection Agency (SEPA) has proposed a pilot study at Hoburgs Bank, in order to go more closely into the matter of making a management plan for that area.

The Swedish experiences of planning and management of marine sites come from marine nature reserves inside the territorial boundary. Based on the Environmental Code the planning and management of a nature reserve can, in principle, address any human activity that may

have an impact on the nature value you want to protect. The development of a management plan for a protected area is a long and complicated process of participation, involvement, integration, coordination and cooperation. In the Koster-Väderö Natura 2000 site in the Skagerrak a management plan has been developed for the area, in which shrimp trawling is the main threat to the cold water corals to be protected. A group of representatives from public authorities, fishing organizations, individual fishermen and scientists have been working to reduce the damaging trawl effects on the corals. Based on the work of the group an agreement has been reached with the fishermen on how to fish in the area. Certain gear regulations have been introduced and a number of small areas within the Natura 2000 site have been identified as protected zones, where the trawling is forbidden. So far the agreement has been successfully introduced and followed.

A special issue with regard to marine reserves and Natura 2000 sites is the control of the effectiveness of the management of a site. In this respect the Swedish Coast Guard usually is given special responsibilities for control and enforcement on sites inside the territorial boundary and would most certainly be given the same task outside the territorial boundary.

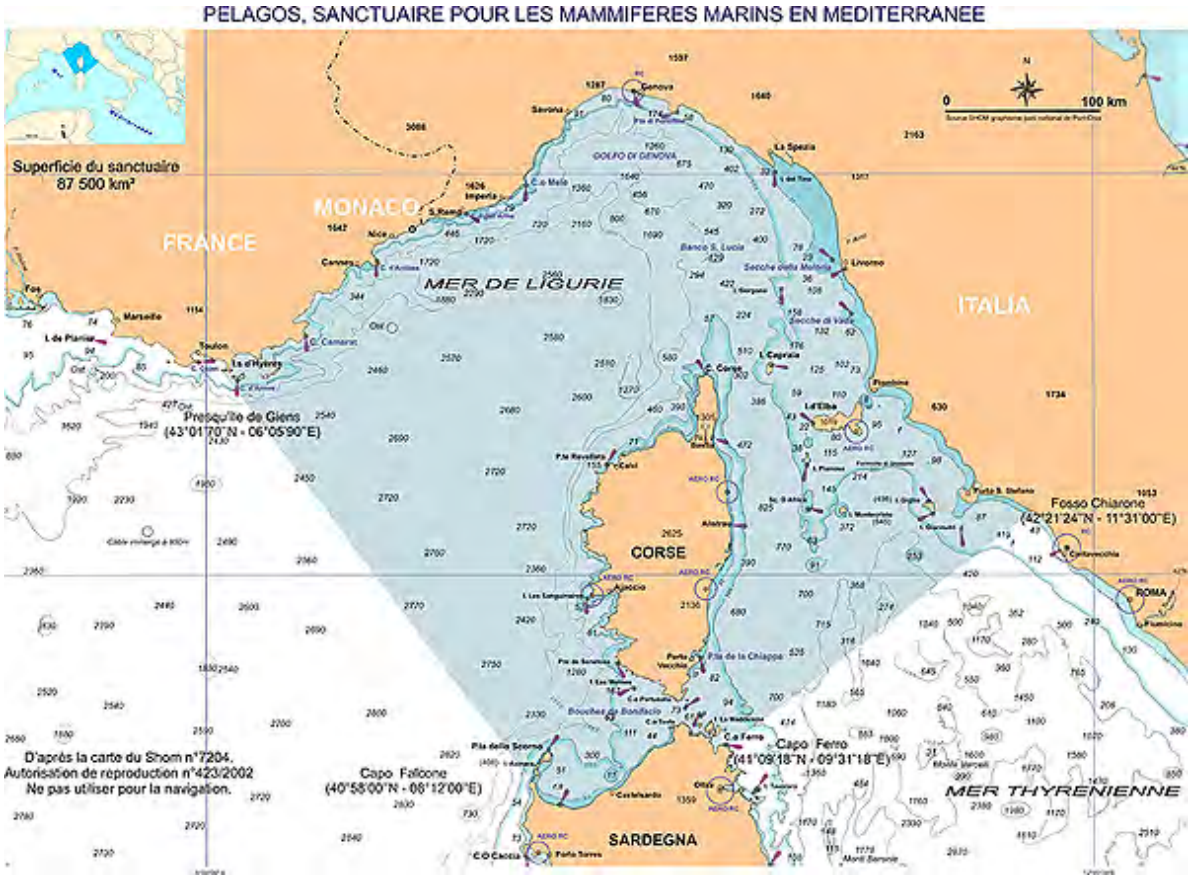
## 6. PELAGOS: An international Marine mammal sanctuary in the North-Western Mediterranean sea

The agreement concerning the creation of PELAGOS, a marine mammal sanctuary in the Mediterranean sea, was signed on the 25th of November 1999 in Rome by the governments of France, Italy and the Principauty of Monaco. Parties may invite other States or international organisations to participate.

### Area of application

- PELAGOS is located in the territorial waters of France, Italy and the Principauty of Monaco, and extends to areas of the Mediterranean high seas under their national jurisdictions. These areas are rich in biodiversity and are crucial to the conservation of marine mammals. The sanctuary covers an area of 87500 km2 and includes 2022 km of coasts. It would host around a thousand whales and 25000 dolphins.

- PELAGOS boundaries are clearly stated in the article 3 of the agreement. It extends from the peninsula of Giens in France to the Toscan archipelago in Italy and includes Corsica.



## Objectives

Pelagos aims are to:

- Guarantee a favourable conservation status of all marine mammal species by protecting them, protecting their habitat, and mitigating direct and indirect impacts of human activities.
- Organise the cooperation between States to evaluate periodically the status of mammal populations, mortality causes, threats on their habitats, and more specifically, threats on vital functions such as reproduction and feeding processes.
- Intensify pollution monitoring and control activities.
- Adopt national strategies to suppress progressively toxic wastes that are being dumped in the sanctuary area.

## Jurisdictional effects

- Within the sanctuary, Parties :
    - forbid intentional catch or disturbance of marine mammals. They may authorise non lethal catches in emergency cases or for the sake of ***in situ*** scientific research.
    - Apply the international and European Union legislations, regarding in particular the use of fishing gears that could be detrimental to cetaceans.
    - Set up together regulations regarding the use of fishing gears that might be involved in the accidental catch of mammals or could threaten their food resources, and submit these regulations for adoption to international forums.
    - Regulate mammal sighting tourism
    - Regulate and if necessary forbid motorised contests within the sanctuary.
    - Harmonise all activities mentioned above
- Parties are allowed to adopt national measures that are stricter than those foreseen in the agreement.
- Parties hold frequent meetings to implement the agreement and follow it up. They encourage national sensitisation campaigns (e.g.: prevention of collisions between mammals and boats, how to inform local authorities in case of sighting of a mammal in danger…) and international research programmes to support the implementation of the agreement.
- To ensure the implementation of the agreement, parties organise control mechanisms within the boundaries of the sanctuary. They cooperate to organise the surveillance. They apply simplified procedures to facilitate one another use of their ports and airports.

- Parties invite other non member States that are active in the sanctuary (through fishing or tourism activities…) to respect the measures applied by the parties to protect mammals within the sanctuary.
- The sanctuary has been listed on the list of the Mediterranean specially protected areas (MSPA)of the Barcelona Convention in 2001. A management plan has been adopted by the three parties and institutional dispositions such as the creation of a secretariat, the provision of a budget and the creation of a scientific committee are under way.

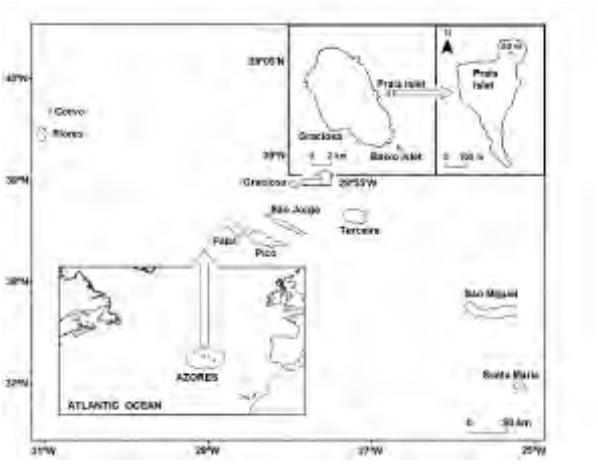
**First concrete results:**

- 230 000 euros have been invested in the French part of the sanctuary on research programmes to reconcile human activities and the presence of cetaceans.
- Speed Boat races within the sanctuary have been forbidden ever since 2001.
- A code of conduct targeting cetaceans watching tourism from boats has been set up.
- The suspension of the use of the 'thonaille', a local fishing gear, has been adopted from the 15th of August till the 15th of September to avoid the frequent by-catch of dolphins that would take place around this period.
- The obligation for fishermen to equip their boats with 'pingers', an acoustic device which frightens dolphins away has been adopted.

## 7. Habitat restoration on Praia islet, Graciosa (Azores)

Maria C. Magalhães [1], Joël Bried [1], Mark Bolton [1, 2], Verónica C. Neves [1, 3], José M. Pereira [4], Maria José Pitta Groz [4], Luís Aguiar [5], Luís R. Monteiro [1, †] and Ricardo S. Santos [1]

[1] Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores, 9901-862 Horta, Azores, Portugal
[2] Royal Society for the Protection of Birds, The Lodge, Sandy, Bedfordshire SG19 2DL, United Kingdom
[3] Ornithology Unit, IBLS, University of Glasgow, Graham Kerr Building, G12 8QQ Glasgow, Scotland, United Kingdom
[4] Direcção Regional do Ambiente, rua Cônsul Dabney, 9900-014 Horta, Azores, Portugal
[5] Praia, Graciosa, Azores, Portugal
[†] Deceased




### Context

The Azores seabird assemblage represents a transition between tropical and temperate avifaunas. For this reason, it has an international scientific importance. Because seabirds essentially breed on oceanic islands free of native terrestrial predators, these species generally lack adaptations that would enable them to cope successfully with introduced predators or with perturbations of their nesting habitat.

Consequent on the introduction of alien mammals in the Azores archipelago by the Portuguese during the 15th century, most seabird species became extirpated from the main islands and are now restricted to a few islets and remote coastal strips. This is likely to have resulted in higher inter-specific and intra-specific competition for nest sites at this locality. Therefore, one of the priorities was to eradicate introduced mammals and to restore habitat whenever and wherever possible. Due to its accessibility to man and to the richness of its seabird community, Praia islet (0.12 $km^2$), off Graciosa island, was chosen for such an experiment. Praia islet holds more than 40% of the Azorean breeding population of Madeiran Storm Petrels ***Oceanodroma castro***, both from hot and cold season populations. Roseate Terns ***Sterna dougallii***, Common Terns ***S. hirundo***, Cory's Shearwaters ***Calonectris diomedea borealis*** and Little Shearwaters ***Puffinus assimilis*** also breed on the islet. All these species are included in Annex I of the EU Wildbirds Directive 79/409and Annex 2 of Bern Convention.

### Problems to be solved

Like at several other localities, the presence of Rabbits ***Oryctolagus cuniculus*** on Praia islet, has resulted in the disappearance of some native plant species and in increased soil erosion, as well as in the destruction of seabird breeding sites and hence a decrease in seabird breeding numbers.

### *Objectives*

Eradicating the rabbits and restoring the habitat on Praia islet, both in terms of vegetation and suitability for seabirds.

***Actions undertaken***

Rehabilitation measures were implemented from 1995 onwards. They included rabbit eradication, habitat restoration, installation of artificial nests for terns and storm petrels and educational measures.

***Rabbit eradication***

Rabbit eradication was conducted from 12 September to 2 October 1997, using brodifacoum, an anticoagulant.

***Control of erosion***

Due to the presence of the rabbits and the nature (friable substrate) of the islet, erosion was very important in some areas. In order to minimize this phenomenon, branches cut down from trees and debris dams made of rock piles and wooden planks were installed in the erosion scars in 1995 and 1997.

***Replanting the native vegetation***

The species that should be (re-)introduced on Praia islet were determined from the results of a preliminary study conducted on the neighbouring Baixo islet (***ca*** 2 km south of Praia) in 1996. Small plants of 9 native species collected on Baixo islet and on Graciosa island were planted on Praia islet from May 1998 onwards, according to their habitat preferences. Operations are still ongoing.

***Measures to increase seabird populations***

Construction of nest boxes for roseate terns:

**To enhance Roseate Tern establishment on Praia islet, 50 wooden nest boxes (0.4 x 0.4 x 0.2 m) were built and installed on the islet at the onset of the 1996 breeding season in order to increase the number of suitable areas for this species. Since then, nests boxes have been installed every year in early April and removed in September, after all the chicks have fledged.**

Construction of artificial nests for Madeiran Storm Petrels:

In 2000 and 2001, 150 artificial nests were installed on Praia islet to increase the breeding populations of the two seasonal morphs of Madeiran Storm Petrels. Since then, these nests have been annually monitored for each seasonal population, monitoring consisting in short visits to the colony (5-10 days) to determine occupancy rate, the number of breeding pairs, and chick productivity. Adults and chicks are ringed.

**Educational measures**

In 1995, informative panels explaining the impact of human disturbance on seabirds were put on the islet to limit the access by visitors to tern colonies, and awareness campaigns were conducted.

**Results:**

***Rabbit eradication***

Rabbit eradication proved to be successful. No evidence of the presence of Rabbits has been found since the end of the 1997 campaign.

***Control of erosion***

Putting tree branches into erosion scars and building debris dams proved their efficacy in terms of soil retention, and herbaceous plants had already started to colonise the soil in 1998. In 2004, all the erosion scars were partially filled up and contained vegetation.

***Replanting the native vegetation***

The program is still ongoing due to some difficulties experienced with some species like ***Azorina vidalii*** or ***Solidago sempervirens*** which have very low growth rates, whereas other species such as ***Festuca petrea*** already started to spread. However, the plants of ***A. vidalii*** introduced in 1998 already produced seeds that have germinated, giving birth to several young plants. Exotic plants that attempt to colonise the islet, (essentially ***Carpobrotus edulis***) are removed. Plant introductions and removal of exotic species are currently conducted by the nature warden from Graciosa.

***Measures to increase seabird populations***

Construction of nest boxes for roseate terns:

Rabbit eradication and the installation of nest boxes resulted in the increase in the breeding populations of terns on the islet, although not immediately. Roseate Terns had been almost totally absent from Praia islet since 1991. Despite the installation of nest boxes, they did not breed between 1996 and 1998. Except for two pairs in 1998, the first noticeable breeding attempts by this species occurred in 2000; since then, breeding numbers have kept increasing, exceeding 300 pairs in 2003.

A few tens of Common Tern pairs have always been breeding on Praia since 1989, except in 1995 and 1996. This species bred again in 1997, before Rabbits were eradicated. Since then, breeding numbers have kept increasing, and Praia islet currently holds the largest Common Tern colony (about 1000 pairs) of the Azores.

**Concerning wooden boxes, however, adult terns never used them, but chicks use them as shelters from both predators and weather.**

Construction of artificial nests for Madeiran Storm Petrels:

The occupancy rate of artificial nests by Madeiran Storm Petrels has kept increasing since 2000, with 46 breeding pairs for each seasonal morph in 2004. This represents a two-fold increase for the cool season morph and a 3.5-fold increase for the hot season morph. A long-term demographic survey is being conducted to estimate the demographic parameters of each seasonal population.

**Educational measures**

Every summer, informative panels are still installed on Praia islet. Although visits on the islet are still allowed, they have been discouraged and overnight stays are only permitted to researchers. Although he is not obliged to do it, the nature warden from Graciosa island is present during diurnal visits to inform the public about the sensitivity of seabirds to human disturbance and the vulnerability of the ecosystem of Praia islet.

**Conclusion: future work**

Praia islet remains a vulnerable area since people come with boats for diurnal visits, most of which occur between May and August, i.e. when the weather is the most settled, but also coinciding with the breeding period of seabirds. However, the nature warden is present during these visits and he keeps the visitors informed about the bird species that are present to ensure that people will not disturb birds during the breeding period. Despite this, people may land on the islet at any time of the day or night (that is, outside the working hours of the nature warden) and cause disturbance inadvertently. Therefore, it is desirable to maintain sessions of environmental education. On the islet, control and/or removal of exotic plants remain necessary. So does the maintenance of the tern nesting habitat (installation of wooden boxes for terns each summer, removal at the end of the breeding season), and that of the storm petrel artificial nests (removing the vegetation at the entrance of the nest boxes).

**Further information and contact addresses**

Maria Pitta Groz, ***Secretaria Regional do Ambiente***, 9900 Horta, Azores, Portugal

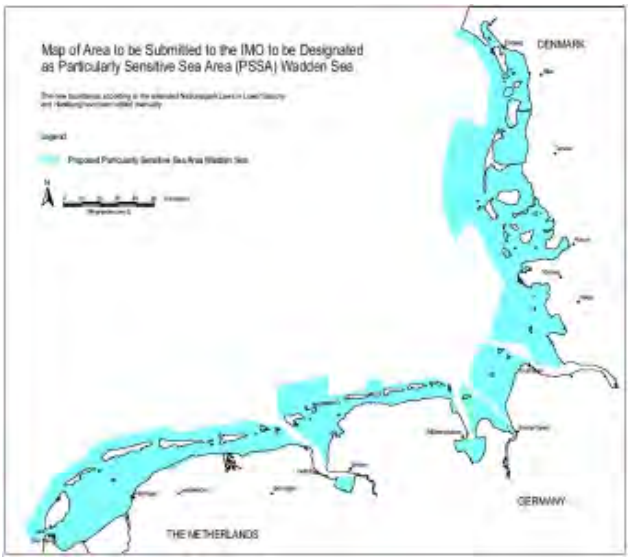
Maria Carvalho Magalhães, ***Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores***, 9901-862 Horta, Azores, Portugal. Email <mcarvalho@notes.horta.uac.pt>

Joël Bried, ***Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores***, 9901-862 Horta, Azores, Portugal. Email joelbried@yahoo.com

## 8. The Wadden Sea : an example for Best-Practices in Marine Conservation

### The Wadden Sea - Location, Habitat Types and Species

The Wadden Sea is Europe's largest and most important marine wetland. It is a marine area of outstanding international importance, which is shared by Denmark, Germany and the Netherlands. Nowhere else in the world is there an area on a similar scale and multifaceted, containing such a complex of tidal flats, gullies, salt marshes, dunes and islands. The Wadden Sea is an exceptional, highly dynamic tidal ecosystem and its exceptionality relates to its extensiveness, complexity and interrelationship of habitats and species as well as its high biomass productivity, which provides the foundation for an abundance of species.




Sandbanks, estuaries, mudflats and sandflats not covered by seawater at low tide, large shallow inlets and bays, reefs, salt marsh habitat types and dune habitat types are the main natural European habitat types according to the EU Habitat Directive, which can be found in the Wadden Sea. About 10 to 12 million waterbirds pass through the area to build up the necessary energy reserve for their migration flight. The most numerous native marine mammal species in the Wadden Sea is the Harbour seal with some 10,800 individuals (2003). The Wadden Sea is the main nursery ground for fish species that are hatched in the North Sea. The commercial fishery of the North Sea is dependent on these nursery ground facilities. (see list of relevant Habitat Directive habitats and species in **Annex 1**)

**Man settled in the Wadden Sea area more than 2000 years ago. The Wadden Sea of today is partly the result of man´s interference with the Wadden Sea environment through land reclamation and altering of the landscape. The Wadden Sea has been subject to a generation of protection and management, also in an international context, as shared by three countries. The trilateral Wadden Sea Cooperation celebrated its 25-year anniversary in 2003. There is hence a long experience in terms of protection and management of a large and complex marine area located in a part of Europe with many pressures and developments impacting the area both in a national and international context.**

It has been recognized that the Wadden Sea could only be protected and managed in the context of an overall management of the coastal zone both landward and offshore because

many of the pressures on the area occur outside the area subject to the protection. The Wadden Sea case provides an extraordinary opportunity to examine the management of a large marine protected area on a national and international scale and in the context of a complex coastal zone.

## *2 Managing the Wadden Sea – The Trilateral Perspective*

**The collaboration between the three countries on the protection of the Wadden Sea is based on the Joint Declaration, which was concluded at the 1982 Wadden Sea Conference. The three governments declare their intention to consult each other in order to coordinate their activities and measures to implement relevant EU directives and other international legal instruments such as the Ramsar and Bonn Conventions. The Joint Declaration is a political declaration of intent made by the three governments expressing a joint responsibility for the protection of the Wadden Sea as a shared marine wetland area. In 1987 the Common Wadden Sea Secretariat was established to facilitate and support the cooperation.**

Wadden Sea Plan: Geographical delimitation - External Impacts

In 1997, the Wadden Sea countries adopted the Wadden Sea Plan, which is the key joint policy and management plan for the overall protection, management and sustainable use of the Wadden Sea. The Wadden Sea Plan is applicable to the Wadden Sea Area as defined by the trilateral Danish-German-Dutch Wadden Sea cooperation as the area between basically three nautical mile offshore and the seawalls on the mainland including the estuaries up to the brackish water limit and the islands. The Wadden Sea Area covers an area of almost 15,000 $km^2$ of which almost 12,000$km^2$ constitutes the trilateral Conservation Area of the national Wadden Sea nature reserves and national parks (see **Figure**: Map of the Wadden Sea Area and Conservation Area). The Wadden Sea is also subject to international designations such as the designation as candidate Special Areas of Conservation (cSACs) according to the EU Habitat Directive and a Special Protection Area (SPA) according to the Bird Directive and Ramsar Convention. It is important to acknowledge that the Wadden Sea Area geographically covers basically all of the Wadden Sea ecosystem including its natural habitats but also to appreciate that the protection and management regime is in principle confined to this area though the significance of external impacts on the area is well recognized.

**Regarding the impact of shipping off the Wadden Sea, the designation of the Wadden Sea as a Particularly Sensitive Sea Area (PSSA) in the year 2002 is a recognition of the vulnerability of the Wadden Sea. The protective measures, which have been taken off the Wadden Sea, are now recognized as associated measures, which serve to protect the Wadden Sea from impacts from shipping.**

Trilateral Objective, Management Principles and Targets

The guiding principle of the trilateral Wadden Sea policy is to achieve, as far as possible, a natural and sustainable ecosystem in which natural processes proceed in an undisturbed way (Wadden Sea Plan, §I,8, 1997). This guiding principle is a compelling political statement on the objective of the efforts of the countries to protect and conserve a natural ecosystem for present and coming generations. Seven management principles, such as the precautionary principle have been agreed to, which are fundamental for decisions on activities and projects within the Wadden Sea Area. A list of those shared principles is in **Annex 2**.



The conservation and management is hence directed towards maintaining and achieving the full scale of habitats, which belong to a natural and dynamic Wadden Sea by working towards targets set for habitats, birds and mammals, quality of sediment and water, and landscape and cultural aspects. A list of the Targets is in **Annex 3**. The Targets were developed upon the extensive scientific documentation of the area and the Quality Status Reports of which two have been issued. The Targets are open-end formulated based on the assessment that in order to achieve a natural and sustainable ecosystem the area, which is natural and undisturbed, should be increased. The target approach is concerning one of the few areas, if any, in Europe where such a management approach is applied to and politically accepted. Recently, it was concluded that the Targets complies with the requirements of scientific credibility, management usefulness and suitability for communication with stakeholders.

For each of the Targets a comprehensive set of joint policies and management has been adopted by the countries as encompassed by the Wadden Sea Plan. These policies and management cover all relevant activities and uses in the Wadden Sea Area related to the Targets on landscape, water and sediments, habitats, birds and marine mammals. These includes policies on coastal protection, agriculture, industry and harbour, fisheries, tourism and recreation, extraction of oil and gas, sand and gravel extraction etc. as listed in the Wadden Sea Plan.

3 Implementation on the National Level

The trilateral protection and management scheme as laid down in the Wadden Sea Plan through a coherent system of management principles, targets, measures, monitoring and assessment, constitutes an integrated ecosystem management of the Wadden Sea as one shared ecosystem. A shortcoming in the approach is the legally non-committal nature of the agreements and the institutions.

The implementation of the agreements made in the framework of the trilateral Wadden Sea Cooperation is the task of the national responsible, primarily of the nature conservation authorities but also other authorities, which have a stake in Wadden Sea conservation and management. There are some notable differences between the national protection schemes.

The German national parks have established a unified management of the protected areas through an overall zoning system. The national parks authorities are also strong institutional elements, which potentially guarantee a strong implementation and enforcement of the

stipulations of the national park laws. Its weakness is the lack of integration with the developments and activities in the adjacent land and sea territory.

In opposition to this, the Dutch approach is one, which in principle has integration as a leading principle horizontally and vertically between the authorities and, which take account of developments in the adjacent area. A weakness is potentially the problems in pursuing conservation objectives in conjunction with the lack of a strong institutionalized lead agency for the Wadden Sea. During the developments of the last decades, however, there have been fewer principle differences between the two approaches, also because of the development of common trilateral framework.

The Danish Wadden Sea nature reserve was established by state order since the Danish state has sole responsibility on the sea territory is very similar to the German national parks with a few essential exceptions. The zoning system is activity related and not a fixed system. Furthermore no special authority has been established but the existing state authority of the Danish Forest and Nature Agency is the competent authority for management and issuing of permits and exemptions.



## *5 Wadden Sea protection - Assessment and Measures*

The implementation of the trilateral Targets is monitored and assessed by the Trilateral Monitoring and Assessment Program (TMAP) on the basis of a common list of agreed parameters. The TMAP is set up to enable an appraisal of the measures, which have been introduced and, if necessary, to design and introduce new ones if required to achieve the Targets. The Targets, measures, monitoring of the Targets and recurring policy assessment is in principle a very consistent system, which is applicable to all other systems and protected area management schemes.

The 1999 Quality Status Report (QSR) is the most recent comprehensive quality assessment of the Wadden Sea based on the Targets, which has made use of the TMAP data to the extent available. Some essential results as summarized (summary available at www.waddensea-secretariat.org) are

- Water, sediment and biota: phosphate levels have decreased significantly in most parts of the Wadden Sea, whereas this is not the case for nitrate; concentrations of most heavy metals in sediment are approaching background levels but an exception is mercury, which is still three to ten times higher than background levels; also concentrations of PCBs in sediment and HCB and HCH in bird eggs show a steady decrease.

- The tidal area: the target of an increased area and more natural development of natural mussel beds, eelgrass meadows and sabellaria reefs has not been reached; the decline of mature beds of the blue mussel and seagrass meadows has continued in the 90s; as a result of human interference, most notable fixed coastal constructions but also fisheries, dredging, sand extraction and gas extraction – the ability of the system to compensate for sea level rise may have decreased.
- Salt marshes: much has been achieved to in the 90ies to improve the natural situation in salt marshes by the reduction, or phasing out of grazing and artificial drainage.
- Birds: the population of several bird species have increased in the last decades and few have declined; the main factor for the increase of breeding birds are, amongst others, an improved protection during the breeding season; Kentish plover and Little tern populations have decreased, which is due to lack of sufficient undisturbed breeding habitats caused by recreational activities.
- Marine mammals: the Harbour seal population has increased significantly and though the population was affected by an epidemic in 2002 as in 1988, the population may be regarded as viable.
- Estuaries: only few estuaries have remained in the Wadden Sea area and consequently natural transitions of fresh and salt water hardly exist; the anthropogenic impact on the three main estuaries is still increasing as a result of current deepening and the building of a storm surge barrage.

The protection of the Wadden Sea ecosystem has benefited much from the comprehensive and integrated protection scheme, which was launched almost a generation ago. The 1999 QSR points to a number of positive developments in particular with regard to birds and seals and some of the habitats such as the salt marshes. The QSR also identifies a number of areas of concern for which an improvement is needed. This concerns the developments in the tidal area and with regard to the external impacts from pollution and other developments in the coastal zone. The next QSR including the assessment until 2003 is being compiled at the moment and will be published in 2005.



## 6 The Seal Management Plan

The Wadden Sea seal population slumped in the mid-1970s to about 3,900 individuals – the lowest number ever logged. A ban on hunting was introduced in all three Wadden Sea countries and as a result seal numbers stabilized and began to rise in some places. This positive development was interrupted by a dramatic epizootic at the end of the 1980s caused by the highly infectious phocine distemper virus (pdv). By 1988, the seal population slumped by about 60 percent. It happened again 14 years later, once more reducing the seal population tremendously. Yet in the meantime a positive new factor had entered the equation.

In October 1991, an Agreement was struck between Denmark, Germany and the Netherlands on the Conservation of Seals in the Wadden Sea. It was the first regional Agreement under the Bonn Convention (CMS) and its aim was trilateral cooperation to improve the conservation prospects of seals in the Wadden Sea. After the first pdv epizootic, between 1988 and 2002, seal numbers rallied significantly. Aerial surveys of the entire Wadden Sea in 2002 counted some 20,975 seals. This comeback was attributed to a higher reproductive rate and lower initial juvenile mortality. But later that same year, pdv struck again and half the Wadden Sea's seals (about 10,500) were found dead. One year later, however, the maximum number of surviving seals counted during the moult period in August 2003 amounted to some 10,800 seals. In other words the population was 53 percent below pre-outbreak levels. Though in absolute numbers more seals died than during the earlier epizootic of 1988, the evidence showed that relative mortality was evidently lower this time around.

It was widely acknowledged that the Seal Agreement played a part in turning the tide. The Agreement required Parties to develop a 'conservation and management plan for the seal population' on the basis of scientific knowledge – the Seal Management Plan (SMP). This plan, which was compiled with the support of the results of the EC funding project 'Joint Management Plan for the Wadden Sea Seal Population', has become the key instrument for achieving and maintaining the objectives of the Seal Agreement. Among other provisions, it set up seal reserves throughout the Wadden Sea, which are closed to all activities in periods when the animals are giving birth and nursing young. The environmental conditions of seals, however, are still not satisfactory. The present and short-term conservation status of the seals in the area is primarily determined by pollution and disturbance as results of various human activities are the main problems.

A rise in seal populations may run the risk of conflict with fishermen. It may also challenge the current reserve system if additional reserves are needed to cope with growing numbers. Research projects on the feeding ecology of Harbour seals, and investigations of habitat requirements of seals in relation to recreational demands are the top two priorities for implementation under the revised SMP for 2002-2006 (available at http://www.waddensea-secretariat.org/). The SMP remains an essential tool for heading off potential future conflicts of interest in an area with lots of commercial users. It aims to strike a balance between managing the area for human uses, and conserving viable stocks of seals to maintain a natural breeding cycle.





## 7 Conclusions - Lessons Learnt

Looking back at a generation of Wadden Sea protection it seems justified to conclude that the entire approach in terms of conservation and management of a comprehensive marine wetland has been a very progressive one. The level of environmental protection and management can be characterized as unique in terms of harmonized international and national policies, management arrangements, and integrated environmental monitoring and assessment procedures. The measures have been successful in conserving species and habitats though there still remain issues of concern in particular the quality of water, sediment and biota caused by the input of hazardous substances and nutrients from sources outside the Wadden Sea. This issue can only be addressed in a larger context.

Furthermore, there is much concern related to the possibility for compensating the effects of the sea level rise and responding to accelerated sea level rise, which is also an issue that requires addressing developments outside the Wadden Sea Area. The decline of mature beds of blue mussel and sea grass meadows and the increasing impact in the estuaries are also a major cause of concern. The comprehensive protection and management of the Wadden Sea as a coastal marine area has been a very positive achievement, which needs to be continued. The management of the Wadden Sea has practiced coastal management for a long period along the principles for integrated coastal zone management as outlined in the European Union program.

## 8 Further Information

**http://www.waddensea-secretariat.org/**
**http://www.waddensea-forum.org/**

## 9 Contact Address

Jens A. Enemark and Bettina Reineking
Common Wadden Sea Secretariat
Virchowstrasse 1,
**D - 26382 Wilhelmshaven**
**Federal Republic of Germany**
Phone: +49 (0)4421 9108- 11
Fax: +49 (0)4421 910830
Email: Enemark@waddensea-secretariat.org
Reineking@waddensea-secretariat.org
**info@waddensea-secretariat.org**

***ANNEXES***

**Figure: Map of the Wadden Sea Area and Conservation Area**

**Annex 1: List of the habitats and species according to the Habitat Directive Annex I and II occurring in the Wadden Sea**

**Annex 2: Shared Principles of the Trilateral Wadden Sea Cooperation - Wadden Sea Plan**

**Annex 3: Trilateral Targets**

**Annex 1:**

**List of the habitats and species according to the Habitat Directive Annex I and II occurring in the Wadden Sea**

**List of Habitats**

1110 Sandbanks which are slightly covered by sea water all the time
1130 Estuaries
1140 Mudflats and sandflats not covered by seawater at low tide
1160 Large shallow inlets and bays
1170 Reefs
1210 Annual vegetation of drift lines
1310 ***Salicornia*** and other annuals colonising mud and sand
1320 ***Spartina*** swards ***(Spartinion maritima***e)
1330 Atlantic salt meadows ***(Glauco-Puccinellietalia maritima***e)
2110 Embryonic shifting dunes
2120 Shifting dunes along the shoreline with ***Ammophila arenaria*** (white dunes)
2130 Fixed coastal dunes with herbaceous vegetation ('grey dunes')
2140 Decalcified fixed dunes with ***Empetrum nigrum***
2150 Atlantic decalcified fixed dunes ***(Calluno-Ulicete***a)
2160 Dunes with ***Hippophaë rhamnoides***
2170 Dunes with ***Salix repens*** ssp. ***argentea (Salicion arenaria***e)
2180 Wooded dunes of the Atlantic, Continental and Boreal region
2190 Humid dune slacks
4010 Northern Atlantic wet heaths with ***Erica tetralix***
4030 European dry heaths

**List of the species**

A4.1 Common Seal and Grey Seal
A4.2 Harbour Porpoise
A4.3 Fish species
A4.4 Root vole
A4.5 Fen orchid

**Annex 2:**

**Shared Principles of the Trilateral Wadden Sea Cooperation - Wadden Sea Plan**

The Guiding Principle of the trilateral Wadden Sea policy is ”to achieve, as far as possible, a natural and sustainable ecosystem in which natural processes proceed in an undisturbed way” (ED §1). The Principle is directed towards the protection of the tidal area, salt marshes, beaches and dunes (LD §8).

In addition, seven Management Principles have been adopted which are fundamental to decisions concerning the protection and management within the Wadden Sea Area (Esbjerg Declaration §3):

- the Principle of Careful Decision Making, i.e. to take decisions on the basis of the best available information;
- the Principle of Avoidance, i.e. activities which are potentially damaging to the Wadden Sea should be avoided;
- the Precautionary Principle, i.e. to take action to avoid activities which are assumed to have significant damaging impact on the environment, even where there is no sufficient scientific evidence to prove a causal link between activities and their impact;
- the Principle of Translocation, i.e. to translocate activities which are harmful to the Wadden Sea environment to areas where they will cause less environmental impact;
- the Principle of Compensation, i.e. that the harmful effect of activities which cannot be avoided, must be balanced by compensatory measures; in those parts of the Wadden Sea, where the Principle has not yet been implemented, compensatory measures will be aimed for;
- the Principle of Restoration, i.e. that, where possible, parts of the Wadden Sea should be restored if it can be demonstrated by reference studies that the actual situation is not optimal, and that the original state is likely to be re-established;
- the Principles of Best Available Techniques and Best Environmental Practice, as defined by the Paris Commission.

Unreasonable impairments of the interests of the local population and its traditional uses in the Wadden Sea Area have to be avoided. Any user interests have to be weighed on a fair and equitable basis in the light of the purpose of protection in general, and the particular case concerned .

**Annex 3:**

**TRILATERAL TARGETS**

***Landscape and Culture***

- Identity - to preserve, restore and develop the elements that contribute to the character, or identity, of the landscape.
- Variety - to maintain the full variety of cultural landscapes, typical for the Wadden Sea landscape.
- History - to conserve the cultural-historic heritage.
- Scenery - to pay special attention to the environmental perception of the landscape and the cultural-historic contributions in the context of management and planning.

***Water and Sediment***

- Background concentrations of natural micropollutants.
- Concentrations of man-made substances as resulting from zero discharges.
- A Wadden Sea which can be regarded as a eutrophication non-problem area.

***Salt Marshes***

- An increased area of natural salt marshes.
- An increased natural morphology and dynamics, including natural drainage patterns of artificial salt marshes, under the condition that the present surface area is not reduced.
- An improved natural vegetation structure, including the pioneer zone, of artificial salt marshes.
- Favorable conditions for migrating and breeding birds.

***Tidal Area***

- A natural dynamic situation in the tidal area.
- An increased area of geomorphologically and biologically undisturbed tidal flats and subtidal areas.
- An increased area and a more natural distribution and development of natural mussel beds, ***Sabellaria*** reefs and ***Zostera*** fields.
- Viable stocks and a natural reproduction capacity, including juvenile survival, of the Common Seal and the Grey Seal.
- Favorable conditions for migrating and breeding birds.

***Beaches and Dunes***

- Increased natural dynamics of beaches, primary dunes, beach planes and primary dune valleys in connection with the offshore zone.
- An increased presence of a complete natural vegetation succession.
- Favorable conditions for migrating and breeding birds.

***Estuaries***

- Protection of valuable parts of the estuaries.
- Maintaining and, as far as possible, restoring the river banks in their natural state.

***Offshore Area***

- An increased natural morphology, including the outer deltas between the islands.
- A favorable food availability for birds.
- Viable stocks and a natural reproduction capacity of the common seal, grey seal and harbour porpoise.

***Rural Area***

- Favorable conditions for flora and fauna, especially migrating and breeding birds.

***Birds***

- Favorable conditions for migrating and breeding birds:
  a favorable food availability;
  a natural breeding success;
  sufficiently large undisturbed roosting and moulting areas;
  natural flight distances.

***Marine Mammals***

- Viable stocks and a natural reproduction capacity of the Common Seal including juvenile survival.
- Viable stocks and a natural reproduction capacity of the Grey Seal including juvenile survival.
- Viable stocks and a natural reproduction capacity of the Harbour Porpoise

## 9. Overview of the measures included in the existing management plans of the French marine Natura 2000 sites

**Normandy , Brittany, Corsica, Poitou Charentes and Provence Alpes Côte d'Azur as at 20th of June 2005**

Below is a synthesis of the measures that are proposed in some French marine Natura 2000 sites that already apply a management plan. The evaluation of their impact will take place in the near future. On the basis of these measures and their effect, a national working group will be proposing additional measures that should be taken into account locally when drafting future management plans.

1. ***Public awareness and information :***

Awareness campaigns are being caried out on the need to protect and better manage wild habitats and species and on the existing legislation : development of education tools (guides for sustainable leisure fishing, information on nesting sites, leaflets on Natura 2000 and its legislation, delimitation of sites with informative signs…)

2. **E*co-label*ling** of products is being encouraged

3. ***Protection activities***

It consists in:

- Promoting nature reserve projects
- Harmonising local legislations
- Protecting and restoring sites that host or could host bird and fish species : spawning and nesting sites, resting sites, feeding grounds
- Controlling invasive species: rats, ravens, … to limit the predation on marine birds nesting sites, ***Caulerpa taxifolia*** in Mediterranean sites to protect ***posidonia*** beds.

4. ***Sustainable development***

The following activities are being set up:

- Collaboration with local producers to adapt their activities to a sustainable use of the resource : design of ways suitable for motor vehicles for the exploitation of oysters and mussels that are not detrimental to birds, development of mooring sites outside of ***zoostera*** and ***posidonia*** beds, no trawling over fragile habitats, protection of waterways between lagoons and the open sea in the Mediterranean sea…
- Limitation of the use and development of the shores and nearby seawaters located in ecologically rich areas. Projects that could have an impact on the substrata (dredging, etc), on sea habitats (harbour developments, embankments, etc), on water quality and the biological balance of natural habitats (sewage treatment plants, aquaculture farms, etc) are being thoroughly screend.
- Follow up of the impact of fisheries (trawls and dragnets), evaluation of local interrelations between seafood farming and marine habitats, support to sustainable fishing practices (e.g. by avoiding the overexploitation of sea urchins predator fish species or limiting the size of herbivorous species feeding on sea grass beds).
- Maintenance of natural harbours and their biodiversity (by avoiding the accumulation of silts, limiting dredging activities…)
- Promotion of the cleaning of beaches and sea wracks by a selective manual sorting of waste; limitation of the amount of waste from sea food farming activities.

### *5. Implication in other programmes related to water quality*

Support to local water management plans, water quality evaluation schemes. Integration of marine water preservation needs into the set criteria used for the management of the continental watershed.

### *6. Follow up and evaluation of habitats and species*

It consists in:

- Setting up local marine biodiversity observatories
- Further developing inventories of marine habitats and species (though the design of more precise marine habitat maps, the closer follow up of endangered habitats and those that have a rich biodiversity and/or that are under strong pressure…
- Increasing the knowledge of marine mammal populations (diet, use of water space, …) and their long term viability (genetic bank…), protecting their resting sites, sensitising the public (tourists, tour operators, fishermen…).
- Protecting migratory fish species through a better knowledge and the suppression of migration obstacles.
- Protecting the feeding grounds of marine species and birds
- Protecting the habitats of the European otter and supporting its installation on the coast line

## 10. Limitation to the negative interactions between dolphins and human activities (LINDA) Corsica, France

### Project Background

The bottlenose dolphin (Tursiops truncatus) has a very large distribution range and is found everywhere around European coasts, from the Mediterranean to the North Sea. However, few data exists on the species and its populations, being classified as «data deficiency » by the UICN. The 3 sites of the project (the 2 marine nature reserves of Bonifacio and Scandola and the Agriates, all of them being proposed Natura 2000 sites) are included in the international marine sanctuary (PELAGOS) and hold half of the total Corsican population, estimated to be between 198 to 242 individuals.

The bottlenose dolphins are essentially gregarious and exploit a large variety of coastal habitats up to 200 meters of depth. They have learnt how to take advantage of man fishing techniques to satisfy their needs, by pilfering directly in fishing nets. However, due to the damages produced this behaviour has led to the hostility of the fishermen. Voluntary aggressions and accidental captures are the consequences of this behaviour. Moreover, the overfishing and the reduction of fish stocks could lead to the accentuation of competition between dolphins and fishermen.

Other threats are maritime traffic and motorboat racing (inducing sound pollution, disturbance, injuries and death by collisions), uncontrolled whale watching activities and pollution.

### *Project Objectives*

The LINDA started in 2004 and will last until 2007. The project aims at maintaining the populations of bottlenose dolphins in Corsica in an accurate status of conservation through securing an harmonious cohabitation between the presence of the species and the economic activities. The main stakeholders, local authorities and tourists collaborate to develop sustainable fishing, yachting and whale-watching practices.

For the achievement of these goals, the LINDA project:

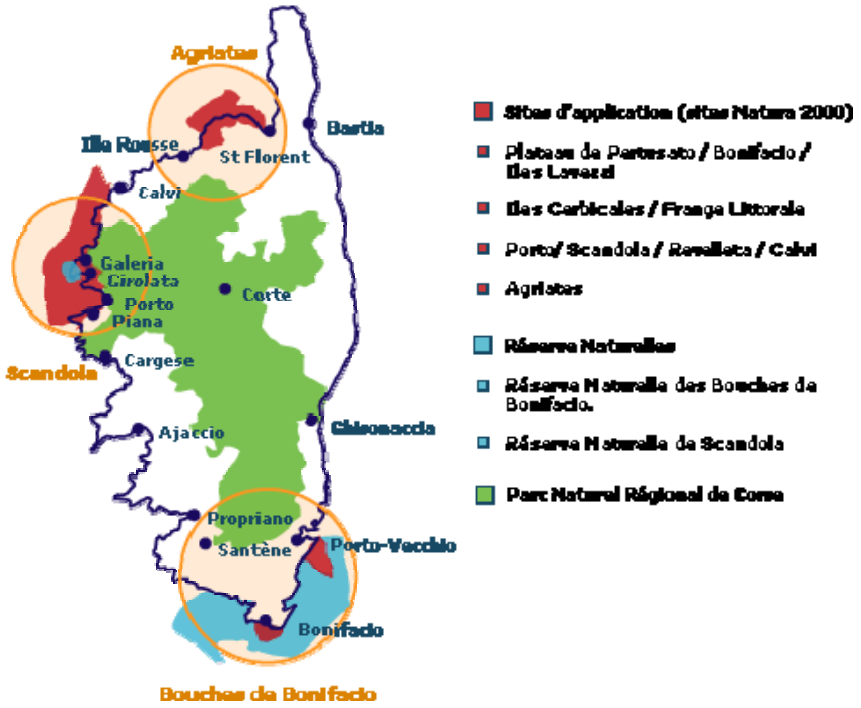
-Monitors the population of bottlenose dolphins and human activities affecting the species (sound pollution, interactions with fishing activities, yachting…) so as to assess the project impact and to produce a regional action plan for the species at the end of the project.

-Implements measures to minimise conflicts between bottlenose dolphins and fishermen (acoustic repellents on fishing nets, alternative fishing practices…)

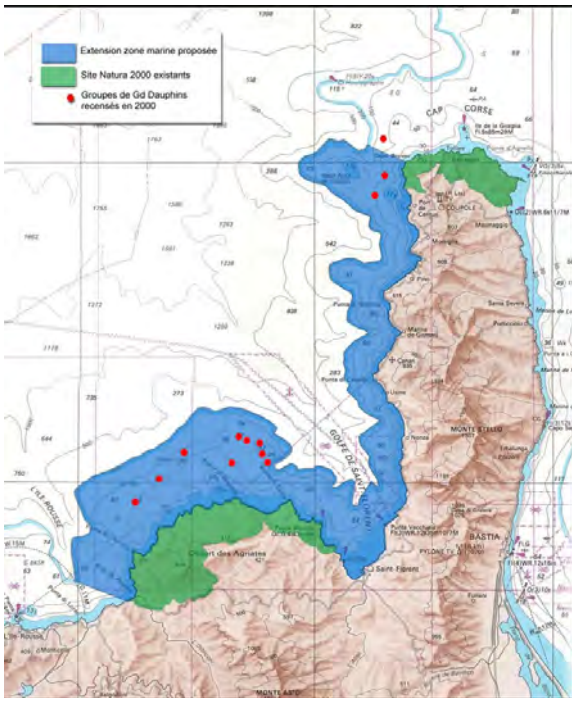
-Promotes dolphin-friendly management of activities related to water sports (motorboat racing, whale watching and yachting) and launch communication initiatives for public awareness.

More information is available on

http://www.lifelinda.org

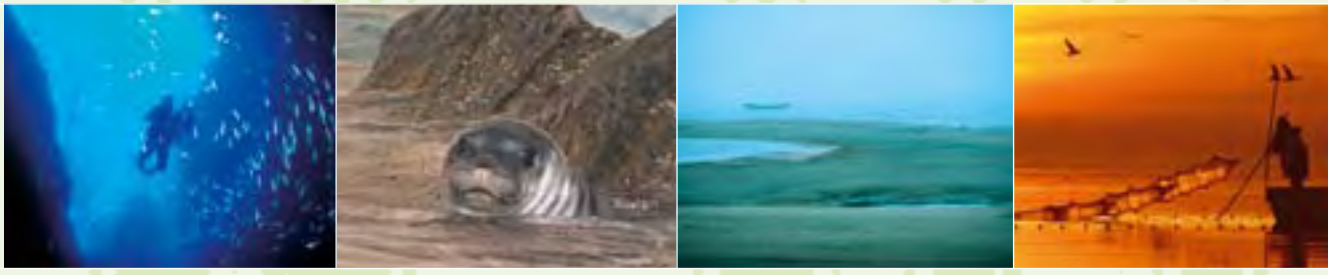



| Location of the LINDA LIFE project sites |
|---|
| |



LIFE III

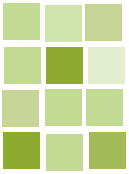
focus



# LIFE and the marine environment

*Promoting sustainable management of Europe's seas*

European Commission



**European Commission**
**Environment Directorate-General**

*LIFE ("The Financial Instrument for the Environment")* is a programme launched by the European Commission and coordinated by the Environment Directorate-General (LIFE Unit - BU-9 02/1).

The content of the publication "LIFE and the marine environment" does not necessarily reflect the opinions of the institutions of the European Union.

**Authors:** João Pedro Silva (Technical expert), Wendy Jones, Jon Eldridge, Eric Sarvan (Astrale GEIE-AEIDL, Communications Team Coordinator). **Managing Editor:** Philip Owen, European Commission, Environment DG, LIFE Unit - BU-9, 02/1, 200 rue de la Loi, B-1049 Brussels. **LIFE Focus series coordination:** Simon Goss (LIFE Communications Coordinator), Evelyne Jussiant (DG Environment Communications Coordinator). **The following people also worked on this issue:** Michael Oliver, José Rizo-Martin, Placido Hernandez Aguilar, Stephen Gardner, Aixa Sopeña, Iñigo Ortiz de Urbina, João Salgado, Georgia Valaoras, Marco Fritz, Olivier Coppieters, Maxime Schreiber. **Graphic design:** Daniel Renders. **Production:** Christine Charlier. **Photos:** From the respective LIFE projects unless otherwise specified. **Acknowledgements:** Thanks to all LIFE project beneficiaries who have contributed comments, photos and other useful material for this report.

Europe Direct is a service to help you find answers to your questions about the European Union.
New freephone number: **00 800 6 7 8 9 10 11**

A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server *(http://europa.eu)*.

Luxembourg: Office for Official Publications of the European Communities, 2006

ISBN 92-79-03447-2
ISSN 1725-5619

© European Communities, 2006
Reproduction is authorised provided the source is acknowledged.

*Printed in Belgium*

Printed on recycled paper

# Foreword



*Peter Gammeltoft*

The world's oceans and seas cover 71% of the Earth's surface and contain more biological diversity than terrestrial and freshwater ecosystems. The marine environment is a precious asset and a great contributor to economic prosperity, social well-being and quality of life. However, the marine environment is under pressure. Waste dumping, dredging and extraction of sand and gravel, water borne and atmospheric deposition of dangerous substances and nutrients, oil and gas exploration and shipping are just some of the activities examples causing the degradation of our seas. Other activities such as bottom trawling and over-fishing are also contributing to the destruction of marine habitats and species.

The European Union, aware of the increasing concern about the state of Europe's oceans and seas, included in the Sixth Environment Action Programme a commitment to develop a strategy for the protection and conservation of the marine environment with the overall aim being "to promote sustainable use of the seas and conserve marine ecosystems".

The Marine Strategy focuses on the protection of the regional seas surrounding the EU, taking into account international commitments and the importance of reducing the EU's impact on the marine environment in a global context. The Marine Strategy must also be seen within the broader context of the development of the new EU Maritime Policy.

The European Commission's LIFE (Financial Instrument for the Environment) programme has contributed to the conservation of highly endangered marine species and habitats. It has also gathered information and experience for the establishment and implementation of the Natura 2000 Network in the marine environment, and has promoted the implementation of the Habitat and Birds Directives on the European seas and oceans.
This LIFE Focus brochure details the accomplishments of various projects that with their actions contributed to the knowledge, protection, prudent use, and understanding of the marine environment.

**Peter Gammeltoft**
*Head of Unit - Protection of Water and Marine Environment*
*European Commission, DG Environment.*



# Contents


## The marine environment status ..... 3

Main threats to the marine environment .....4

EU marine policy in an international context .....5

The European Marine Strategy.....6

The marine component of the Natura 2000 Network.....8

LIFE on the sea .....10

## Enhancing our knowledge of the marine environment..... 11

Implementation of the marine component of the Natura 2000 Network.....12

SCANS: Abundance of small cetaceans in the North Sea and adjacent waters.....14

Portugal and Spain: Marine IBAs.....17

UK: Establishing management schemes on Marine Special Areas of Conservation (SACs).....19

## Preserving and protecting marine species and habitats of Community interest ..... 21

The European Seas.....22

France: Rescuing Mediterranean *Posidonia* beds from invasive algae *Caulerpa taxifolia*.....24

Greece: Recovery of the loggerhead sea turtle population on Crete .....26

Conserving marine life in Spanish waters.....29

Spain: Recovery plan for the Balearic shearwater *Puffinus mauretanicus*.....31

Restoring terns and petrels colonies on the islands of Brittany.....32

Recovering the Audouin's Gull population in Spain .....34

## Ensuring prudent utilisation of marine goods and services..... 35

Threatened Cetaceans: Aiding the recovery of Black Sea dolphins .....36

Greece: Protecting the endangered monk seal in fishing areas .....39

## Building partnerships for the seas..... 41

Portugal: Sustaining coastal and marine zones in the Azores .....42

Bothnian Bay: Conserving through partnership.....44

## Improving environmental quality of our seas ..... 45

Treating TBT-rich sediment from the Port of Antwerp.....46

OSIS: Improving oil-spill detection in the North Sea .....48

Further successful and promising projects .....50

Available LIFE publications.....53







# The marine environment status



**Europe borders four major seas and two oceans: the Mediterranean, Black Sea, Baltic Sea, North Sea, and the North Atlantic and Arctic Oceans. Almost every EU-25 country[1] has coastal areas, and the maritime surface area under their jurisdiction is larger than the total land area of the European Union. Europe's identity, quality of life and economic development are directly related to the health and diversity of its seas and oceans. However, the marine environment is under significant pressure.**

*1 Excluding Austria, Luxembourg, Slovakia, Czech Republic and Hungary*

# Main threats to the marine environment

**Current pressures on Europe's marine environment that are putting the sustainability of our oceans and seas at risk include:**

**> Overfishing**
This is a common problem in all European seas, although management systems for the exploitation of these resources have been introduced within the Common Fisheries Policy. A number of important commercial fish stocks have reached historically low levels. In addition, intensive fishing activities may have also significantly damaged non-target fish species and other marine life (cetaceans, seals, seabirds and turtles) and may damage important marine habitats such as maerl beds, *Posidonia* seagrass beds and deep-sea reefs.

**> Alien species**
The introduction (unintentional or deliberate) of non-indigenous species, genetically modified or disease-bearing organisms to the marine environment can have a catastrophic effect on natural ecosystems, thus threatening marine biodiversity.

**> Habitat modifications and disturbance**
Human activity along coasts and offshore (such as the development of ports and harbours, coastal protection, land reclamation, tourism, sand and gravel extraction, offshore oil, gas and wind power installations) has a significant impact on the marine habitats. This is the result of direct destruction, excessive demands for marine services and goods, increasing traffic, acoustic disturbance (underwater and on the surface), exploration and installation of offshore platforms.

**> Pollution (hazardous substances)**
Industrial and urban discharges and emissions that reach the marine environment may contain various hazardous substances. Some substances[1] have been shown to be able to disrupt the biological processes of marine species and to interfere with the ecological food chain.

**> Eutrophication**
This is a condition caused by the excessive influx of nutrients (nitrogen and phosphorous). Although this is predominantly from agricultural and urban sources, the atmospheric deposition of airborne nitrogen compounds (for instance from seagoing ships) may also be a relevant factor. The abundance of nutrients can promote spectacular growths of macroscopic algae – *algal bloom*.

**> Oil pollution**
The majority of oil pollution at sea is not the result of spectacular oil slicks but comes from routine operations, such as leaks from coastal installations, harbour tanker terminals and coastal transport pipelines to refineries, and widespread operational discharges from tankers and other vessels on the ocean. The damage caused to coastlines from oil pollution is costly and takes a long time to recover. As a result, the marine ecosystems and centres of human activity (for example, aquaculture sites and tourist centres) may be affected.

**> Climate change**
The possible consequences of climate change on the marine environment are far from being fully understood, but some of the results are already noticeable. The consequences may include changes to the strength and transport capacity of ocean currents, the speed of formation of water masses, sea-level height variation, the intensity and frequency of climatic phenomena, rainfall and the flow of waterways, with downstream effects on ecosystems and fisheries. One of the most visible effects of rising sea levels is coastal erosion. One fifth of the EU's coastline is already affected, and some places are losing between 0.5 to 2 metres a year and even up to 15 metres in a few alarming cases. A particular worrying effect is the increase in the acidity of marine waters, resulting from increased rates of dissolved $CO_2$.

*1 These include, inter alia, tributyltin (TBT), PCBs (Polychlorinated Biphenyls), organochlorine pesticides, PAHs (Polycyclic Aromatic Hydrocarbons) and heavy metals*

**This publication shows, through LIFE case studies, how the conservation of marine ecosystems and marine biodiversity can be incorporated into policies and management plans to preserve the EU´s seas. The LIFE examples featured in this brochure enhance the knowledge of our marine environments (thus promoting the implementation of the Natura 2000 Network), promote the protection of endangered species and habitats, ensure the prudent use of marine goods and services, build partnerships between stakeholders, and improve the environmental quality of our seas.**

# EU marine policy in an international context

**One of the particular features of the marine environment is the number of organisations, regional conventions and international bodies that are concerned with its protection. In addition, the EU itself has an extensive body of legislation, policies and programmes that directly or indirectly impact upon the quality of our oceans and seas.**

A review of current EU policies and legislation[1] shows the existence of a wide variety of EU measures that contribute to the protection of the marine environment. However, as most of this is sectoral and as the geographic scope varies, there is no integrated EU policy focused on the marine protection. The institutional and legal complexity of marine protection is indeed one of the main challenges to be confronted.

EU marine environment policy has evolved in a broader context of treaty obligations at global and regional levels. There are a large number of different organisations contributing to the protection of the marine environment. There is an important overlap in the geographical area covered by these organisations and in terms of membership.

At a global level, the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD) are among the most relevant bodies under which the EU has committed itself to protect the marine environment. Further agreements and commitments at a regional level, under the OSPAR Convention for the North-East Atlantic, the Helsinki Convention (HELCOM) for the Baltic Sea and the Barcelona Convention for the Mediterranean Sea, should also be highlighted.

Two recent environmental initiatives of the European Commission should be underlined:

1. The European Marine Strategy, which is intended to provide an integrated framework for action to deal with the impact of human activities on the marine environment;
2. The full implementation of the Birds and Habitats Directives in all waters under the jurisdiction of EU Member States. Once completed, the Natura 2000 Network in offshore waters will constitute a very important tool to ensure the proper protection of marine wildlife.

*1 See, for instance, annexes to COM(2002)539: "Towards a Strategy to protect and conserve the marine environment."*



Photo: Jean Roche / Still Pictures

## The Law of the Sea

The UNCLOS – United Nations Convention on the Law of the Sea was signed by participating countries under the auspices of the United Nations (UN) at Montego Bay (Jamaica) on 10 December 1982, and has gained virtual universal acceptance. One hundred and forty-nine nations have ratified the convention since its entry into force on 16 November 1994. The convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas. It also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority*.

** More information on: http://www.un.org/Depts/los/index.htm*

## International Council for the Exploration of the Sea

The International Council for the Exploration of the Sea (ICES) is an intergovernmental organisation that coordinates and promotes marine research in the North East Atlantic, the Baltic Sea and North Sea. More than 1,600 marine scientists from 19 countries around the North Atlantic gather information about the marine ecosystem. As well as filling gaps in existing knowledge, this information forms the basis for unbiased, non-political advice on fish and shellfish stocks, the marine environment including contaminants, and the status and outlook for marine ecosystems including the effects of human exploitation. The ICES plans and coordinates marine research, and prepares technical advice on catches of fishing stocks, as well as strategies and measures to mitigate the impact of human activities on the marine ecosystem, to its including the European Commission and other international regulatory bodies such as OSPAR and HELCOM*.

** More information can be found on http://www.ices.dk/*

# The European Marine Strategy

**The "Thematic Strategy on the Protection and Conservation of the Marine Environment" aims to ensure that all European seawaters are in good environmental status by 2021. This ambitious Marine Strategy, launched by the Commission on 24 October 2005, targets the protection of the marine environment and is also the key component of the future Maritime Policy, which has been proposed by the Commission.**

Coastal and marine ecosystems are among the world's most productive ecosystems and provide a wide range of services to society. However, the marine environment is under significant pressure. The UN Millennium Ecosystems Assessment[1] points out that human activity is the main cause of degradation and loss of marine species and habitats, and forecasts "a great risk of collapse of all major fish stocks and climate change-induced sea-level rise (with mean value of 0.5 – 0.7 m)".

Although some significant improvements in the quality status of seas surrounding Europe have been achieved and some of the worsening pollution trends have been halted or reversed, a large number of problems have yet to be fully addressed and major threats still persist. The reasons for this include:

- A complex and inadequate legal framework for the management of the seas within and outside the EU, and the number of actors concerned;
- Gaps in basic knowledge, due to a lack of alignment between research priorities and needs;
- A lack of an integrated marine protection policy.

*1 UNEP (2006) Marine and costal ecosystems and human well-being. A synthesis report based on the findings of the Millennium Ecosystems Assessment.*

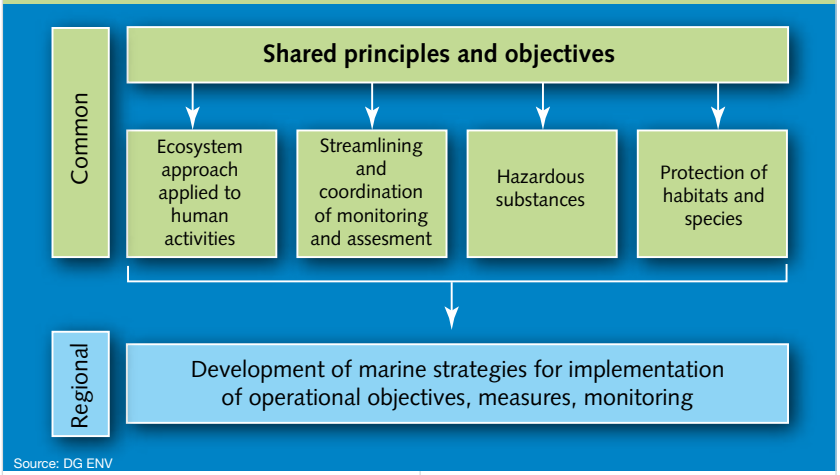


*European Marine Strategy logo*

Taking into account the underlying problems that affect the marine environment, the Sixth Environment Action Programme (6th EAP) considered the conservation and the protection of the marine environment as a key environmental priority. In 2002 the European Commission adopted the Communication "Towards a strategy to protect and conserve the marine environment". After three years, this communication was followed by a "Thematic Strategy on the Protection and Conservation of the Marine Environment." The Commission proposed a "Marine Strategy Directive", requiring Member States to take measures to achieve good environmental status for all the EU's marine waters by 2021. To this end, they have to prepare and implement programmes of measures in close cooperation with other Member States and third countries that share the same waters, through the development of marine strategies for its marine waters. Cooperation between EU Member States and with countries outside the EU would be encouraged within the framework of existing Marine Regional Conventions (OSPAR, HELCOM, Barcelona Convention and the Bucharest Convention).

Regional marine strategies will contain a detailed assessment of the state of the environment, a definition of "good environmental status" at regional level and the establishment of clear environmental targets and monitoring programmes. To take account of regional differences, the Commission's proposal puts forward a "two level" approach that sets out common objectives and

Figure I: **Two-level approach of the Marine Strategy**




Source: DG ENV

principles to be implemented at regional level. As a result, Member States sharing a marine area will be responsible for working in close cooperation to ensure the good environmental status of their common waters (see Figure I).

## The Ecosystem[2] approach

The Convention on Biological Diversity (CBD)[3] defines the ecosystem approach as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way". The CBD also recognises that "humans, with their cultural diversity, are an integral component of ecosystems". The proposal for the Marine Strategy is based on the ecosystem approach and focuses on the integrated management of human activities.

Extensive work on application of the ecosystem approach to the marine environment was carried out during a stakeholder consultation process before the adoption of the Strategy[4]. This approach is instrumental to the sustainable development of Europe's oceans and seas and to the effective protection of the marine environment. It builds upon concepts such as "favourable status of conservation" and "good ecological status". It should apply to all areas, including coastal seas, territorial waters, exclusive economic zones or equivalent ones as well as all activities taking place in these areas that affect the marine environment

The endorsement of this approach results in a well-defined way of working that starts with the consideration of the objectives stemming from the Vision or desired state adopted for the marine environment in general and the existing principles and obligations that apply. These objectives have to be put into action. The effectiveness of the actions has to be monitored by using indicators and targets that will allow further adjustments of the actions to ensure that the objectives are eventually achieved. A summary of the process is shown in Figure II.

## The Marine Strategy and the new EU Maritime Policy

In addition, the European Commission is launching a wide debate on an EU Maritime Policy that coordinates the current sectoral policy approach. On 7 June 2006 the European Commission published a Green Paper titled "Towards a future Maritime Policy for the Union: A European vision for the oceans and seas". It aims to accomplish the objectives of the Lisbon Strategy and integrate many related maritime policy areas such as transport, renewable energies, trade, tourism, fisheries, aquaculture, marine research, coastal and harbour industries. The Marine Strategy will constitute the "main environmental pillar of the EU Maritime Policy"[5] and be seen as the environmental component of the overall policy. A period of consultation with citizens and stakeholders has followed, starting 7 June 2006 and ending 30 June 2007. All documents, including the Green Paper and information of events, can be found on the Commission's maritime website[6].

## Natura 2000 and the Marine Strategy

Rather than creating new legal provisions or requirements for designating Marine Protected Areas (MPAs), the proposed Directive supports the full implementation of the Natura 2000 ecological network in the marine environment under the Habitats and Birds Directives, as an important contribution to achieving good environmental status of marine waters.

The proposed marine strategy requires the Member States to identify measures that need to be implemented in order to achieve good environmental status, taking into consideration the measures relevant for MPAs in general. Measures aimed at achieving the conservation objectives set for Natura 2000 sites included in a marine region should then be inserted in the plan of measures for the region as a whole.

*2 Ecosystem definition – "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit" (Article 2 of the CBD)*

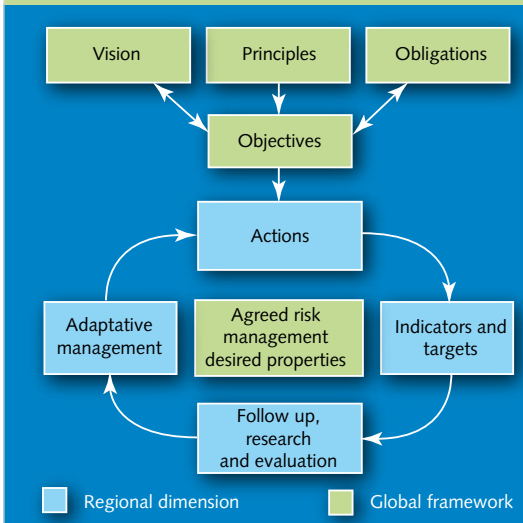
*3 http://www.biodiv.org/programmes/cross-cutting/ecosystem/default.shtml*

*4 A working group led by the International Council for the Exploration of the Sea, ICES produced the ICES cooperative research report No 273 (http://www.ices.dk/pubs/crr/crr273/crr273.pdf)*

*5 Speech by Dr. Joe Borg Member of the European Commission responsible for Fisheries and Maritime Affairs at the European Maritime Policy and the Regions conference, Azores, 26 June 2006*

*6 http://ec.europa.eu/maritimeaffairs/policy_en.html*

Figure II: **Implementing the 'Ecosystem Approach'**




Source: Dan Laffoley, English Nature

# The marine component of the Natura 2000 Network

**The Natura 2000 Network is an ecological network of natural areas designated to conserve Europe's rich but vulnerable habitats and species. The network includes more than 20,000 sites from all 25 Member States of the EU. Collectively, they cover almost a fifth of Europe's land and continental waters.**

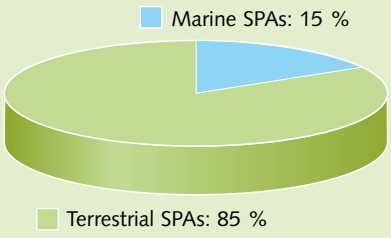


Photo: ImagDOP@Svizinho

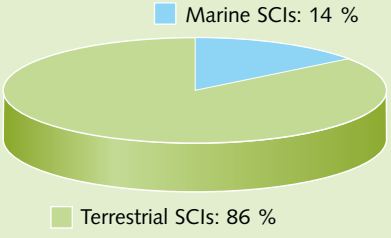
*Ponta do Castelo marine site in the Azores*

The Natura 2000 ecological network, set up by the EU Habitats and Birds Directives, is the cornerstone of the EU's nature conservation policy. The marine component of the Natura 2000 Network will be an integral component of the overall Natura 2000 Network.

**Marine Special Protection Areas (SPAs) in Europe**




**Marine Sites of Community Interest (SCIs) in Europe**




Together with the Special Protection Areas (SPAs) designated under the Birds Directive, the areas designated under the Habitats Directive as Special Areas of Conservation (SACs) shelter species and habitats that are rare or endangered at European level. This network is one of the principal means of implementing the commitment made by the Union's Heads of State and Government at the Gothenburg summit in June 2001 to "halt the loss of biodiversity by the year 2010". It will also contribute to fulfilling obligations stemming from

international conventions such as the CBD Convention. For the first time, all Member States are working together towards the same conservation goal and within the same legislative framework (the two directives) to protect and manage vulnerable species and habitats across their natural range, irrespective of political boundaries. Designation of SPAs and proposals for SACs (the so-called Sites of Community Importance, SCIs) is now almost complete in the old EU15, and the process is well under way in the new Member States. The total EU25 marine and terrestrial SCIs' area covers 559,082 km$^2$ and the SPAs' area covers 444,368 km$^2$.



Photo: ImagDOP@Svizinho

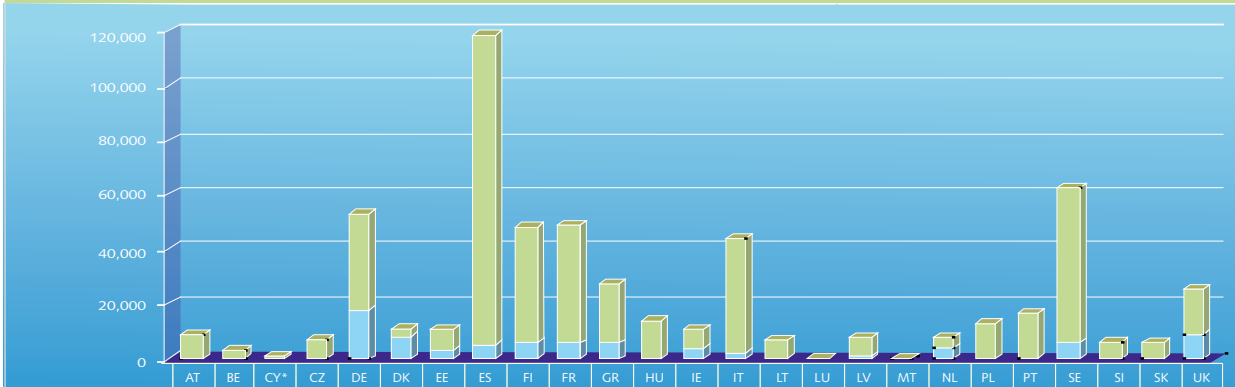
*Release of Madeiran Storm-Petrel, an endangered seabird that spends most of its life at sea*

The Natura 2000 Network introduced a series of key elements in nature conservation related to the marine environment:

- The inclusion of open sea as a breeding, feeding or resting zone for the targeted species in a network of protected areas, the protection of valuable habitat types, as well as the specific protection of habitats such as cold water reefs and *Posidonia* beds (underwater sea-grass prairies).
- The protection of each area as part of a coherent network, rather than as isolated sites.
- The freedom of choice for Member States to guarantee the conservation of sites either with specific management plans or through conservation measures included in broader development plans, rather than the establishment of one set of strict rules and regulations for general application.

Many conservation actions funded by LIFE focus on building a sound knowledge base on marine species and habitats in order to be able to develop appropriate conservation measures to protect them.

Figure III: **Marine and terrestrial areas of the SCIs by Member State**




| | AT | BE | CY* | CZ | DE | DK | EE | ES | FI | FR | GR | HU | IE | IT | LT | LU | LV | MT | NL | PL | PT | SE | SI | SK | UK |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Terrestrial Areas (km$^2$) | 8,884 | 3,040 | 459 | 7,241 | 35,208 | 3,177 | 7,172 | 113,913 | 43,092 | 43,204 | 21,643 | 13,929 | 7,175 | 41,750 | 6.493 | 343 | 7.095 | 39 | 3,485 | 13,125 | 16,013 | 56,708 | 6.359 | 7,539 | 15,972 |
| Marine Areas (km$^2$) | – | 181 | 50 | – | 18.086 | 7,959 | 3,419 | 5,191 | 5,460 | 5,605 | 5,998 | – | 3,386 | 2,227 | 171 | – | 556 | 0 | 4.025 | 0 | 490 | 5,848 | – | – | 9,131 |

** denotes the area where the community acquis currently applies according to protocol 10 of the Accession Treaty.*

Source: Natura 2000 Barometer - June 2006. (http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/barometer.htm)

# LIFE on the sea

**Although a relatively small fund in EU terms, LIFE's contribution has helped establish and manage the Natura 2000 Network on open water, promoting innovative techniques for the protection of the marine environment and capacity-building around the Mediterranean and Baltic Seas.**

Establishing and managing Natura 2000 sites costs money. The Habitats Directive acknowledges this, and in its Article 8 foresees a contribution from the Community towards these costs. Launched in 1992 – at the same time as the Habitats Directive came into force – the nature strand of LIFE III is the only EU programme primarily dedicated to nature conservation and to the creation of the Natura 2000 ecological network. LIFE-Nature is assigned 47% of the total LIFE III programme budget for actions that contribute to the protection of species and maintaining or restoring of natural habitats under the Birds and Habitats Directives. It has so far contributed more than € 700 million to more than 800 nature projects with a total budget of € 1.3 billion across the EU and Romania. It was not intended to financially cover the implementation of the Natura 2000 Network wholesale (that would require much more money) but to help establish the network and demonstrate how it can work in practice. Some 2,000 sites, representing over 10% of the total network, have been targeted by LIFE-Nature projects so far.

Another LIFE III programme strand, LIFE-Environment, aims to implement Community policy and legislation on the environment in the EU and Romania. This approach enables the demonstration and development of new methods and innovative techniques for the protection and the enhancement of the environment. Nearly half – 47% – of the LIFE III programme budget goes to LIFE-Environment. Five areas, all with a potential impact on the marine environment, are tackled by LIFE-Environment projects:



Photo: ©IFAW

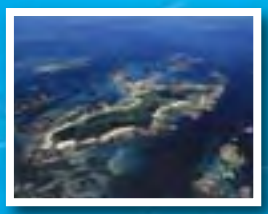
*Striped dolphin* (Stenella coeruleoalba) *an Annex IV Habitats Directive species*

- Land-use development and planning.
- Water management.
- Environmental impact of economic activities.
- Waste management.
- Environmental impact of products through an integrated product policy.

LIFE-Third Countries, which specifically aims to provide capacity building in countries outside the EU around the Mediterranean and Baltic Seas, is the third LIFE III programme strand, taking around six percent of the LIFE budget. LIFE-Third Countries projects in the marine environment cover issues like the development of national and international systems for responding to accidental marine pollution, establishing effluent limits based on best available technology, reducing heavy metal pollution and establishing marine environmental action plans.

The LIFE programme, as a whole, has demonstrated its effectiveness as a key financial and technical tool helping Member States to fulfil their obligations as regards the protection of the marine environment. Some of the most common actions funded are:

- Information gathering about the status and requirements of marine species and habitats, including monitoring sea mammal, bird and fish populations.
- Identification and designation of Natura 2000 sites in open waters.
- Elaboration and implementation of management actions (including management plans) for marine sites, with the aim of avoiding the depletion of endangered species and of maintaining and restoring valuable habitats.
- Demonstration and testing of innovative methods and technologies for preventing pollution and mitigating the effects of environmental accidents.
- Consultation with the public on plans and projects for the elaboration and adoption of integrated management plans for marine areas.
- Promoting capacity building in the private and public sectors in countries bordering the Mediterranean and Baltic seas.





# Enhancing our knowledge of the marine environment



**Implementing the Habitats and Birds Directives in the marine environment presents some substantial challenges, especially as regards the offshore environment, due to the difficulties in obtaining scientific knowledge on the distribution and abundance of species and habitats. So while the designation of Natura 2000 sites in coastal and inshore waters is considered to be fairly advanced, there are still important gaps in the offshore marine environment network.**

**The LIFE programme has helped to enhance the knowledge of the marine environment needed to designate Natura 2000 sites in the open sea.**



# Implementation of the marine component of the Natura 2000 Network

## Knowledge and designation of Natura 2000

Implementing the Habitats Directive, which includes some marine species and habitats, presents substantial challenges, especially for the offshore marine environment due to existing knowledge gaps about the distribution and abundance of species and habitats and the cost of carrying out oceanographic research. In addition, the need for a more precise definition of marine habitat types in Annex I of the Habitats Directive is widely acknowledged. Many of these species and habitats are also listed in regional conventions such as the OSPAR, Helsinki or Barcelona Conventions. On the other hand, all marine bird species are covered by the Birds Directive, which makes its implementation more straightforward.

The full establishment of the marine component of the Natura 2000 Network will be a significant step towards the protection of the marine environment in EU waters.



Part of the problem in implementing Natura 2000 in the sea is that there is insufficient data when compared with terrestrial environments. Offshore marine surveys are difficult to do and also tend to be very costly. As a result, the amount of data on the distribution of species and habitats tends to decrease the further one goes from the shore. Nevertheless, a basic level of knowledge is essential if suitable marine sites are to be selected for the Natura 2000 Network.

Member State Nature Directors agreed that further work was needed to develop a common understanding of the provisions of the Birds and the Habitats Directives to designate and manage marine Natura 2000 sites. The European Commission was asked to establish an ad hoc working group under the Habitats Committee, with a view to providing guidance on this subject.

Since March 2003, a Marine Expert Group has been working on the development of a common understanding of the provisions of Natura 2000 relating to the marine environment in order to facilitate the designation and future management of these areas. This should help Member States achieve this important task and will provide useful reference material for other stakeholders.

## Legal aspects of applying the Birds and Habitats Directives to the marine environment

The opinion of the Commission is that the claim by a Member State of rights on the maritime zone should include obligations as well as those rights: “The provisions of the Habitats Directive automatically apply to the marine habitats and marine species located in territorial waters (maximum 12 miles). However, if a Member State exerts its sovereign rights in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating licence for a drilling platform), it thereby considers itself competent to enforce national laws in that area, and consequently the Commission considers in this case that the Habitats Directive also applies, in that Community legislation is an integral part of national legislation*”.
This opinion was confirmed by the Position of the European Court Justice delivered in the case C-6/04 on 20 October 2005.

Thus the exclusive right of exploiting natural resources implies also the conservation of the marine ecosystems and applies to all the maritime areas claimed by the Members states, including:

- The internal waters and the Territorial Sea;
- The Exclusive Economic Zone (EEZ) and/or to other areas where MS are exercising equivalent sovereign rights (fishing protection zones, environmental protection zones…);
- The Continental Shelf.

** COM (1999) 363*

## Marine site selection

After the clarification of where the Habitats and Birds Directives apply, the question is: how to select marine sites for Natura 2000?

There are nine marine habitat types, 18 species listed in the Habitats Directive and numerous seabirds (under the Birds Directive), for which Member States are required to propose sites for the Natura 2000 Network. The procedures for the delineation of sites are the same as on land. The assessments must take into account the size, the distribution and conservation status of the target habitats and species and their overall contribution to the Natura 2000 Network.

The first step is to distinguish between coastal and inshore water species and habitats, and the true pelagic species (species that live in the open sea). Fish species such as those belonging to the genera Valencia or Aphanius, terns (genus Sterna), and habitats such as coastal lagoons (Habitats Directive Annex I code - 1150* - priority) or estuaries (1130) are related to coastal areas. For these cases the site designation procedure is similar to land sites and the surveying and delineation of areas is relatively easy to accomplish. These sites also provide for the conservation of land areas where marine species spend a part of their lifecycle, such as islands for seabirds, sandbanks for seals, and nesting beaches for loggerhead sea turtles.

Thus, the requirement for the identification and proposal of offshore sites is linked to a shorter list of habitats and species. For these cases the answer is to carry out surveys focusing on habitats and species. The surveys have to be appropriate (for example not all would depend on sea floor information) and sometimes would be linked with oceanographic information (geology, bathymetry-sea depth, currents sea temperature, salinity levels, nutrients and plankton patterns). For a wide range of species (sea mammals and seabirds) the surveys must include onboard surveys and satellite/radio tracking to build up a picture of the species' distribution patterns and behaviour.

LIFE-Nature has been contributing to projects that aim to carry out preliminary studies and surveys of the marine environment. This could be considered as something of an exception to its normal rule of not funding scientific studies and surveys. This approach allowed the funding of more than 50 projects that had an important information gathering and survey component, and thus provided important data that is used for the identification of sites and their inclusion in the Natura 2000 Network. Some of the projects contributed for the first time to the production of real large-scale results that covered wide areas of the European seas.



Photo: Imag*OOP@JFontes*

*Dusky grouper* (Epinephelus marginatus) *in the Azores*

LIFE in action

# SCANS: Abundance of small cetaceans in the North Sea and adjacent waters

**The SCANS LIFE project increased knowledge of the abundance and distribution of North Sea cetaceans. Its survey produced reliable information which formed the basis for establishing threshold levels for the sustainability of cetacean populations and for implementing conservation measures.**

Across the world, sea mammals are under threat. Accidental entanglement (the by-catch) in fishing nets, pollution, overfishing of their food supplies and hunting are contributing to the problem. The threats faced by cetaceans in EU waters are recognised in the Habitats Directive, which lists those that require strict protection (Annex IV). Furthermore, Annex II of the directive lists the harbour porpoise *(Phocoena phocoena)* and the bottlenose dolphin *(Tursiops truncatus)* as species that Member States should protect under Special Areas of Conservation (SACs).

The International Whaling Commission (IWC) has stated that the level of by-catch for cetacean populations should be less than 1%. Also, the Agreement on the Conservation of Small Cetaceans in the Baltic and North Seas (ASCOBANS) advised that the maximum annual by-catch for harbour porpoises should not exceed 1.7% of the population. Nonetheless, the by-catch of harbour porpoise in fish nets has reached high levels and has given rise to calls for the introduction of management measures. In this respect, the adoption of a Common

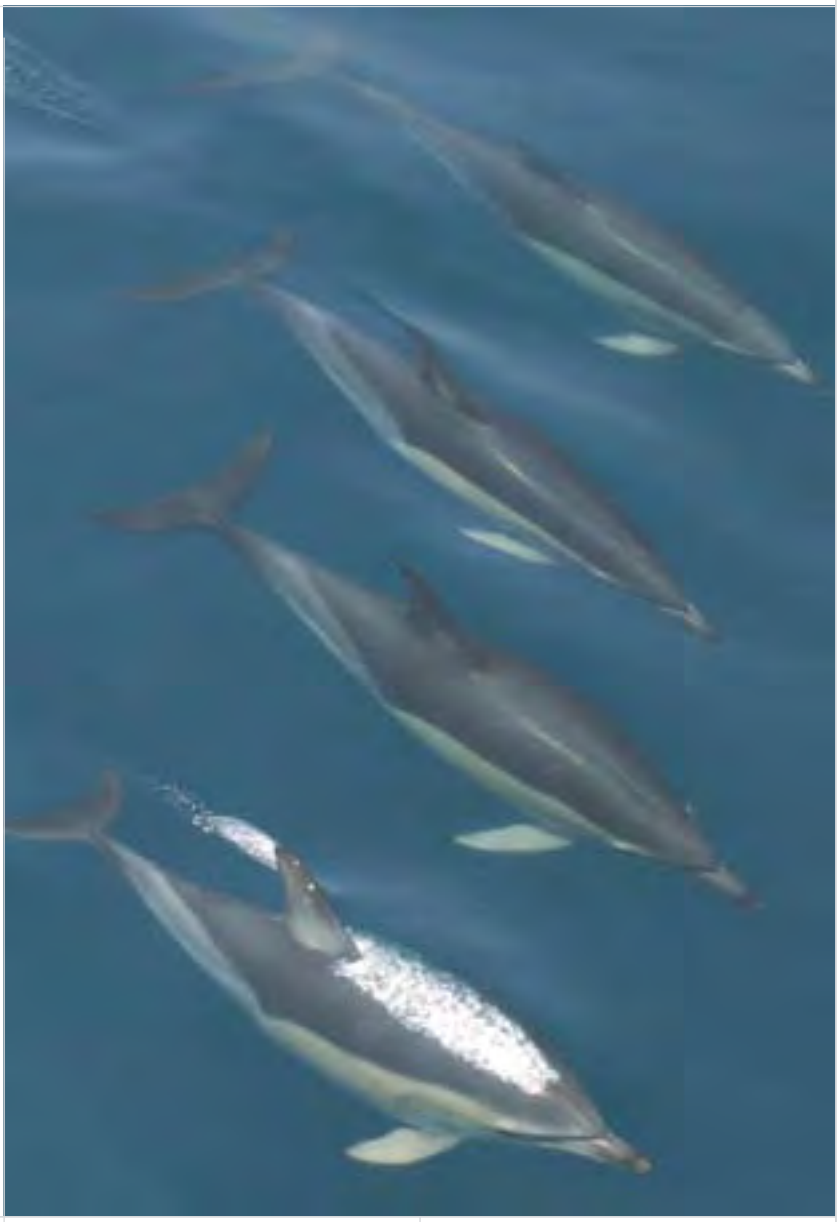


Photo: Ana Cañadas

*Common dolphin* (Delphinus delphis) *spotted during the SCANS project surveys*



*Onboard survey of the sea for cetaceans*

Fisheries Policy Regulation[1] setting measures aimed at reducing cetacean by-catch should be seen as a breakthrough. In any event, assessing the impact of by-catch and implementing concrete conservation measures requires good estimates of the population of cetaceans in European waters. Quantitative information on the distribution and abundance of cetaceans is essential for the conservation and management of these species and serves as a baseline for their future monitoring.

The LIFE-Nature SCANS project, coordinated by the Sea Mammal Research Unit (SMRU) and involving extensive international partnerships, proposed to collect information on the distribution and abundance of cetaceans in the North Sea.

## What did LIFE do?

The SCANS project estimated the absolute abundance and distribution of the harbour porpoise and other small cetaceans in the North Sea and adjacent areas. The survey was carried out by international teams of observers onboard research ships and small aircraft during July 1994. The estimated population of harbour porpoise was 341,000. Most of the countries with a North Sea coast were included in the survey to map the distribution and to estimate the abundance of the harbour porpoise and other species. The project also included the revision of the methodology for collecting and analysing survey data. The intention of the project was to use these distribution and abundance estimates to set the limits of by-catch and assess the impacts on the target species.

Figure IV: **SCANS-1 project survey areas**




## What was the outcome?

The LIFE SCANS project produced the first large-scale estimates of the abundance of harbour porpoise, white-beaked dolphin and minke whale in the North Sea. The extensive survey coverage and the

Figure V: **SCANS-II project survey areas covering 1,011,000 Km² of sea**



## Habitats Directive Annex II cetaceans' species

The harbour porpoise *(Phocoena phocoena)* is a small cetacean on average 1.8 m long, weighing between 50-70 kg. It has a circumpolar distribution in the Northern Hemisphere, and occurs, as its name indicates, mainly in coastal waters or river estuaries. Though it is the most abundant cetacean species in the North Sea, it is considered endangered by the IUCN*. The bottlenose dolphin *(Tursiops truncatus)* is the most common and well-known dolphin species. It ranges form 2 to 4 m in length and weighs between 150 and 650 kg. In north European waters it is found in coastal waters and further offshore. Its diet consists of fish, squid and shrimp.

** Red List of Threatened Species IUCN (International Union for Conservation of Nature), 2006*

*1 Council Regulation (EC) No 812/2004 of 26.4.2004*



*Cetacean observation box installed at the bow of the survey boat*

methodological developments resulted in precise, scientific estimates.

The SCANS results are now widely used by a range of international organisations (IWC, International Council for the Exploration of the Sea, ASCOBANS and the European Commission) to assess the impact of by-catch and to implement conservation measures on small cetaceans. The by-catch of harbour porpoises in these areas has decreased due to a combination of reduced fishing and the use of acoustic "pingers" (acoustic devices which emit ultrasonic signals to warn cetaceans of the proximity of nets). Furthermore, the project contributed to the development of new survey and analysis methods that are now widely accepted by the world's scientific community.

The project results provided important data essential for the conservation and management of cetaceans in the North Sea.

## Life after LIFE

The SCANS project provided the first reliable information on the abundance and distribution of small cetaceans in the North Sea. Nevertheless such estimates are only useful if repeated at ten-year intervals to monitor changes in populations and distribution. The SMRU, now based at the University of St Andrews in Scotland, proposed a follow-up LIFE-Nature SCANS II survey that started during the second half of 2004 and aimed to update the estimates. In addition to the area surveyed during SCANS, this project will also cover continental shelf waters to the west of Britain, Ireland, France, Spain and Portugal.

The first survey was carried out in 2005 and covered more than 30,000 km of sea survey transects and 200 hours of flying time. Another part of the project aimed to refine methods to determine cetacean abundance via shipboard and aerial surveys. The information on abundance and monitoring from this project can be used to assess by-catch and provide scientific information to managers so that they can ensure conservation objectives are met. This project will aid Member States and the Commission in the definition and assessment of favourable conservation status for cetaceans as required under the Habitats Directive.

## Conclusions

This project and the follow-up SCANS II project were very successful. The data acquired and the current update has been adopted as a standard for the implementation of the Natura 2000 Network in European waters.

*SCANS-I project survey ship* Dana.



**Project number:** LIFE92 ENV/UK/000065
**Title:** Distribution and abundance of the harbour porpoise and other small cetaceous in the North Sea
**Key species:** *Phocoena phocoena, Tursiops truncatus*
**Beneficiary:** Sea Mammals Research Unit, NERC c/o British Antartic Survey
**Contact:** Kelly MacLeod
**Email:** scans2@st-andrews.ac.uk
**Website:** http://biology.st-andrews.ac.uk/scans2/
**Period:** 01-Jan-1993 to 31-Mar-1995
**Total budget:** € 1,408,900
**LIFE contribution:** € 704,500

LIFE in action

# Portugal and Spain: Marine IBAs

**LIFE-Nature co-funded projects in Portugal and Spain are providing guidelines for the implementation of the Birds Directive in the marine environment. These projects involve extensive survey work covering vast offshore and costal areas of the Atlantic and Mediterranean seas. Among the expected results from these pioneering projects is the publication of an inventory of marine IBAs that will subsequently be considered as a proposal for the identification of future Marine SPAs under the European Birds Directive.**

Marine birds spend most of their life at sea. They use the marine environment to roost, feed or migrate. Indeed, some species only visit the coast during the breeding season. Seabirds, in their offshore marine habitat, are under threat as a result of increasing pollution, fishing activities, marine transport and depletion of food sources.

Thus, the implementation of the Birds Directive in the marine environment is crucial for the conservation of all seabirds and has to include more than just the simple delimitation of Special Protection Areas (SPAs) on some coastal breeding sites These sites must be sufficient in number and size for the conservation of birds listed in Annex I of the Birds Directive as well as migratory species, taking into account their protection requirements. The difficulties for implementing Natura 2000 offshore are related to a lack of scientific knowledge and the high costs of offshore research and surveying.



Pedro Geraldes

*Cory's Shearwater* (Calonectris diomedea) *seabird surveyed by the project*

Two LIFE-Nature projects run by SEO and SPEA (BirdLife partners in Spain and Portugal) aim to identify Important Bird Areas (IBAs) in Spanish and the Portuguese Economic Exclusive Zone (EEZ), including those of the Canaries, Madeira and the Azores archipelagos.

## What is LIFE doing?

These two projects are contributing to the implementation of the Birds Directive in the marine environment and will identify the most suitable areas for Annex I marine birds, that can later be proposed as SPAs in coastal and pelagic areas within Portugal and Spain.

*Madeiran Storm-Petrel* (Oceanodroma castro)



### Projects' Target Species (Annex I Birds Directive)

Fea's Petrel: *Pterodroma fea**
Bulwer's Petrel: *Bulweria bulwerii*
Little Shearwater: *Puffinus assimilis*
Madeiran Storm-petrel: *Oceanodroma castro*
Roseate Tern: *Sterna dougallii**
Cory's Shearwater: *Calonectris diomedea*
White-faced storm petrel: *Pelagodroma marina*
Freira Petrel: *Pterodroma madeira**
Shag (Mediterranean subspecies): *Phalacrocorax aristotelis* subsp. *desmerestii**
Audouin's Gull: *Larus audionii**
Balearic shearwater: *Puffinus mauretanicus*

** Considered as "priority for funding under LIFE"*



*Survey boat* Noruega *used for the detection of seabirds*

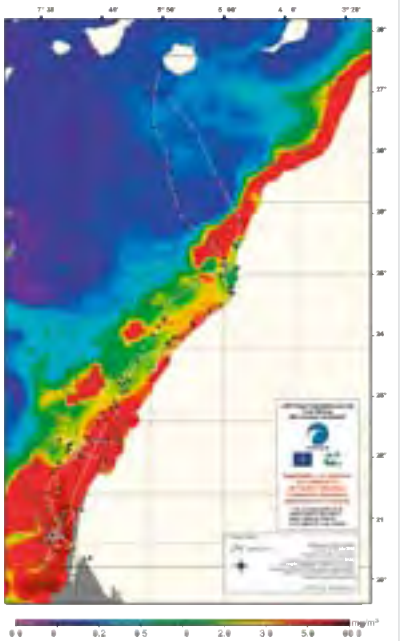
In 2005, the projects organised two international seminars in Lisbon and Vilanova (Barcelona) that addressed the definition of practical and methodological parameters for marine IBAs' determination and the subsequent implementation of Natura 2000 in the marine environment. The debate focused on the application of terrestrial bird IBA criteria to the marine environment. Normally this simple approach results in enormous sites. Among the conclusions of these two workshops was a new definition of the four types of marine IBAs:

- Important feeding areas at sea;
- Areas with important regular concentrations of seabirds;
- Seaward extension of breeding colonies;
- Migration hotspots where due to the geographical position, seabirds fly in large concentrations during the migrating season.

These two projects target all the seabirds included in Annex I of the Birds Directive and are currently implementing the following actions:

- Aerial and marine census of seabirds (some of the marine censuses were done together with the LIFE-Nature project SCANS II);
- Satellite and data-logger tracking of individual birds;
- Radio-tracking of the smaller seabird species;
- Oceanographic characterisation of the marine environment (salinity, chlorophyll, temperatures, currents etc);
- Analysis of fishing activity and the presence of marine mammals.

All the data will be analyzed and correlated in order to sketch out the potential distribution for both coastal and offshore distribution patterns of seabirds. Maps are being produced showing areas of interaction with human activities and correlations with ecological and oceanographical data. From this it should be possible to identify the most appropriate areas that could qualify as IBAs. Such pre-selected areas will then be described in detail, threats to them identified and recommendations made for their conservation.



*Satellite tracking movements of the* Cory's Shearwater *in the Canary Islands*

**Project number:** LIFE04 NAT/ES/000049
**Title:** Important Bird Areas for seabirds (marine IBAs) in Spain
**Key species:** *Calonectris diomedea, Larus audouinii, Bulweria bulwerii, Puffinus assimilis, Oceanodroma castro* and *Phalacrocorax aristotelis* subsp. *desmarestii*
**Beneficiary:** Sociedad Española de Ornitología, SEO/BirdLife
**Contact:** Alejandro Sánchez Pérez
**Email:** lifemarinas@seo.org
**Website:** http://www.seo.org/programa_intro.cfm?idPrograma=32
**Period:** 01-Oct-2004 to 01-Oct-2008
**Total budget:** € 1,092,000
**LIFE contribution:** € 780,000

**Project number:** LIFE04 NAT/P/000213
**Title:** Important bird areas for seabirds in Portugal
**Key species:** *Pterodroma feae, Pterodroma madeira, Bulweria bulwerii, Calonectris diomedea, Puffinus mauretanicus, Puffinus assimilis, Oceanodroma castro, Sterna hirundo, Sterna dougallii, Sterna sandvicensis, Larus melanocephalus, Larus audouinii* and *Uria aalge (ibericus)*
**Beneficiary:** Sociedade Portuguesa para o Estudo das Aves - SPEA
**Contact:** Ivan Rámirez, IBA and Marine Programmes Coordinator
**Email:** ivan.ramirez@spea.pt
**Website:** http://www.spea.pt/MIBA/
**Period:** 01-Oct-2004 to 01-Oct -2008
**Total budget:** € 1,515,000
**LIFE contribution:** € 1,136,000

LIFE in action

# UK: Establishing management schemes on Marine Special Areas of Conservation (SACs)

**The UK's marine habitats are highly diverse and support a range of human activities, with intensive fishing, recreational and industrial uses. A LIFE-Nature project aimed to improve knowledge of the marine habitats around the UK by studying their ecology and developing management schemes for 12 marine sites within a framework that would be transferable to other marine SACs in the EU in order to fulfil the requirements of the Habitats and Birds Directives.**

Successful conservation of the marine environment and effective implementation of management measures in protected areas must be based on comprehensive understanding of marine species and their habitats. An important aspect of this is understanding the sensitivity of different areas to human activity.

The UK's marine habitats range from coastal lagoons and estuaries, to sea caves and reefs. The UK's coastal waters are heavily used for fishing, recreation, and industry. All of these uses pose potential threats to marine species and habitats. The UK government has adopted legislation (UK Habitats Regulations) providing for management schemes to be established for marine SACs. These are designed to ensure that use of the sites is compatible with the conservation needs of the habitats and species of European interest.

The project defined and established management schemes for 12 sites around the UK, based on nine marine habitat reviews reports, guidelines, and seven studies on the impact of human activities on marine sites. The nature conservation interest of each site was defined, along with guidelines designed to ensure that the key features – such as bottlenose dolphins in Cardigan Bay or *Zostera* eel-grass habitats along the north Norfolk coast – are maintained. The guidelines also address how to monitor sites for change, and how to respond if detrimental changes are detected.

## What did LIFE do?

The project was carried out by a consortium of UK nature conservation agencies. Its key innovation was a partnership approach involving the main marine user, interest, and specialist groups, including port authorities, fisheries authorities, local and regional councils, scientific research institutes and recreational interest groups.

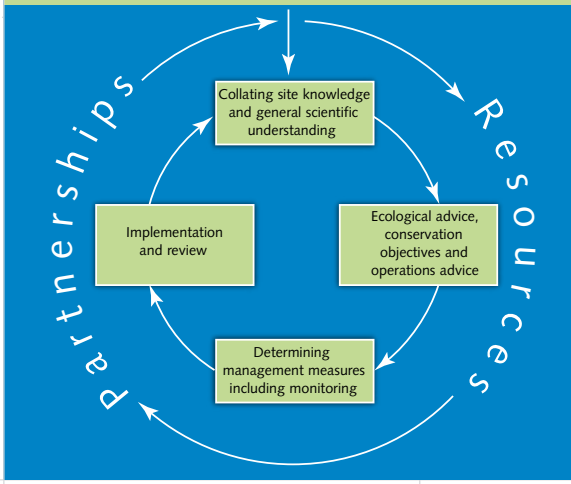
The four year project sought to develop approaches to and techniques for the management and monitoring of twelve marine Natura 2000 special conservation areas, thus fulfilling the EC Habitats Directive objective of setting up protected marine areas. The success of the project was based on gathering existing knowledge on the dynamics and sensitivity of marine features and on the impact of human activities, and from this developing practical techniques for monitoring and assessing the state of marine species and habitats. The project also anticipated the sharing of good practice on developing appropriate management schemes and raising awareness in the UK and continental Europe.

## What was the outcome?

The project encouraged the development of management schemes at other UK marine sites by providing a national centre of expertise, by developing the skills base amongst consultants and others, and by disseminating information to a wide audience.

For each management plan a management group was established, which coordinated the gathering of survey data, the filling of knowledge

**Process approach to management of marine SACs**






*The 12 marine project sites covered by management schemes*

gaps, data mapping, the defining of conservation objectives, evaluation of current and potential operations, identification of monitoring programmes, and the drafting and finalising of management schemes.

The project involved the relevant authorities that have a special role in the management of a Natura 2000 marine site (local authorities, sea fisheries committees, port, harbour and navigation authorities, etc.). The project also focused on a democratic participatory approach and gave stakeholders the opportunity to voice their opinions.

The project produced surveys and marine habitat maps cartography, and compiled essential information with the help of various UK experts. This information was used to produce nine detailed review reports for habitats and communities common to many of the 12 sites covering: Zostera beds, intertidal reef biotopes, intertidal sand and mudflats and subtidal mobile sandbanks, infralittoral reef biotopes with kelp species, sea pens and burrowing megafauna, circalittoral faunal turfs, subtidal brittlestar beds, biogenic reefs, and maerl beds. The review reports underpinned the development of the marine site management plans and provided definitive reference sources that could be used in all EU marine sites.

The project published 12 guidelines for developing conservation objectives for marine SACs that give the framework for a management and monitoring plan. The guidelines cover the legal background, practical development, supporting information, and presentation of conservation objectives.

In addition, within the scope of the project, seven series of studies were produced focusing on the impacts of human activities on marine species and habitats. These covered recreational activity, ports and harbours, water quality, collecting bait, fisheries practice, water quality in saline lagoons, and aggregate extraction. The studies have helped to establish common ground across conflicting interest groups, and their use may reduce the time needed for consultation when developing future management schemes.

In addition the project implemented a wide range of activities to raise awareness about the project sites, targeted at the general public but also local stakeholders and the European scientific community.

## Life after LIFE

Conservation objectives and operations advice was provided for each of the 12 sites. In addition the guidelines for developing conservation objectives for marine SACs are not a statement of nature conservation agency policy but an opportunity to transfer the learning from the project to conservation agency staff and practitioners in the UK and other Member States. The monitoring handbook, meanwhile, fulfils the monitoring requirements under the Habitats Directive and the Water Framework Directive and gives a thorough background to the legislation and links to existing monitoring programmes.

## Conclusions

The project made a major contribution on compiling and filing gaps in information regarding the implementation of management plans in marine Natura 2000 sites. Overall, it was a major breakthrough in the monitoring and management of marine sites, species and habitats.

**Project number:** LIFE96 NAT/UK/003055
**Title:** To develop and promote the necessary conservation measures for UK marine SACS
**Key species:** *Phocoena phocoena*
**Key habitats:** Submerged or partially submerged sea caves, Estuaries, Mudflats and sandflats not covered by water
**Beneficiary:** English Nature
**Contact:** Jon Terless
**Website:** www.ukmarinesac.org.uk
**Period:** 01-May-1996 to 31-Oct-2001
**Total budget:** € 4,914,000
**LIFE contribution:** € 2,457,000







# Preserving and protecting marine species and habitats of Community interest

**Over the last 10 years, LIFE-Nature has contributed some € 40 million to around 50 marine projects across the EU´s Natura 2000 marine sites. Many have focused on the conservation of highly endangered marine species such as the loggerhead sea turtle *(Caretta caretta)*, sea mammals like the harbour porpoise *(Phoconea phocoena)*, and rare seabirds such as Audouin's gull *(Larus audouini)*. Projects have also focused on the conservation and improvement of marine habitats such as *Posidonia* beds, reefs and sea caves.**





# The European Seas

## GENERAL VIEW



## North Sea

The shallow areas of the sea are among the most productive marine areas in the world. This high productivity supports a wide range of species and habitats and one of the world's most important fishing grounds. The seabed is also rich in oil and gas.

**Species**
Harbour Porpoise *(Phocoena phocoena)*

**Habitats**
Mud flats (1140)

**Threats**
Anthropogenic impacts have been significant for many years. Pollution is still the main issue for the North Sea. Over the last decade, awareness of and concern about the precarious status of North Sea fish stocks and the impact of fisheries on other parts of the ecosystem has increased.

## North-East Atlantic Ocean

The North-east Atlantic Ocean along the Western coastline of Europe is dominated by deep ocean basins. The overall biodiversity is high and the ocean hosts unique habitats, such as high diverse cold-water coral reefs, hydrothermal vents, and rare species including seabirds, several seals and whales.

**Species**
Zino's Petrel *(Pterodroma madeira)*

**Habitats**
Reefs (1170)

**Threats**
Around the North-east Atlantic Ocean the human population is concentrated in the coastal area. Increased human activity around the coasts has led to an increase in sewage discharge, in maritime transport, use of the sea for tourism and recreation, and exploration of the sea's natural resources. Over-fishing, eutrophication, dumping, direct discharges and spills of contaminants are all threats to biodiversity in this ocean.

## Mediterranean Sea

The Mediterranean Sea is almost completely enclosed by land. This results in high water temperatures, low nutrients, high salinity (it is the most saline of Europe's seas), and reduced tidal range variation. The Mediterranean Sea is one of the world's highest biodiversity areas, particularly in the coastal zone where this is high occurrence of endemic species.

**Species**
Monk seal *(Monachus monachus)*

**Habitats**
*Posidonia oceanica* beds (1120)

**Threats**
The Mediterranean coast hosts many human activities that degrade the marine ecosystem. The main threats are: urban, industrial and oil effluents, coastal eutrophication, coastal urbanisation and biological invasions (manly via the Suez Canal).



## Baltic Sea

The Baltic Sea region is one of the largest brackish water areas in the world and in many aspects is similar to an estuary or inland lake. Only the shallow waters between Denmark and Sweden connect the Baltic to the open sea. These unique features contribute to highly diverse communities ranging from fresh to salty water habitats. The surrounding land is heavily industrialised and populated.

**Species**
Ringed seal *(Phoca hispida* subsp. *bottnica)*

**Habitats**
Large shallow bays (1160)

**Threats**
The Baltic sea is a semi-enclosed area that is very sensitive to anthropogenic pressures. Eutrophication remains the most pressing problem in the region. Nitrogen and phosphorus inputs are still too high, despite considerable efforts to reduce discharges. Overexploitation of fish is also considered a severe problem, mainly due to fishing quotas being exceeded and excessive fleet capacity.

## Black Sea

The Black Sea is a deep water depression. Due to the relatively high salinity and density of the water, the ocean bed to surface currents are highly reduced and result in a naturally anoxic (without oxygen) environment, which also has high levels of hydrogen sulphide. Its almost landlocked position, the major influx of fresh waters from its tributary rivers, such as the Danube and Dnjeper, and hydrological factors make this sea a very unique environment and highly sensitive to anthropogenic impacts.

**Species**
Dolphin *(Tursiops truncatus)*

**Habitats**
Estuaries (1130)

**Threats**
The Black Sea is probably one of the most environmentally degraded seas on our planet. Pollution and eutrophication by land-based sources (agriculture, industrial activity and inputs of insufficiently treated sewage), overexploitation and no overall management of fish stocks are the main threats that the Black sea faces.

**The annexes to the Habitats and Birds Directives list nine habitat types, 29 seabirds and 16 other marine animals in need of protection in view of their precarious conservation state. These include such well known species as the Mediterranean monk seal, the loggerhead sea turtle, and the bottlenose dolphin, as well as rare habitats such as cold water reefs and *Posidonia* beds (underwater prairies).**

### Marine environnent natural habitat types in Annex I of the Habitats Directive (92/43/EEC)

- Sandbanks which are slightly covered by sea water all the time - 1110
- *Posidonia* beds *(Posidonion oceanicae)* - 1120*
- Estuaries - 1130
- Mudflats and sandflats not covered by seawater at low tide - 1140
- Coastal lagoons - 1150*
- Large shallow inlets and bays - 1160
- Reefs - 1170
- Submarine structures made by leaking gases - 1180
- Submerged or partially submerged sea caves - 8330

### Marine environment species in Annex II of the Habitats Directive (92/43/EEC)

**> Sea Mammals**
- *Tursiops truncatus*
- *Phocoena phocoena*
- *Halichoerus grypus*
- *Phoca vitulina*
- *Monachus monachus**
- *Phoca hispida* subsp. *bottnica*
- *Phoca hispida* subsp. *saimensis**

**> Sea turtles**
- *Caretta caretta**
- *Chelonia mydas**

**> Fish**
- *Lampetra fluviatilis*[a]
- *Petromyzon marinus*[a]
- *Acipenser naccarii**[a]
- *Acipenser sturio**[a]
- *Alosa alosa*[a]
- *Alosa fallax*[a]
- *Salmo macrostigma*[a]

### Sea Birds included in Annex I of the Birds Directive (79/406/EEC)

- *Gavia stellata*
- *Gavia immer*
- *Pterodroma madeira*
- *Pterodroma feae*
- *Bulweria bulwerii*
- *Calonectris diomedea*
- *Puffinus puffinus* subsp. *mauretanicus*
- *Puffinus yelkouan*
- *Puffinus assimilis*
- *Pelagodroma marina*
- *Hydrobates pelagicus*
- *Oceanodroma leucorhoa*
- *Oceanodroma castro*
- *Phalacrocorax aristotelis* susbsp. *desmarestii*
- *Phalacrocorax pygmeus*
- *Charadrius alexandrinus*
- *Calidris alpina schinzii*
- *Larus melanocephalus*
- *Larus genei*
- *Larus audouinii*
- *Larus minutus*
- *Sterna caspia*
- *Sterna sandvicensis*
- *Sterna dougallii*
- *Sterna hirundo*
- *Sterna paradisaea*
- *Sterna albifrons*
- *Uria aalge ibericus* (U. aalge in Baltic Sea and North Sea)

** priority for conservation*
*[a] anadromous: Fish that live most of their adult life in marine environment but spawn in freshwater*

LIFE in action

# France: Rescuing Mediterranean *Posidonia* beds from invasive algae *Caulerpa taxifolia*

**A growing menace to some of Europe's unique marine habitats lies under the blue waters of the Mediterranean. *Caulerpa taxifolia*, an invasive green algae, is quickly destroying high bio-diversity *Posidonia* beds. In 20 years, the ecological integrity of more than 15,000 hectares of sea-bed has been compromised. The LIFE programme funded two projects to monitor the spread of the invasive species in the Mediterranean, and to establish guidelines and approaches to help manage it.**



*Despite its beauty* Caulerpa taxifolia *is an invasive species*

*Posidonia* seagrass beds[1] are an important part of the Mediterranean sea's marine ecosystem. The beds are mainly comprised of the seagrass *Posidonia oceanica*. Human pressure on this habitat has increased significantly in the last few years, resulting in a reduction of the surface area of the seagrass beds. The principal cause of this decline is a Caribbean green algae that competes with the seagrass. This non-native species, *Caulerpa taxifolia*, was introduced in 1984. As well as its impact on biodiversity, it also threatens food resources, and can pose a risk to human health because of transmission of the algae´s toxins along the food-chain. As a consequence of this coastal fishing for fish, molluscs and crustaceans, has become impossible in some areas.

*1 A priority conservation habitat classified under Annex I of the Habitats Directive.*

## What did LIFE do?

Between 1992 and 1999, the LIFE programme funded two projects (LIFE92 ENV/F/000066 and LIFE95 ENV/F/000782), led by Marseilles University and with the involvement of Spanish and Italian partners (universities, local authorities and scientific centres). These projects aimed to build knowledge about the ecology of *C.taxifolia* in

order to predict its possible spread in the Mediterranean, and to establish a scientific and technological basis for its management and thus the conservation of the *Posidonia* beds.

The projects deoped a strategy and tools for surveying *C.taxifolia* and monitoring its expansion into new locations. In order to conduct the survey, the beneficiary distributed 60,000 pamphlets in six languages to fishermen, divers and yachtsmen, asking them to report the presence of the plant and, when found in nets and on anchors, not to throw it back into the sea. With this information it was possible to build a predictive model of the algae's expansion, and thus identify 'at-risk' areas and habitats. The projects also worked to improve eradication techniques using copper, as an alternative to manual eradication.

The beneficiary produced identification and eradication guidelines in English, French, Catalan and Spanish, and conducted a public awareness campaign that was also extended to southern Mediterranean countries (Malta, Tunisia and Algeria), which are also affected by the spread of *C. taxifolia*.

## What was the outcome?

As a result of the LIFE projects, *Caulerpa taxifolia* is a very well known, introduced species. Unfortunately, the project has also confirmed that once the algae is introduced, it cannot be completely eradicated. Nevertheless, a Mediterranean detection and survey network has been developed, and strategic guidelines for the control of the invasive algae have been implemented. The projects have also carried out stakeholder and public awareness campaigns.

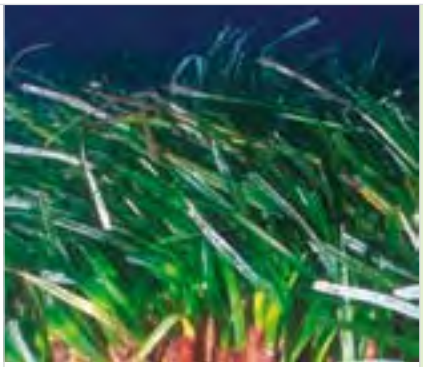


Photo: LIFE00 NAT/E/007303

Posidonia oceanica *beds an endangered Mediterranean habitat*

## Life after LIFE

Following the formal closure of the projects, the regional governments of the Balearics, Catalonia and Valencia drew up anti-Caulerpa regulations. In France, the Parliament is examining an anti-*Caulerpa taxifolia* law. Also, on the Côte d'Azur, diving enthusiasts, both amateur and professional, perform annual systematic underwater searches, and manually clear *Caulerpa taxifolia*.

### *Posidonia oceanica*

*Posidonia oceanica*, named after Poseidon, the god of the sea, and commonly called Neptune grass, is a seagrass that plays an important role in the ecosystem of the Mediterranean sea by providing a vital habitat for a wide variety of marine species. It lives in a narrow coastal strip, normally on beds of soft sediment, at depths of between five and 50 metres, depending on water clarity. It is a true plant, in that it can bear flowers and disperse seeds.
The *Posidonia* habitats are increasingly being destroyed by human activities (trawler-fishing, the development of new marinas and offshore constructions, and boat anchoring). However, one of the greatest threats comes from competition with the invasive *Caulerpa taxifolia*.
The European Environment Agency's 2006 report "Priority Issues in the Mediterranean Environment", considered the *Posidonia oceanica* "a key species for the Mediterranean region".

** http://reports.eea.europa.eu/eea_report_2006_4/en/medsea_4_2006.pdf*

**Spread of *Caulerpa taxifolia* in the Mediterranean**



**Project number:** LIFE95 ENV/F/000782
**Title:** Control of the *Caulerpa taxifolia* extension in the Mediterranean Sea
**Beneficiary:** GIS Posidonie
**Contact:** Claude Boudouresque
**Tel:** +33 4 91269130
**Website:** http://www.com.univ-mrs.fr/gisposi/article.php3?id_article=8
**Period:** 01-Jan-1996 to 08-Mar-1999
**Total budget:** € 290,300

LIFE in action

# Greece: Recovery of the loggerhead sea turtle population on Crete

**The loggerhead turtle *(Caretta caretta)* is an endangered species in Europe. It is threatened on land, where it comes to nest, and at sea, as a result of the activities of fishermen. One of several LIFE-funded projects to protect the loggerhead turtle focused on increasing, in the long term, the numbers that nest on the island of Crete. Volunteer monitoring patrols were established, and public-awareness campaigns were introduced to encourage local involvement in the protection of the sites used as nesting areas. In addition, a management plan was drawn up to ensure the long term viability of these sites. Crete can play a crucial role in the survival of the loggerhead turtle. One in four of the total population of Greece nests on the island, and the turtle returns to the same nesting sites year after year.**

The use of the same nesting sites means that the survival of sea turtles is dependent on the viability of the beaches for nesting. If a nesting site is destroyed, the female may not find an alternative and eventually the local population could be wiped out through lack of recruitment. However, the sandy beaches of Greece have attracted tourists, which have caused severe degradation of the sites. Beaches have natural protection against erosion in the form of sand replenishing dunes, but constructions on the dunes can affect this process and leave beaches vulnerable. Umbrellas and sunbeds, pathways and light pollution pose an increasing threat to the nesting sites of the turtles. They impede access to the back of the beach where nests are constructed, while artificial light disorientates newly hatched turtles that use reflected moon or starlight to navigate their way to the sea.

As a result, a strategy for sustainable development of tourism and other forms of land use is vital for the protection of the beaches.

The LIFE programme in Crete aimed to tackle these problems through the protection of nesting sites, public-awareness campaigns and the implementation of a management plan for sustainability. The beneficiary was the Sea Turtle Protection Society (STPS), which was set up in 1983 to lobby for the protection of sea turtles initially on the island of Zakynthos, as well as raising awareness among the public about the threats they face. Six years after its formation, as a result of a nationwide beach survey of Greece, the STPS identified important nesting sites for loggerhead sea turtles on the island of Crete and began small-scale initiatives in these areas.



Caretta caretta *a priority species listed in Annex II of the Habitats Directive*

Unlike Zakynthos, the density of turtle nests on Crete is relatively low and the population could only be sustainable provided certain conditions are respected. Islanders, however, were largely ignorant of the sea turtles existence, so raising awareness was a key first step. Public funding for the

necessary protection of the three principal beaches was insufficient. Therefore in 1995, STPS applied to LIFE-Nature for funds.

## What did LIFE do?

LIFE funding supported the daily patrol of the beaches to assess the number of nests dug and, later in the season, the number of hatchings. The patrol also included protection measures such as placing metal cages in situ to avoid human disturbances, and shading to prevent hatchling disorientation through light pollution. The beaches of Crete are prone to high seas due to strong northerly winds. As there is a danger of nests being destroyed by flooding, vulnerable nests were relocated higher up the beach, or at one of the natural hatcheries away from the danger. A major campaign was launched to persuade hotel and sunbed operators to stack their chairs each night at the back of the beach. Similar campaigns were run to reduce light pollution, and curb the use of vehicles on the beaches.

An awareness campaign was launched that targeted local authorities, businesses, hotels, tourists, and schools. It consisted of the distribution of printed material, presentations at hotels, meetings with local businesses, talks and projects with schoolchildren and the setting up of information kiosks. The public was also informed of the beach work. Finally, a management plan for the long-term conservation of the sea turtle in Crete was agreed and circulated widely for consultation. The final version was presented to the local authorities for adoption at the end of the project.

## What was the outcome?

Over the three years of the project, STPS attracted a large number of volunteers to monitor the three beaches and protect nests. At the end of the third year, hatchling rate had already increased.

Attempts to persuade hoteliers to voluntarily stack sunbeds were only partly successful, and focus has now

*Municipality of Platanias information board*



*Marking and protection of turtles' nests*





*Painting the street lights facing the sea*

shifted towards achieving stacking of sunbeds through regulations determined by the relevant authorities. Similar regulations would also be helpful in reducing the effects of artificial light. However, 25 operators were persuaded to make changes to their lightings for the benefit of the nesting sites, and project members painted the sides of lights facing the sea to reduce artificial light on the beach.

The project was also successful in persuading those responsible for municipal beach-cleaning activities to take into account the needs of the turtles, that is, not compacting the sand with heavy machinery. Its awareness initiatives included around 300 hotel presentations per year, reaching an estimated quarter of a million visitors over the three years. Press releases also generated wide media coverage.

## Life after LIFE

The end of the project has by no means signalled an end to the volunteer work. In fact, volunteer numbers have almost doubled. With a sufficient workforce, STPS has been able to continue its monitoring and protection work on the three beaches.

Under the LIFE project vulnerable nests were commonly transferred to hatcheries, but following international consultation, nests are now transferred as close as possible to the original location of the nest. However, STPS realised that too little was known about the potentially damaging effects of these transfers, and noted that 35-40% of the nests laid on the monitored sites need to be transferred or they would otherwise be destroyed through inundation.

The STPS has also been the beneficiary of two subsequent LIFE programmes: the implementation of a management plan for the sea turtles in Southern Kyparissia Bay (LIFE98NAT/GR/5262) and a project to reduce turtle mortality at sea (LIFE02NAT/GR/8500).



*Coast guards take an injured turtle to ARCHELON's centre*

## Conclusions

The LIFE project has played a vital role in the survival of the loggerhead turtle on Crete. It has helped establish the beneficiary as a powerful advocate for the species on the island and has enabled it to protect nest sites. The profile of the species has also risen locally and internationally, and a strong emphasis on cooperation has shown that sea turtles and tourism can exist side by side.

A strategic long-term approach to conservation is still required, however, and it is important that national and local authorities are engaged. Legal obligations to protect beaches point the way forward, and STPS can be an effective lobbying agency in bringing these about.

**Project number:** LIFE 95 NAT/GR/001115
**Title:** Recovery of the Loggerhead Sea Turtle *(Caretta caretta)* Population Nesting on Crete
**Key species:** *Caretta caretta*
**Beneficiary:** Sea Turtle Protection Society of Greece (STPS) - ARCHELON
**Contact:** Aliki Panagopoulou
**Email:** stps@archelon.gr
**Website:** http://www.archelon.gr
**Period:** 01-Apr-1995 to 31-Mar-1998
**Total budget:** € 536,000
**LIFE contribution:** € 402,000

LIFE in action

# Conserving marine life in Spanish waters

**Spanish waters off the coast of Andalusia and Murcia are home to many protected habitats that contain endangered marine life including turtles and cetaceans. A 2002 LIFE project aimed to draw up management plans for habitats in the area in collaboration with local stakeholders.**

A recent LIFE project in the marine areas around the southern coast of Spain concentrated on developing marine management plans in collaboration with local stakeholders. The range of stakeholders with an interest in marine environments tends to be both diverse and uncoordinated. Moreover, few interest groups have previous experience of marine conservation issues. As a result, any attempt to change existing practices or attitudes is best accompanied by a targeted campaign to inform stakeholders of the issues and the potential impacts for them.

Such an approach was very successful for the southern coast of Spain. Previously the beneficiary, the Spanish Cetacean Society, had identified several potential marine Natura 2000 sites along the narrow sea that links the Mediterranean to the Atlantic. The project organisers recognised that attempts to protect these sites would be met with great resistance from local interest groups that would feel their livelihoods unjustly threatened. The project therefore launched a major awareness-raising campaign targeted at potential stakeholder groups along the coast. The aim was to explain why the rich seas around Andalusia and Murcia needed protection and to engage the different interest groups in discussions about the best ways to conserve this natural resource, while respecting the needs of local communities.



*Atlantic spotted dolphins* (Stenella frontalis) *surface breathing*

In 2002, three boats travelled to 19 ports on the coast to deliver talks and hold events, excursions and other awareness-raising activities aimed at local stakeholders. A follow-up trip, a year later, took the process one step further and engaged local stakeholders in discussing the protection of these valuable resources, especially in areas where there are potential conflicts with existing human activities.

The final trip aimed to reach a consensus on draft management plans for the areas that were prepared on the basis of the extensive consultation process. In addition to the general information campaign activities, formal meetings were held with stakeholder groups at strategic locations along the coast to take the process forward.

So far signs are encouraging. The discussions are being held in a spirit of cooperation and constructive dialogue. Stakeholders are now aware of the important issues, meaning they can concentrate on finding practical solutions in specific areas of conflict

*Figurehead of the project boat* Toftewaag





*Project boat,* Toftewaag*, in Almería harbour*

without questioning the whole concept of marine protection.

Although objections to the designations cannot be ruled out, the inclusive nature of the preparatory work should facilitate local acceptance of potential restrictions to activities. Threats addressed include poor fishing practices (especially harmful to turtles), illegal fishing, noise and marine pollution. Where restrictions are likely, the project will encourage new economic ventures such as whale watching.

## Reducing by-catch and pollution

To help the management planning process further, the project is also undertaking a number of practical actions relating to fisheries by-catch and marine pollution. Through its partners, the Ministry of Fisheries and the Spanish Oceanographic Institute, satellite tracking is being used to determine the movements of turtles through this narrow sea passage and to correlate this with information on water temperature and long-line fishing operations. The results are expected to highlight the areas of greatest conflict in order that they may be specifically addressed. Already it is clear that swordfish and red tuna long lines are the most problematic.

The project is also tackling the problem of marine rubbish. Not only is this unsightly, but it also causes problems for many marine animals. For example, turtles sometimes ingest plastic bags and bottles thinking it is food and birds can get caught up in plastic material and drown. Working with local fishermen and port authorities, the project installed dustbins on all main fishing harbours and on 25 fishing vessels. This was accompanied by an awareness-raising campaign. Numerous spent lightbulbs, used during night fishing and then simply discarded overboard, have already been safely disposed of.

## Building on experience

Several LIFE-Nature projects have already been coordinated by the Spanish Cetacean Society, and the regional government of the Canaries. The first conservation project for the protection of turtles and dolphins in the Canary Islands began in 1997. In cooperation with the regional government and the Society for the Study of Cetaceans in the Canary Archipelago, it identified the key marine sites and regulated activities adversely affecting them.

Surveys showed that waters surrounding the Canaries contain some of the most densely populated areas for bottlenose dolphins in the EU. Several new sites were identified to be of key importance to the species. As a result, boundaries of existing Natura 2000 marine sites were adjusted and the standard datasheets updated to reflect the presence of dolphins in the existing marine sites.

The project also addressed the issue of whale watching which is becoming a major industry in the Canaries bringing in over € 30 million a year. After studying the biological and socioeconomic aspects of the industry, the project developed a series of measures to regulate whale watching activities in order to ensure they do not unduly disturb the mammals. By the end of the project a new law had been passed which tightened up the regulations for operating a whale watching business.



**Project number:** LIFE02 NAT/E/008610
**Title:** Conservation of cetaceans and turtles in Andalusia and Murcia
**Key species:** *Tursiops truncatus, Phocoena phocoena, Caretta caretta*
**Beneficiary:** Spanish Cetacean Society
**Contact:** Ricardo Sagarminaga van Buiten
**Email:** sec@cetaceos.com
**Website:** http://www.cetaceos.com/life/index.htm
**Period:** 01-Jul-2002 to 30-Jun -2006
**Total budget:** € 3,474,000
**LIFE contribution:** € 1,737,000

LIFE in action

# Spain: Recovery plan for the Balearic shearwater *Puffinus mauretanicus*

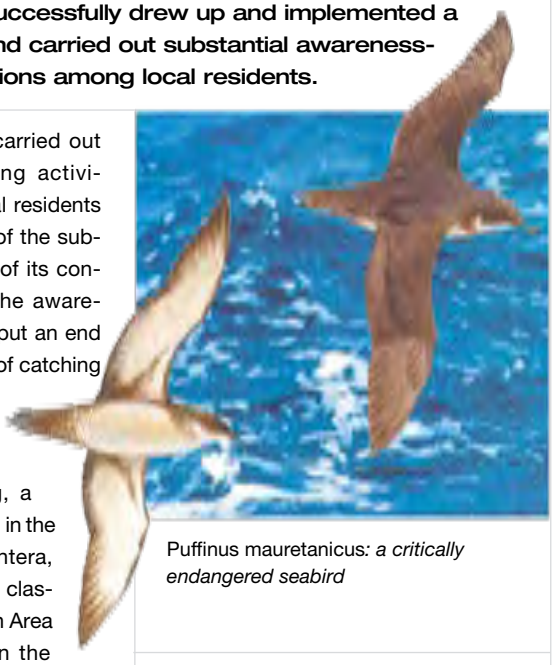
**The LIFE-Nature "Puffinus" project carried out detailed monitoring of Balearic shearwater *(Puffinus mauretanicus)* colonies – providing valuable information on numbers, biology and behaviour of this critically endangered seabird species. The project also successfully drew up and implemented a plan to control predation and combat theft from nests, and carried out substantial awareness-raising activities to increase support for conservation actions among local residents.**

The Balearic shearwater *(Puffinus mauretanicus)* is a critically endangered species endemic to the Balearic Islands. After spending autumn along the French Atlantic, the shearwater returns to the Mediterranean in November to mate and nest. The seabird nests in burrows or caves in the cliffs along the northern coasts of the archipelago. The main threats affecting the species on the islands are predation by rats and introduced mammals, and competition for burrows with rabbits. Even in recent times, locals have made use of the bird as a food source. As a consequence, a decline of its population has been observed since the mid-20th century and some nesting colonies have even disappeared altogether from the Balearic Islands. At present, 70% of the total breeding population is found on the island of Formentera.

## What did LIFE do?

The project was implemented by the regional governing body for the Balearic Islands (Conselleria de Medio Ambiente). Its aim was to implement the Balearic shearwater *(Puffinus p. mauretanicus)* Action Plan within the Special Protection Areas designated in the Balearic Islands. Its overall objective was to ensure the viability of existing colonies, as well as to increase the numbers of their colonies and the subspecies' distribution range. The project also carried out various awareness-raising activities aimed at making local residents aware of the importance of the subspecies and of the value of its conservation. In particular, the awareness campaign aimed to put an end to the traditional practice of catching the birds for food.

In order to meet these objectives, Can Marroig, a 130-hectare estate located in the northern coast of Formentera, was purchased. This area, classified as a Strict Protection Area has been incorporated in the Natural Park of Ses Salines of Ibiza and Formentera.



Puffinus mauretanicus*: a critically endangered seabird*

## Life after LIFE

The main legacy of the project is the monitoring of shearwater numbers. This work has included population counts, which will be continued on a regular basis. It is difficult to determine whether the population in the islands has increased or decreased since the beginning of the project. However, it is clear that the situation remains critical, and the biggest colonies have already been lost in Formentera. The monitoring work will be supported by surveys of other species in the area. Measures to control cats and rats are also planned. The LIFE project has played a vital role in increasing the knowledge of the ecology and distribution of the species.

**Project number:** LIFE97 NAT/E/004147
**Title:** Recovery Plan of *Puffinus p. mauretanicus* in SPA (Balearic Islands)
**Key species:** *Puffinus puffinus* subsp. *mauretanicus*
**Beneficiary:** Conselleria de Medi Ambient, Govern Balear
**Period:** 01-Mar-1997 to 31-Dec-2000
**Total budget:** € 2,973,000
**LIFE contribution:** € 1,486,000

LIFE in action

# Restoring terns and petrels colonies on the islands of Brittany

**Populations of terns in Brittany are declining and endangered. As a result of changes to their habitats, successful breeding has become more difficult and the threat of predators greater. A LIFE project aimed to improve breeding conditions for the threatened bird species.**

The huge number of islets off the coast of Brittany are rich in rare wildlife. Many of the coast's marine habitats are listed for special protection under the Habitats Directive and are home to the nesting sites of several species of tern, including the rare Roseate tern *(Sterna dougalii)*, and petrels *(Hydrobates pelagicus)*. Despite enjoying legal protection, however, the island habitats are threatened by environmental changes, mounting human pressures and introduced species such as rats and rabbits. The biodiversity of the region is further affected by the increasing presence of herring gulls *(Larus argentatus)* and people.



Photo: Arnaud Le Nevé, Bretagne Vivante - SEPNB




*Young Roseate tern (above)*
*Project awareness campaign leaflet (left)*

The LIFE project aimed to promote the preservation of Brittany's marine areas through pilot conservation measures on five groups of islets. The first and largest group, Trégor-Goèlo, contains 80 islets ranging in size from 0.1 to 18.8 hectares. The Natura 2000 management plan had already been adopted in this group, and the project aimed to assess its success, in addition to a series of activities including securing management contracts, cleaning up and regulating access to the inter-tidal zone, and the restoration of a lagoon.

The second group was made up of privately owned islets. For this group, the project aimed to draw up conservation contracts with landowners. On Béniguet Island, the third area, the focus was on habitat restoration, while the fourth and fifth groups targeted specific measures for terns and petrels. On three of the groups, the most visited islets, people's movements were analysed as a basis for possible future management. Increasing public awareness and safeguarding nesting sites would lead to an improved chance of successful breeding.

*Schoolchildren learn about the Brittany marine environment*



Photo: Arnaud Le Nevé, Bretagne Vivante - SEPNB

*Common tern* (Sterna hirundo) *in flight*



Photo: Fanch Ladure, Bretagne Vivante - SEPNB

# Preserving and protecting marine species and habitats





Photo: Olivier Ganne, Bretagne Vivante - SEPNB

*Clearing vegetation at* Île-aux-Dames



Photo: Pierre Yésou, ONCFS

*SEPNB and construction of nest shelters for terns*

## Surveying and preserving

On Trégor-Goèlo, the project raised awareness of the importance of preserving the biodiversity of the tidal zone, particularly through good fishing practices. To support this goal, an educational kit containing different tools, including an aquarium, a CD-ROM, a video and models was created. The awareness-raising campaign was continued after the end of the LIFE project. However, only one agreement with an island owner for the management of land was signed. (The other owners were unwilling to accept the terms of the proposed conservation contracts.) Nevertheless, natural heritage inventories of 10 private islands were drawn up. These reports, called *bilan patrimonial*, were often the first surveys to have been made of the small islands and contain vital information for their ecological management.

New equipment including a boat helped improve the quality of the surveillance of the four species of tern that breed on the Brittany islands. In order to make their breeding sites more secure, it was necessary to control the populations of gulls and invasive species such as American mink *(Mustela vison)* and rats. Vegetation was also cut back before the breeding season to maintain favourable conditions for the terns. For three species – the sandwich tern, the common tern and the little tern – results were positive: the project achieved an overall increase in their populations. The threatened population of the fourth species, the Roseate tern, remains stable. The colony in Brittany is the only one in France and is still endangered due its small size (about 70-80 pairs on a small island).

## Restoring habitats

Artificial nest burrows for the storm petrel were tested in the Sept-Iles and Molène archipelagos. The results were encouraging in the Molène natural reserve at the start of the bird colonisation. Agricultural activity on Béniguet Island has been largely abandoned leading to an expansion of wasteland to the detriment of natural habitats. Thanks to the tractor bought by the project, it was possible to restore dune grassland by mowing bracken *(Pteridium aquilinum)*. Poor diet has resulted in the low breeding success of terns on the island in the past.

Finally, the project organised a three-day workshop on Island Management in Ouessant and Molène in February 2001. More than a hundred participants attended this symposium, which brought together scientists, stakeholders, managers, NGOs, and Balearic and Scottish experts.

**Project number:** LIFE98 NAT/F/005250
**Title:** Maritime archipelagos and islets of Brittany
**Key species:** *Hydrobates pelagicus, Sterna sandvicensis, Sterna hirundo, Sterna dougallii, Sterna albifrons*
**Beneficiary:** Société pour l'Etude et la Protection de la Nature en Bretagne - Bretagne vivante, France
**Contact:** Luc Raoul
**Email:** bretagne-vivante@bretagne-vivante.asso.fr
**Period:** 01-Oct-1998 to 28-Feb-2003
**Total budget:** € 1,113,000
**LIFE contribution:** € 557,000

LIFE in action

# Recovering the Audouin's Gull population in Spain

**While numbers of Audouin's Gull have increased slightly in recent years, this native Mediterranean bird is threatened by rival species and the scarcity of nesting sites. A LIFE project was set up on a Spanish island to monitor populations of the gull and draw up a recovery plan.**

The project took place on Isla Grosa, a Natura 2000 site off the southeast coast of Spain that hosts a colony of 900 pairs of Audouin's Gull *(Larus audouinii)*. Ninety percent of the world's population of the species can be found in the EU, though they migrate south in the winter, particular to the Atlantic coast of Africa.

The fish-eating birds feed on waste from fishing boats and compete with the yellow-legged gull *(Larus cachinnans)* for that. The species is also threatened as a result of the lack of suitable nesting sites and its concentration in just a few locations.

To combat these threats, a LIFE project was set up with the Ministry of Environment, Water and Agriculture of the region of Murcia, in particular, the Directorate General for Nature Conservation, which is responsible for species and habitats conservation at the regional level. The project's activities were coordinated with the regional administrations of Catalonia and Valencia, which are also conducting LIFE projects on the species.

The Murcia project restored an abandoned military installation to use as a surveillance and research centre. It also sought to control competitor species, in particular the yellow-legged gull *(Larus cachinnans)*. Restoration of the Audouin's Gull population was also attempted by encouraging the species to breed. This was done by creating artificial nests and using artificial calls. The same methods were used to enhance the breeding of the European storm petrel *(Hidrobates pelagicus)*.



*Audouin's Gull* (Larus audouinii)*: 90% of the world's population can be found in the EU*

This ongoing project features a widespread public information campaign, and the recovery plan for the species on the island, based on the results of the monitoring programme, will be approved during the project.

**Project number:** LIFE03 NAT/E/000061
**Title:** Conservation of *Larus audouinii* in Spain. Grosa Island SPA (Murcia)
**Beneficiary:** Consejería de Medio Ambiente y Ordenación del Territorio
**Contact:** Matías García
**Email:** matias.garcia@carm.es
**Website:** http://www.carm.es/cma/dgmn/europa/life0361/indice.htm
**Period:** 01-Jan-2004 to 31-Dec-2007
**Total budget:** € 943,000
**LIFE contribution:** € 707,000

# Ensuring prudent utilisation of marine goods and services







**Many Natura 2000 marine sites are also economically important. Activities such as transport, tourism and temporarily fishing, or constantly impact on the marine environment. Many LIFE-Nature projects have established management plans and national action plans for marine species and sites. The development of these plans is complex and delicate, involving a wide range of interests. Moreover, many stakeholders had limited previous management experience and incomplete base-line information on the marine environment. The projects helped to change practices and attitudes through awareness-raising campaigns and demonstration activities that fulfil both Natura 2000 conservation requirements and socio-economic objectives. These goals included the regulatory control of financial activities, incentive schemes for implementing appropriate management practices, limiting of activities to defined zones, and establishing sustainability objectives.**



LIFE in action

# Threatened Cetaceans: Aiding the recovery of Black Sea dolphins

**The overwhelming majority of stranded dolphins on the Romanian Black Sea coast were found to have been caught up in gillnets, and either drowned or died from their injuries after escaping. A LIFE-Nature project reduced the number of dolphin fatalities and addressed the problems of habitat loss and degradation, and the depletion of food resources. The success of this project was mostly due to intensive awareness-raising campaigns that targeted local fishermen, tourists and schoolchildren. Some of the project's actions have served as a model for other dolphin programmes in the Black Sea.**

Three dolphin species live in the Romanian Black Sea waters: the harbour porpoise (*Phocoena phocoena*, between 400-600 individuals), the bottle-nosed dolphin *(Tursiops truncatus*, 500-1,000 individuals) and the common dolphin (*Delphinus delphis*, 600-800 individuals). Today's population in the Black Sea is estimated to be a mere 4% of what it once was. After a period of killing for soap production between the1930s and the early 1980s, a hunting ban was declared (in 1966 in the former USSR, Bulgaria and Romania; and in 1983 in Turkey). In spite of the ban, stocks continued to decline, primarily due to dolphins getting caught in large fishing nets.

Urban development and industrialisation along the coast have also taken a toll. Pollution and over-fishing have resulted in the destruction of fish nurseries and the accumulation of toxic compounds in the cetaceans. Habitat degradation and maritime traffic is also affecting the dolphins. These threats have raised the level of stress and incidence of disease among Black Sea dolphins.

Romania has signed up to several international agreements to undertake measures for improving the conservation status of cetaceans in the Romanian Black Sea. The LIFE-Nature project, however, proposed a national action plan for dolphin conservation. The project was implemented by the National Institute for Marine Research and Development in collaboration with the NGO, Mare Nostrum, and Dolphinarium Constanta.



*A group of Black Sea bottlenose dolphins* (Tursiops truncatus)

LIFE funding made possible the implementation of an ambitious conservation project that also led to the creation of the first protected marine site on the Romanian coast. (The site now extends across the border to Bulgaria.)

## What did LIFE do?

The main goal of the project was to develop the technical and legal bases for conservation of the three endangered dolphin species in the Romanian Black Sea. It aimed to find out more about the accidental catching of dolphins and to impose restrictions on fishing methods known to have adverse impacts on them. The project also prepared and adopted a national action plan, proposing measures for the conservation of the habitat, including the designation of new marine reserves.

## What was the outcome?

Knowledge about the Black Sea dolphin populations has greatly increased as a result of the project. Years after the project, dolphin sightings, strandings and unintended captures continue to be systematically recorded. Furthermore, the project cooperated with a leading oil company to obtain data on population distributions and conducted a survey on the adverse impact of marine and land-based economic activities. A marine database was created that allows dolphin scientists to monitor the effects of management plans. Initial results show that the decline of the dolphin populations has stopped.

Cooperation was found to be important. The support of ACCOBAMS (Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area) and international experts[1] as well as the cooperation of the main stakeholders and authorities involved in dolphin conservation, made possible the adoption of a national action plan for dolphin conservation. The action plan has served as a valuable model for Bulgarian waters and the Mediterranean. Moreover, a suitable monitoring system has been designed and implemented to assess the change in cetacean populations and their habitats in this marine area.

Little was known about the Black Sea's fish stocks, and it was important to make an assessment of the main fish species that make up the dolphins' diet. Data collected can also be used to mitigate the effects of possible over-fishing in the Black Sea. Romanian fishermen do not see dolphins as serious competitors in their fishing areas. Dolphin by-catch happens mostly incidentally and creates financial losses, and fishermen are legally obliged to notify the authorities of each caught dolphin. The same authorities are responsible for issuing fishing licences and fishing associations receive a small grant for valuable information about stranded dolphins.

Surveys conducted as part of the project have identified the best areas for dolphin protection in the Romanian littoral zone. These have helped flesh out a management plan for one of the priority areas, the Danube Delta Biosphere Reserve. Together with the Ministry of Environment, the beneficiary is implementing measures for considerably reducing fishing pressure in this reserve. Two key measures were the suspension of fishing licences for the 1,200 km$^2$ Danube Delta marine area; and the reduction of the diameter of existing gillnets to reduce the risk of dolphins being caught in the nets.

The second priority area is the marine reserve of Vama Veche - 2 Mai, which the LIFE beneficiary was authorised to manage. Actions included the removal of fishing gear in the reserve area and the cross-border matching extension of the reserve into Bulgarian waters.

Key to the success of the project is the support of the public, and numerous awareness-raising activities were held with the participation of local institutions (the dolphinarium, schools, children's clubs, etc.). During the project, a dolphin week was organised every year featuring exhibitions, theatre performances, and drawing contests, among other activities. Moreover, the project widely publicised its activities through the mass media, including TV broadcasts on several channels, and the production of eye-catching communications.



*Dead dolphins as a result of illegal fishing*

The project also presented its results at scientific meetings in the Black Sea region and in scientific publications. In addition, scientists from the neighbouring countries Bulgaria, Turkey and Ukraine, in cooperation with the ACCOBAMS secretariat, were trained in dolphin protection.

Around 50 people cooperated with the project on a voluntary basis: students, border police and even the Romanian navy were trained by the NGO, Mare Nostrum, in monitoring stranded dolphins on beaches. Fishermen, meanwhile, are registering the dolphin by-catches. Young people have been especially positive towards dolphin protection, and local stakeholders (fishermen, sailors, frontier policemen) have changed their attitudes towards environmental protection.

*Dolphin awareness-raising campaign logo*




*1 ACCOBAMS website: http://www.accobams.mc/*



*Stranded dolphins on a Black Sea beach*

Analysing the impact of fishing gear on dolphins and stock assessments of the main migrating fish species are now common exercises, which the project plans to intensify in the future. In cooperation with Turkey, several marine resource management and conservation measures have been implemented on the south coast of the Black Sea. International cooperation on projects has the added benefit of prompting local authorities in Romania to intensify their nature protection efforts.

## A model project

One of the main achievements of the project has been to include relevant national and international stakeholders in drawing up and implementing a national action plan for dolphins. The project has promoted a consensus about the protection and suitable management of these species in the Romanian Black Sea among scientists, nature conservationists, authorities, fishermen and international organisations. Such a consensus is quite an achievement for Romania, which had little experience of the management of marine species and areas before the LIFE project.

## Life after LIFE

LIFE has given an enormous boost to dolphin protection in Romanian waters, but they are still far from being entirely dolphin-friendly. The beneficiary was aware that the work of the three-year EU-funded project needed to continue. Along with the project partners, it has managed to maintain the high profile of dolphin protection along the Black Sea coast.

Monitoring the incidental catches of dolphins and strandings continues, along with the surveys and behaviour observations at sea. The school projects in Constanta are also ongoing, as is the yearly dolphin week. Scientific studies are still urgently needed in several areas, including fishing gear management and acoustic deterrents (which are believed to disturb dolphins' orientation).

Furthermore, both marine areas, as well as almost 50% of the Romanian Black Sea coastline, have been included in the Natura 2000 site nomination process. It is also proposed that the marine reserve, Vama-Veche - 2 Mai, should be included in this list along with the other priority area for dolphin protection, the Danube Delta biosphere reserve (marine zone). Such measures ensure that Romania meets the EU's target for designating Special Conservation Areas that assure the protection and conservation of the three dolphin species included in the Habitats Directive.

## The future

Future measures include the creation of a tissue bank for aiding research into the causes of diseases affecting the dolphin population and closer monitoring of Black Sea pollution. In addition, the introduction of a dolphin-safe label should popularise dolphin-friendly fishing products. Surveys on pollutant sources from the Romanian coast that have harmful effects on dolphins and studies on the incidence of diseases will also be carried out.

**Project number:** LIFE00 NAT/RO/007194
**Title:** Conservation of the Dolphins from the Romanian Black Sea waters
**Key species:** *Delphinus delphis, Phoecena phoecena, Tursiops truncatus*
**Beneficiary:** National Institute for Marine Research and Development
**Contact:** Gheorghe Radu
**Email:** gpr@alpha.rmri.ro
**Website:** http://www.delfini.ro/
**Tel:** 40 41 540870
**Period:** 01-Jul-2001 to 30-Jun-2004
**Total budget:** € 417,000
**LIFE contribution:** € 208,000

LIFE in action

# Greece: Protecting the endangered monk seal in fishing areas

**The Mediterranean monk seal *(Monachus monachus)* is one of the most endangered marine mammals in the world. The main threats come from accidental or deliberate killing by fishermen, reduction in food sources (mainly because of over-fishing), human disturbance, and the deterioration and destruction of their habitats. Greece has a special responsibility for this species, as its waters host the largest European populations (200-250 individuals). One of three LIFE projects to protect the monk seal focused on the study and protection of the species at two Natura 2000 sites. Surveillance with regular boat patrols was central to the success of the project. It highlighted the effect of tourist boats and amateur fishing boats in one area. Surveillance findings helped secure funding for a follow-up LIFE project that aims to mitigate the conflicts between protecting the seals and the fisheries sector.**

## What did LIFE do?

Over the past nine years, the project beneficiary, the Hellenic Society for the study and protection of the monk seal (MOm) in Greece, has run three consecutive LIFE-Nature projects concerned with the monk seal. The first project in 1996 (LIFE96 NAT/GR/003225) set out to discover more about the species' distribution.



*Awareness-raising campaign*



*The monk seal - one of the most endangered marine animals in the world*

Photos: P.Dendrinos/MOm

Having helped to establish a network of protected sites for the seals in Greece under Natura 2000, the second project sought to implement some of the main actions proposed in the management plans on the islands of the Polyaigos-Kimolos and the Karpathos-Saria complex, which host around 40 and 20 seals respectively.

To achieve this objective, the beneficiary first established regular surveillance activities of the monk seal sites and caves; and secondly implemented a major awareness-raising programme aimed at fishermen, local inhabitants and tourists.

The project targeted in particular the problem of deliberate killings of seals by fishermen and illegal fishing. For decades, monk seals have been persecuted by local fishermen for stealing fish and damaging nets.

A dedicated team of local wardens was recruited at both of the Natura 2000 sites and provided training in surveillance techniques at the National Marine Park of Alonissos-Northern Sporades. The teams were responsible for implementing a protection scheme in cooperation with the port authorities. This involved collecting information on various aspects of the species' behaviour and monitoring illegal activities.



The teams talked to local people about the plight of the monk seal and built up support and acceptance for conservation. The awareness-raising campaign was supported by dissemination tools, such as a website and information leaflets, posters, stickers and newsletters. These were aimed at tourists, local authorities and, in particular, fishermen. Schoolchildren were



*The impact of human activities was studied by the project*



*Preparing to monitor the monk seal populations*



*Dimitris an orphaned monk seal found in December 2003*

targeted via a programme of environmental education, and the general public via information centres. The project team also worked closely with local, regional and national authorities in order to promote the two management plans.

## What was the outcome?

The project made significant progress in implementing conservation measures at the two sites. By the end of the project, 32 seal pups had been born in the Kimolos-Polyaigos area – a breeding rate of eight pups per year had been achieved in the Natura 2000 site. According to the beneficiary, "It is the second highest number of pups ever recorded – in such a period – in a single area within the Mediterranean." Based on available data, the beneficiary estimated that the area contained at least 43 seals (not including the pups). The project also highlighted the potential threat to the marine environment posed by tourist boats and amateur fishing boats in the area of Kimolos.

For the Karpathos area, over the same four-year period, 19 newborn pups were recorded – an average birth rate of just under five pups per year. The beneficiary estimated that a minimum of 23 adult and juvenile seals inhabit the area.

The local element of the project was fundamental to its success. As well as aiding conservation, teams located on the ground helped to change local attitudes. Rather than viewing the monk seal as a threat, local people are now realising the potential of eco-tourism for the islands.

## Conclusions

A third LIFE project (LIFE05 NAT/GR/000083) is building on the experience of the project by aiming to mitigate the conflicts between monk seals and fishermen in Greece. Seven hotspots will be selected in which the scale of the problem will be assessed and measures to combat it will be proposed. A monk seal fisheries action plan is expected to be adopted by 2009 that will cover the monk seal's range in Greece[1].

*Awareness-raising campaign for schoolchildren*







**Project number:** LIFE00 NAT/GR/007248
**Title:** The Monk Seal: conservation actions in two Greek Natura 2000 sites
**Key species:** *Monachus monachus*
**Key habitats:** *Posidonia* beds *(Posidonion oceanicae)*
**Beneficiary:** MOm/Hellenic Society for the Study and Protection of the Monk Seal
**Contact:** Spyros Kotomatas
**Website:** www.mom.gr/life
**Period:** 01-Jan-2001 to 31-Jan-2005
**Total budget:** € 1,498,000
**LIFE contribution:** € 899,000

*1 Source DG Environment website: "Marine: Good management practices of Natura 2000" http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/managing_natura_2000/exchange_of_good_practice/marine/04case_seals.html*









# Building partnerships for the seas

**Another key issue addressed by many LIFE-Nature projects concerns the interactions between fisheries and threatened marine habitats and species. Numerous surveys have shown the extent of the problem and the types of fishing practices that are most damaging in specific marine areas. This knowledge has been used to open a dialogue with the fishermen and authorities concerned.**

LIFE in action

# Portugal: Sustaining coastal and marine zones in the Azores

**The coastal and maritime environments of the Azores archipelago boast a natural heritage of national and Community-wide importance. The Portuguese islands contain a range of important marine species and habitats. With the active support and participation of regional environment and fisheries' authorities, tourism operators and the local population – the MARÉ project was able to complete management plans for 12 Natura 2000 sites and to introduce key measures for the conservation of four marine species – including the priority loggerhead sea turtle *(Caretta caretta)*, the bottlenose dolphin *(Tursiops truncates)*, the Madeiran storm-petrel (*Oceanodroma castro)* and the Roseate tern *(Sterna dougallii)* seabirds.**



Photo: IFAW

*Sperm whales* (Physeter macrocephalus) *in the Atlantic*

Over the past 20 years, an increase in human activities (fishing, tourism, scuba-diving etc.) has started to damage the marine species and habitats of the region's coastal and marine environments. Several measures to reduce this environmental damage were introduced during this period, including the legal protection of loggerhead seas turtles and bottle-nosed dolphins. But these measures did not address broader issues such as the management of activities already going on in nature reserves or the surveillance of these areas. The application of the Birds and Habitats Directives to the Azores had resulted in the designation of 31 proposed Natura 2000 sites.

## What did LIFE do?

The four-year project sought to draw up a range of integrated measures for 12 of the 31 proposed sites, targeting the sustainability of fishing and tourism activities, including whale watching. The project was implemented by the project beneficiary, the University of the Azores, through its Department

# Building partnerships for the seas



Photos: ImagDOP©JFontes

*Common dolphin* (Delphinus delphis).

of Oceanography and Fisheries *(Universidade dos Açores - Dep. de Oceanografia e Pescas).*

When the project began there was little data on the impact of socio-economic activities on the targeted marine species notably on loggerhead sea turtles and bottlenose dolphins in the region. The first phase of the project was therefore dedicated to the collection of such data and included a marine species census. On the basis of this information management plans were drawn up and implemented in conjunction with local environment and fisheries authorities. They were adopted following public consultation.

Management actions were also developed for whale watching. These resulted in the adoption of a new regional regulation. Measures to be adopted by fishermen to reduce the amount of by-catch of sea turtles were also defined.

## What was the outcome?

Management plans for 12 Natura 2000 sites were completed. An important achievement was the establishment of good cooperation between the scientific community and the tourism and fisheries' sectors. Awareness-raising activities were also successful both in the Azores and on mainland Portugal, as shown by the continuing high demand for the project's awareness-raising educational kit. This project involved the whole Azores community (fishermen, students, scientific community and local population) together with the economic agents (tourism operators) and the regional authorities responsible for the Natura 2000 coastal and marine sites management.

## Life after LIFE

A post-project follow-up study of the project was carried out in March 2006 by the LIFE external monitoring team. It showed that a permanent warden post had been created. Moreover, four other people hired under the LIFE project are continuing to work on some of the actions initiated by LIFE but now funded by Interreg, the European Regional Development Fund, and the Portuguese Science and Technology Foundation.

Management plans are being drawn up for a further 18 Azores Natura 2000 sites. This task is now overseen by the regional authorities and financed through structural funds for the Azores region and also with an Interreg project with Spanish partners. Two other projects have been launched to continue research into biological and ecological aspects of cetaceans of the



Photos: ImagDOP©JFontes

*Diver with pilot whales* (Globicephala melaena)

Azores. These should prove useful in monitoring the effectiveness of the proposed actions and possibly in improving existing management measures. A test on turtle by-catch in long line fishing activities is still ongoing. So are the majority of the awareness-raising measures through schoolteachers and NGOs that were involved with the project, and also through a visitors' centre established during the LIFE phase and now managed by an NGO.

## Conclusions

The project made a major contribution to the establishment of the Natura 2000 Network; its management plan preparation and implementation strategies can be used as a model for other important marine sites both in mainland Portugal and elsewhere in the EU.

**Project number:** LIFE98 NAT/P/005275
**Title:** MARÉ - Integrated management of coastal and marine zones in the Azores
**Key species:** **Caretta caretta, Oceanodroma castro, Sterna dougallii, *Tursiops truncatus*
**Beneficiary:** *Universidade dos Açores- Dep. de Oceanografia e Pescas*, Portugal
**Contact:** Ricardo Serrão Santos
**Email:** ricardo@dop.horta.uac.pt
**Website:** www.horta.uac.pt/projectos/macmar/ogamp/index.html
**Period:** 01-Oct-1998 to 31-Mar-2003
**Total budget:** € 1,366,000
**LIFE contribution:** € 819,000

** Denotes priority species*

LIFE in action

# Bothnian Bay: Conserving through partnership

**Human activities pose a threat to the marine environment of Bothnian Bay in the Baltic Sea. To meet this challenge, a LIFE project brought together various governmental bodies to develop a joint database for the exchange of information about the bay's water quality and to introduce a plan for the sustainable management of the area.**

Located between Finland and Sweden, Bothnian Bay is the most northern basin of the Baltic Sea. The bay, which freezes over for several months of the year, is particularly vulnerable due to the scarcity of the species living in it, its arctic conditions and the shallowness of its waters (average depth 40 metres). Moreover, the bay is exposed to pollution from the local steel, pulp and paper industries as well as from sewage treatment plants. Perhaps even more importantly, the bay is affected by agricultural and forestry practices, peat mining, and to some extent construction work related to sea transport.

## Tools for managing the sea area

Many different national and regional bodies monitor environmental conditions in the bay, and the beneficiary identified the need to pool various information sources. To achieve this, the project built up an extensive online database under the guidance of the beneficiary, the North Ostrobothnia Regional Environment Centre (NOREC) in Finland. The database features various indicators of water quality in the bay:

- Physical and chemical data from 62 observation points.
- Results of automatic water quality monitoring and samples collected by the system.
- Data on the material transport and water discharges of 31 rivers, and use of the land in their catchment area.
- Information about the 52 industrial plants and wastewater treatment plants, including annual loading data.
- Top ten lists for rivers, industries and wastewater treatment plants.

In addition to the database, the project also developed a web-based BAT (Best Available Technology) information exchange system for the metal industry and produced a versatile exhibition for dissemination purposes.

The project, which began at the end of 2001, also developed a model for estimating the impact of human actions in the coastal areas. The Bothnian Bay Water Quality and Ecosystem Model allows experts working in the area to assess the impact of loading on water quality. Assessments are made by calculating likely changes to the concentration of soluble nutrients and algae. Human activity has caused eutrophication (the addition of nutrients that promote the growth of algae) that disrupts the coastal ecosystems.



Photo: Anne Laine

*Bothnian Bay: the most northern basin of the Baltic Sea*

The project canvassed the views of a wide range of experts and stakeholders to produce an action plan for Bothnian Bay. The plan outlines targets and priorities for sustainable development and sets guidelines for monitoring and for status assessments. It also aims to meet EU and national environmental requirements and to improve information exchange and cooperation in the Bothnian Bay area. NOREC continues to cooperate with the project partners to implement the action plan and maintain databases.

**Project number:** LIFE00 ENV/FIN/000646
**Title:** Integrated Management System for the Bothnian Bay
**Beneficiary:** North Ostrobothnia Regional Environment Centre, Finland
**Contact:** Anne Laine
**Email:** anne.laine@ymparisto.fi
**Website:** www.ymparisto.fi/perameri
**Period:** 01-Aug-2001 to 31-Jan-2005
**Total budget:** € 1,049,000
**LIFE contribution:** € 520,000





# Improving environmental quality of our seas



**Despite the many conventions and measures taken at national and international levels, the environmental status of our seas is still not satisfactory and in some areas can be considered critical. However, there are also positive signs. The reinforcement of effluent limits, waste recycling, and alternative solutions for treating dangerous substances are on their way. Some legislation sets best practice standards, and LIFE can contribute substantially to the improvement of best available techniques and methods.**

LIFE in action

# Treating TBT-rich sediment from the Port of Antwerp

**As one of the largest ports in the world, the Port of Antwerp is particularly affected by TBT-contamination from ship paints. A LIFE project attempted to remove affected sediments from Antwerp's harbours and to treat the material for eventual reuse.**

The use of tributyltin (TBT) in ship paints has been banned in the EU since the beginning of 2003. TBT is a toxic biocide that was used since the 1970s to prevent the growth of algae, barnacles and other organisms on ships' hulls. The toxic substance, however, leaches from the paint into marine waters and eventually accumulates in sediments on the beds of harbours and ports. The removal of these sediments is vital to prevent TBT being reabsorbed into the water.

The project, which was carried out by the Antwerp Port Authority (Gemeentelijk Havenbedrijf Antwerpen), aimed to demonstrate an integrated approach to the elimination of TBT from the marine environment: prevention, removal, treatment and finally reuse. Specific objectives included the following:

- Assess the environmental impact of available alternatives for TBT.
- Evaluate the release of TBT from sediments into the aquatic environment during dredging operations.
- Test on a pilot-scale several treatment technologies for TBT contaminated sediments.
- Identify possibilities for the reuse of treated sediments.

The port teamed up with the Environmental Research Centre (ERC) in Hofstade, (Aalst) to carry out the chemical analyses and perform lab-scale feasibility experiments for the different sediment and water remediation techniques.



*Dredging craft in the port of Antwerp*

## Five-point plan

The project was expected to produce a list of environmentally friendly alternatives to TBT in anti-fouling (that is, the prevention of growth of organisms) systems. It was also expected to determine limits and best practice for dredging operations in order to minimise the release of TBT from sediments. To achieve its aims, the project focused on five main action areas:

1) The drawing up of a questionnaire on alternatives for TBT to be sent to interested parties in the EU including coating producers, ship-repair yards, ship-owners etc. From the answers received, the project would be able to assess the impact of the alternatives based on their characteristics, active compounds, methods of application, energy use, waste generation and ease of maintenance.

2) Simulation of dredging operations on a pilot-scale and analysis of TBT concentrations in the aqueous phase. TBT concentrations would be correlated with turbidity measurements taken simultaneously.

*Removal of TBT contaminated sediments*



3) The dredging of about 2000 $m^3$ of TBT contaminated sediments form the Port of Antwerp and elsewhere in Flanders and its treatment in pilot-scale installations, on-site or off-site, using thermal treatment, bioremediation, washing and separation, phyto-remediation and electrochemical treatment. An evaluation of TBT removal rates for each technique was to be performed.
4) The construction of a pilot-scale treatment plant for the purification of TBT contaminated waters created during dredging or treatment operations. An evaluation of the removal efficiency of this plant for TBT was planned.
5) The reuse of cleaned sediments in landscaping, dike reinforcement and construction.

## Results

While a standard practice for the reuse or application of sediment on land has yet to be reached, geotechnical and chemical requirements were developed. Chemical criteria were developed by the Flemish Institute for Technological Research (VITO) in accordance with Flemish legislation on reuse of soil and treated mineral waste for construction purposes.

The project provided a general framework for quantifying the effects of toxic materials that can be used in discussions with the Flemish authorities and for the development of European quality controls on the reuse of sediments.

*Deposition of extracted sediments following TBT removal*





*Disseminating the project results and experiences*

Some results of the project could also be used to formulate recommendations and restrictions on dredging activities. The project demonstrated that the amount of TBT released during dredging activities is mainly determined by conditions in the harbour (for example acidity, salinity and temperature).These environmental conditions are more important than the dredging technique.

The project also determined that dredging of highly contaminated sediments in the Port of Antwerp is best performed during the winter when the pH of the water is below 8.0. A new time schedule for dredging operations now dramatically reduces the release of TBT in the port. Such a recommendation could also apply to other ports.

Another important aspect of the project was the construction of a mechanical water extraction installation. The installation should be operational by the end of 2008 and will cost an estimated € 65 million.

The project worked in consultation with the Flemish government to carry out the mechanical extraction of water from dredged material and to develop acceptable TBT-concentrations in dewatered sludge and discharge limits for effluent water. Dumping sites in Antwerp are expensive and limited in number and size. However, prospects for the port are very encouraging. Once recycled, for example, sediments can now be reused for creating dikes and other constructions.

**Project number:** LIFE02 ENV/B/000341
**Title:** Development of an integrated approach for the removal of tributyltin (TBT) from waterways and harbours: prevention, treatment and reuse of TBT contaminated sediments
**Beneficiary:** Gemeentelijk Havenbedrijf Antwerpen, Belgium
**Contact:** Eddy Bruyninckx
**Website:** www.portofantwerp.be/tbtclean
**Email:** eddy.bruyninckx@haven.antwerpen.be
**Period:** 01-Oct-2002 to 01-Jan-2005
**Total budget:** € 3,222,000
**LIFE contribution:** € 1,335,000

LIFE in action

# OSIS: Improving oil-spill detection in the North Sea

**Ships and offshore installations are the most common sources of more than 500,000 tonnes of oil that is spilt in the marine environment every year. The OSIS (Oil Spill Identification System), developed and tested with LIFE-Environment co-funding, is aiding identification of oil discharges from offshore installations in the North Sea. This permanently-mounted 'real-time' sensor – together with a new mobile sensor being adapted for ships in a follow-up LIFE project – will allow decision-makers to take corrective action rapidly.**



*New OSIS sensor on board* Cunnar Seidenfaden

Every day large amounts of oil are deliberately pumped into the sea by ships along the coastline of Europe. Together with large oil spills, such pollution constitutes a major threat to the environment and places enormous demands on national authorities responsible for rapid response and clean-up operations. The 1992 OSPAR Convention[1] for the protection of the marine environment of the northeast Atlantic tackles this environmental threat.

Effectively controlling oil pollution has, however, proved difficult. Airborne surveillance systems currently used to control oil outlets are too expensive to be utilised efficiently against the large number of offshore

*1 The OSPAR Convention http://www.ospar.org/eng/html/welcome.html, which entered into force in March 1998 and includes the participation of the EU, develops new programmes and measures required to identify, prioritise and monitor the emissions, discharges and losses of substances to the marine environment.*




*'Real-time' OSIS sensor at the front of an oil rig*

installations. Along with ships, such installations are the most common sources for the more than 500,000 tons of oil spilt annually into the marine environment[2]. The lack of monitoring systems means that offshore installations have not yet been included in the strict OSPAR rules governing oil pollution in 'special areas' designated by the International Maritime Organisation (IMO).

## OSPAR call for technologies

Peter Moeller-Jensen, project manager at OSIS International, a privately owned Danish SME says: "In the late 1990s, OSPAR called for technologies, such as OSIS to be developed so that they could enforce a new type of regulation in those special areas." The OSIS team thus sought to demonstrate a potential solution to this widespread problem of international concern by developing online remote monitoring of offshore installations in any location based on new sensor technology. The system would use a new generation of communication satellites and the internet.

The project has fully achieved its objective, posting impressive results from tests for the detection of spills surrounding oils rigs in the North Sea. Data gathered by OSIS is also transferred via satellite to onshore decision-makers and can be used in conjunction with a Geographical Information System (GIS). This provides further information about leaks and helps the planning of corrective actions. "This will enhance the information for decision-making concerning corrective action and also provide opportunities for efficient clean-up operations," says Mr Moeller-Jensen.

## Conclusions

The OSIS technology, designed for fixed offshore structures such as oil platforms, is also proving attractive for maritime transport. A second LIFE project (LIFE04 ENV/DK/00076) launched in 2004 by the same beneficiary is currently adapting the fixed OSIS sensor and transmission system for ships.

*2 Source: Global Marine Oil Pollution Information Gateway http://oils.gpa.unep.org/facts/sources.htm*

*Close-up of the permanently-mounted OSIS sensor*




**Project number:** LIFE02 ENV/DK/000151
**Title:** Sensor for identification of oil spills from offshore installations
**Beneficiary:** OSIS International, Denmark
**Contact:** Peter Moeller-Jensen
**Website:** www.osis.biz
**Email:** pmj@osis.biz
**Period:** 01-Jan-2002 to 30-Apr-2005
**Total budget:** € 3,359,000
**LIFE contribution:** € 867,000

# Further successful and promising projects

**The table below presents some of the numerous past and current LIFE projects focusing on the marine environment. For further information on individual projects, visit the online LIFE database at: http://ec.europa.eu/environment/life/home.htm.**

| Start | Country | Number | Title |
|---|---|---|---|
| **Enhancing our knowledge of the marine environment** | | | |
| 1992 | United Kingdom | LIFE92 ENV/UK/000065 | Small Cetacean Abundance in the North Sea and adjacent waters (SCANS) with follow-up project |
| 2004 | Portugal | LIFE04 NAT/P/000213 | Important bird areas for seabirds in Portugal |
| 2004 | Spain | LIFE04 NAT/ES/000049 | Important Bird Areas For Seabirds (Marine IBAs) in Spain |
| 2004 | United Kingdom | LIFE04 NAT/UK/000245 | Small Cetaceans in the European Atlantic and North Sea (SCANS II) |
| **Preserving and protecting marine species and habitats of Community interest** | | | |
| 1995 | Greece | LIFE95 NAT/GR/001115 | Recovery of the Loggerhead Sea Turtle *(Caretta caretta)* population nesting on Crete |
| 1996 | Greece | LIFE96 NAT/GR/003221 | Conservation actions for *Larus audouinii* in Greece |
| 1996 | Portugal | LIFE96 NAT/P/003019 | Conservation support project for North Atlantic *Caretta caretta* sea turtles |
| 1996 | Spain | LIFE96 NAT/E/003144 | Actions for the recovery of the Atlantic Monk Seal *(Monachus monachus)* population |
| 1996 | United Kingdom | LIFE96 NAT/UK/003055 | To develop and promote the necessary conservation measures for UK marine SACS |
| 1997 | Italy | LIFE97 NAT/IT/004153 | Capraia and other small islands of the Tuscan Archipelago : biological diversity conservation |
| 1997 | Spain | LIFE97 NAT/E/004146 | Recovery plan of *Puffinus p.mauretanicus* in SPA's |
| 1997 | Spain | LIFE97 NAT/E/004151 | Project to support the conservation of *Caretta caretta* and *Tursiops truncatus* in the Canary Islands |
| 1998 | France | LIFE98 NAT/F/005250 | Maritime archipelagos and islets of Brittany |
| 1998 | Spain | LIFE98 NAT/E/005300 | Conservation of island SPAs in the Valencian region |
| 2000 | Spain | LIFE00 NAT/E/007303 | Protection of *Posidonia* grasses in SCIs of Baleares |
| 2002 | Spain | LIFE02 NAT/E/008610 | Conservation of cetaceans and turtles in Andalusia and Murcia |
| 2002 | Third Countries | LIFE02 TCY/TR/061 | Preserving the Marine Environment of Oludeniz Lagoon |
| 2003 | France | LIFE03 NAT/F/000105 | Conservation of Cory's shearwater on the Hyères islands |
| 2003 | Italy | LIFE03 NAT/IT/000163 | Reduction of the impact of human activity on Caretta and Tursiops and their conservation in Sicily |
| 2003 | Spain | LIFE03 NAT/E/000061 | Conservation of *Larus audouinii* in Spain. Grosa Island SPA (Murcia) |
| 2003 | Spain | LIFE03 NAT/E/000062 | Conservation of *Tursiops* and *Caretta* on the Gomera Island |

| Start | Country | Number | Title |
|---|---|---|---|
| 2004 | Italy | LIFE04 NAT/IT/000172 | Tuscan Islands: new actions towards sea birds and habitat |
| 2004 | Italy | LIFE04 NAT/IT/000187 | Tartanet, a network for the conservation of sea turtles in Italy |
| 2005 | France | LIFE05 NAT/F/000137 | Conservation of the Roseate Tern in Brittany |
| 2005 | United Kingdom | LIFE05 NAT/UK/000141 | Canna seabird recovery project |
| 2006 | Denmark | LIFE06 NAT/DK/000159 | Rebuilding of Marine Cavernous Boulder Reefs in Kattegat |
| **Ensuring prudent utilisation of marine goods and services** | | | |
| 1997 | Finland | LIFE97 NAT/FIN/004102 | Conservation and Management of the Porvoonjoki Estuary - Stenböle Natura 2000 Area |
| 1998 | Greece | LIFE98 NAT/GR/005262 | Application of Management Plan for *Caretta caretta* in southern Kyparissia Bay |
| 1999 | Italy | LIFE99 NAT/IT/006271 | Urgent conservation measures of *Caretta caretta* in the Pelagian Islands |
| 1999 | Italy | LIFE99 NAT/IT/006275 | Protection of sea and coastline habitats in SCIs along the Southern Tyrrhenian Sea in Italy |
| 1999 | Portugal | LIFE99 NAT/P/006432 | Project for the conservation of cetaceans in Madeira Archipelago |
| 2000 | Greece | LIFE00 NAT/GR/007248 | The Monk Seal : conservation actions in two Greek NATURA 2000 sites |
| 2000 | Romania | LIFE00 NAT/RO/007194 | Conservation of the dolphins from the Romanian Black Sea waters |
| 2002 | Greece | LIFE02 NAT/GR/008500 | Reduction of mortality of *Caretta caretta* in the Greek seas |
| 2003 | France | LIFE03 NAT/F/000104 | Limitation to the negative interactions between dolphins and human activities |
| 2005 | Greece | LIFE05 NAT/GR/000083 | Monk seal & fisheries: Mitigating the conflict in Greek seas |
| 2005 | Spain | LIFE05 ENV/E/000267 | Benign and environmentally friendly fish processing practices to provide added value and innovative solutions for a responsible and sustainable management of fisheries. |
| 2006 | Italy | LIFE06 NAT/IT/000050 | Urgent conservation measures for biodiversity of Central Mediterranean Sea |
| 2006 | Portugal | LIFE06 NAT/P/000192 | Restoration and Management of Biodiversity in the Marine Park Site Arrábida-Espichel |
| **Building partnerships for the seas** | | | |
| 1996 | Denmark | LIFE96 ENV/DK/000012 | Integrated Cooperation on Sustainable Tourism Development and Recreational Use in the Wadden Sea Area |
| 1998 | Portugal | LIFE98 NAT/P/005275 | Integrated management of coastal and marine zones in the Azores |
| 2000 | Finland | LIFE00 ENV/FIN/000646 | Integrated Management System for the Bothnian Bay |
| 2005 | Latvia | LIFE05 NAT/LV/000100 | Marine protected areas in the Eastern Baltic Sea |

| Start | Country | Number | Title |
|---|---|---|---|
| **Improving environmental quality for our seas** | | | |
| 1995 | France | LIFE95 ENV/F/000782 | Control of the *Caulerpa taxifolia* extension in the Mediterranean Sea |
| 1996 | Third Countries | LIFE96 TCY/INT/08 | Development of oil spill response capabilities of Cyprus, Egypt and Israel |
| 1998 | Greece | LIFE99 ENV/GR/000567 | Demonstration and large scale application of the new magnetic method 'cleanmag' for the clean-up of waterborne oil spills |
| 1998 | Italy | LIFE98 ENV/IT/000079 | BO.FO.PO.LI Port of Leghorn's seabed reclamation |
| 1998 | Netherlands | LIFE98 ENV/NL/000199 | Action to demonstrate the harmful impact of TBT. Effective communication strategies between scientists and policy makers to assist in policy development |
| 1999 | Third Countries | LIFE99 TCY/INT/017 | Development of the national system for preparedness and response to accidental marine pollution in Syria |
| 2000 | Spain | LIFE00 ENV/E/000560 | Integral management of fishing waste in a coastal area : Pilot scheme |
| 2002 | Belgium | LIFE02 ENV/B/000341 | Development of an integrated approach for the removal of tributyltin (TBT) from waterways and harbours |
| 2002 | Denmark | LIFE02 ENV/DK/000151 | Sensor for identification of oil spills from offshore installations |
| 2003 | Netherlands | LIFE03 ENV/NL/000474 | LNG Tanker, Demonstrating the effective and safe use of liquid natural gas as fuel for ship engines for short-sea shipping and inland waterway transport. |
| 2004 | Denmark | LIFE04 ENV/DK/000076 | Oil Spill Identification System for Marine Transport |
| 2006 | Belgium | LIFE06 ENV/B/000362 | Demonstration of a 100% non-toxic hull protection and anti-fouling system contribution to zero emissions to the aquatic environment and saving 3-8 % heavy fuels |
| 2006 | Finland | LIFE06 ENV/FIN/000195 | Controlled Treatment of TBT-Contaminated Dredged Sediments for the Beneficial Use in Infrastructure Applications Case: Aurajoki - Turku |
| 2006 | Germany | LIFE06 ENV/D/000479 | Demonstration of an innovative wind propulsion technology for cargo vessels |

**http://ec.europa.eu/life**

**The LIFE programme's online database features all LIFE projects since 1992, including LIFE-Nature projects specifically addressing marine environment issues. Many of the LIFE-Environment and LIFE-Third Country projects registered are also relevant to the marine environment.**

**Search the database by year, country or keyword, to find information and contact details of successful projects and good practices relevant to your work.**

# Available LIFE publications

## LIFE-Focus brochures

**A number of LIFE publications are available on the LIFE website:**

**LIFE and European forests** (2006 - 68pp. ISBN 92-79-02255-5 - ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/forests/forest_lr.pdf*

**LIFE in the City – Innovative solutions for Europe's urban environment** (2006, 64pp. - ISBN 92-79-02254-7 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/urban/urban_lr.pdf*

**Integrated management of Natura 2000 sites** (2005 - 48 pp. – ISBN 92-79-00388-7) *http://ec.europa.eu/environment/life/infoproducts/managingnatura_highres.pdf*

**LIFE, Natura 2000 and the military** (2005 - 86 pp. – ISBN 92-894-9213-9 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifeandmilitary_en.pdf*

**LIFE for birds - 25 years of the Birds Directive: the contribution of LIFE-Nature projects** (2004 - 48 pp. – ISBN 92-894-7452-1 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifeforbirds_en.pdf*

**The air we breathe - LIFE and the European Union clean air policy** (2004 - 32 pp. – ISBN 92-894-7899-3 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/focusair/lifeair_hr_en.pdf*

**LIFE-Nature: communicating with stakeholders and the general public - Best practice examples for Natura 2000** (2004 - 72 pp. – ISBN 92-894-7898-5 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/naturecommunicating_lowres_en.pdf*

**A cleaner, greener Europe - LIFE and the European Union waste policy** (2004 - 28 pp. – ISBN 92-894-6018-0 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifewaste_en.pdf*

**Alien species and nature conservation in the EU - The role of the LIFE programme** (2004 - 56 pp. – ISBN 92-894-6022-9 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/alienspecies_en.pdf*

**Industrial pollution, European solutions: clean technologies - LIFE and the Directive on integrated pollution prevention and control (IPPC Directive)** (2003 - 32 pp. – ISBN 92-894-6020-2 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/cleantechnologies_en.pdf*

**LIFE and agri-environment supporting Natura 2000 - Experience from the LIFE programme** (2003 - 72 pp. – ISBN 92-894-6023-7 – ISSN N° 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/agrienvironmentreport_en.pdf*

**LIFE for Natura 2000 - 10 years implementing the regulation** (2003 - 108 pp. – ISBN 92-894-4337-5) *http://ec.europa.eu/environment/life/infoproducts/lifepournatura2000_en.pdf*

**A sustainable approach for the environment - LIFE and the Community Eco-Management and Audit Scheme (EMAS)** (2003 - 32 pp. – ISBN 92-894-0543-0) *http://ec.europa.eu/environment/life/infoproducts/emas_en.pdf*

**Water, an essential resource - LIFE and the new European water policy** (2002 - 28 pp. – ISBN 92-894-0538-4) *http://ec.europa.eu/environment/life/infoproducts/water_en.pdf*

**A number of printed copies of certain LIFE publications are available and can be ordered free-of-charge at: *http://ec.europa.eu/environment/env-informa/***

## Other publications

**Best LIFE-Environment Projects 2005-2006** (2006, 40 pp. – ISBN 92-79-02123-0) *http://ec.europa.eu/environment/life/infoproducts/bestlifeenv/bestenv_0506_lr.pdf*

**Best LIFE-Environment Projects 2004-2005** (2005, 44 pp. – ISBN 92-79-00889-7) *http://ec.europa.eu/environment/life/infoproducts/bestlifeenv/bestenv.pdf*

**LIFE-Environment 1992 – 2004 "Demonstrating excellence in environmental innovation"** (2005, 124 pp. – ISBN 92-894-7699-3 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/bilanlife/lifeenv1992_2004_en.pdf*

**LIFE-Environment in Action. 56 new success stories for Europe's environment** (2001 -131 pp. – ISBN 92-894-0272-5) *http://ec.europa.eu/environment/life/infoproducts/successstories2001_en.pdf*

**LIFE-Environment Projects 2006 compilation** (2006, 56 pp.-ISBN 92-79-02786-7) *http://ec.europa.eu/environment/life/infoproducts/lifeenvcompilation_06.pdf*

**LIFE-Nature Projects 2006 compilation** (2006, 67 pp. – ISBN 92-79-02788-3) *http://ec.europa.eu/environment/life/infoproducts/lifenatcompilation_06.pdf*

**LIFE-Third Countries Projects 2006 compilation** (2006, 20 pp. – ISBN 92-79-02787-5) *http://ec.europa.eu/environment/life/infoproducts/lifetcycompilation_06.pdf*

**LIFE-Environment Projects 2005 compilation** (2005, 97 pp.-ISBN 92-79-00104-3) *http://ec.europa.eu/environment/life/infoproducts/lifeenvcompilation_05_lowres.pdf*

**LIFE-Nature Projects 2005 compilation** (2005, 55 pp. – ISBN 92-79-00102-7) *http://ec.europa.eu/environment/life/infoproducts/lifenatcompilation_05_lowres.pdf*

## The programme

**Name** LIFE ("L'Instrument Financier pour l'Environnement" / The financial instrument for the environment)

**Type of intervention** co-financing of actions in favour of the environment in the twenty-five Member States of the European Union, in the candidate countries who are associated to LIFE and in certain third countries bordering the Mediterranean and the Baltic Sea.

LIFE is made up of three thematic components: "LIFE-Nature", "LIFE-Environment" and "LIFE-Third countries".

### Objectives

> with a view to sustainable development in the European Union, contribute to the drawing up, implementation and updating of Community policy and legislation in the area of the environment;
> explore new solutions to environmental problems on a Community scale.

**Beneficiaries** any natural or legal person, provided that the projects financed meet the following general criteria:

> they are of Community interest and make a significant contribution to the general objectives;
> they are carried out by technically and financially sound participants;
> they are feasible in terms of technical proposals, timetable, budget and value for money.

### Types of project

> Eligible for LIFE-Environment are innovative pilot and demonstration projects which bring environment-related and sustainable development considerations together in land management, which promote sustainable water and waste management or which minimise the environmental impact of economic activities, products and services. LIFE-Environment also finances preparatory projects aiming at the development or updating of Community environmental actions, instruments, legislation or policies.
> Eligible for LIFE-Nature are nature conservation projects which contribute to maintaining or restoring natural habitats and/or populations of species in a favourable state of conservation within the meaning of the "Birds" (79/409/EEC) and "Habitats" (92/43/EEC) Community Directives and which contribute to the establishment of the European network of protected areas – NATURA 2000. LIFE-Nature also finances "co-op" projects aiming to develop the exchange of experiences between projects.
> Eligible for LIFE-Third countries are projects which contribute to the establishment of capacities and administrative structures needed in the environmental sector and in the development of environmental policy and action programmes in some countries bordering the Mediterranean and the Baltic Sea.

**Implementation** National authorities in the Member States or third countries send the Commission the proposals of projects to be co-financed (for LIFE-Environment preparatory projects, the applicants send their proposals directly to the Commission). The Commission sets the date for sending the proposals annually. It monitors the projects financed and supports the dissemination of their results. Accompanying measures enable the projects to be monitored on the ground.

**Period covered (LIFE III)** 2000-2006.

**Funds from the Community** approximately EUR 638 million for 2000-2004 and EUR 317 million for 2005-2006.

### Contact

European Commission – Environment Directorate-General
LIFE Unit – BU-9 02/1 – 200 rue de la Loi – B-1049 Brussels – Fax: +32 2 292 17 87
Internet: http://ec.europa.eu/life

European Commission
**Life Focus / LIFE and the marine environment**

KH-76-06-433-EN-C

Publications Office

ISSN 1725-5619

# Appendix 5

**Bibliography**

## General

- **IUCN Marine and Coastal Protected Areas. IUCN, Gland: 370pp. and Kellerher, G. 1999. Guidelines for Marine Protected Areas, IUCN, Gland: 107pp.**

- **IUCN – The World Conservation Union. How is your MPA doing? A Guidebook of Natural and Social Indicators for Evaluating Marine Protected Area Management Effectiveness. Robert S. Pomeroy. John E. Parks. Lani M. Watson. 2004.**
  http://www.panda.org/downloads/marine/mpascompiled.pdf
  **http://panda.org/downloads/marine/bro2005b.pdf**

## MARINE HABITAT TYPES INTERPRETATIONS

References related to different marine habitat types are included in Appendix number 1

- **Boedeker, D., Jochen C. Krause and von Nordheim, H. 2006**. Interpretation, identification and ecological assessment of the NATURA 2000 habitats "sandbank" and "reef". In: von Nordheim et al. (eds.) Progress in Marine Conservation in Europe, NATURA 2000 Sites in German Offshore Waters: chapter 3, 47 - 64.

- Jones, L.A., Hiscock, K, & Connor, D.W. 2000. ***Marine habitat reviews***. ***A summary of ecological requirements and sensitivity characteristics for the conservation and management of marine SACs***. Peterborough, Joint Nature Conservation Committee. (UK Marine SACs Project report.) **http://www.ukmarinesac.org.uk/pdfs/marine-habitats-review.pdf**

## ATLASES

**General :**

- UN Atlas of the Oceans. http://www.oceansatlas.org/

- IOC, IHO, and BODC 2003 "Centenary Edition of the GEBCO Digital Atlas", published on CD-ROM on behalf of the Intergovernmental Oceanographic Commission and the International Hydrographic Organization as part of the General Bathymetric Chart of the Oceans; British Oceanographic Data Centre, Liverpool. See **http://www.bodc.ac.uk/projects/gebco/** and **http://www.ngdc.noaa.gov/mgg/gebco/gebco.html**

- Marine Data Networks in Europe. (operational oceanography, marine geology, ocean geology…) Sea-Search website maintains an overview and relevant web links to these marine data networks in Europe. **http://www.sea-search.net/mdn/content.htm**

- Buck, A L and wright, J. (1995) EC Habitat Directive: a provisional atlas of Annex I habitats and Annex II species. JNCC report., no. 241.

### Habitats:

- **AUGIER H. (1982).** Inventaire et classification des biocénoses marines benthiques de la Méditerranée. Publication du Conseil de l' Europe, Coll. Sauvegarde de la Nature, 25, 59 pages.

- Connor, D.W., Brazier, D.P., Hill, T.O., & Northen, K.O. 1997. ***Marine Nature Conservation Review: marine biotope classification for Britain and Ireland. Vol. 1. Littoral biotopes. Version 97.06***. Joint Nature Conservation Committee Report, No. 229.

- Connor, D.W., Dalkin, M.J., Hill, T.O., Holt, R.H.F., & Sanderson, W.G. 1997. ***Marine Nature Conservation Review: marine biotope classification for Britain and Ireland. Vol. 2. Sublittoral biotopes. Version 97.06***. Joint Nature Conservation Committee Report, No. 230.
- T.J. Holt, E.I. Rees, S.J. Hawkins, R. Seed. 1998. Biogenic Reefs (volume IX). An overview of dynamic and sensitivity characteristics for conservation management of marine SACs. Scottish Association for Marine Science (UK Marine SACs Project). 170 Pages. **http://www.ukmarinesac.org.uk/pdfs/biogreef.pdf**

## Marine Birds

- ***Important marine areas for wintering birds in the Baltic Sea*** (Durinck ***et al.*** 1994) , and
- ***Important bird areas in the Baltic Sea*** (Skov ***et al.*** 2000).
- ***Carboneras & Viada; Towards the identification of Important Bird Areas (IBAs) at sea in Spain. SEO Birdlife 2004***
- Birdlife International. 2004. ***Tracking ocean wanderers: the global distribution of albatrosses and petrels***. BirdLife International, Cambridge.
- Birdlife International. 2005. ***Towards the identification of marine IBAs in the EU: an exploration by the Birds and habitats Directives Task Force***. Unpublished report. BirdLife International, Cambridge.
- Buckland S.T., Anderson D., Burnham K., Laake J., Borchers D. & Thomas L. 2001. ***Introduction to distance sampling: estimating abundance of biological populations***. Oxford University Press, Oxford.
- Cressie N.A.C. 1991. ***Statistics for spatial data***. Wiley-Inter-science, New York.
- Garthe S. & Skov H. Selection of suitable sites for marine protected areas for seabirds: a case study with Special Protection Areas (SPAs) under the EU Birds Directive in the Baltic Sea. Aquatic Conservation:Marine and Freshwater Ecosystems. Submitted.
- Hemson, G., Johnson, P., South, A., Kenward, R., Ripley, R. & McDonald, D. 2005. Are kernels the mustard? Data from global positioning system (GPS) collars suggest problems for kernel home-range analyses with least-squares cross-validation. J. Anim. Ecol. 74: 455-463.
- Kahlert J., Desholm M., Clausager I., & Petersen I.K. 2000. ***Environmental impact assessment of an offshore wind park at Rødsand***. Natural Environment Research Institute, Rønde.
- McSorley C.A., Dunn T.E., Gray C., Reid J.B., Webb A. & Dean B.J. 2005. ***The spatial extent of Manx shearwater Puffinus puffinus evening rafts at Skomer, Rum and Bardsey: Implications for seaward boundary extensions to existing UK qualifying colony Special Protection Areas***. Unpublished JNCC Report, JNCC, Peterborough.
- McSorley C.A., Webb A., Dean B.J. & Reid J.B. 2004. ***Recommendations for the selection UK inshore Special Protection Areas: a methodological evaluation of site selection and definition of the extent of the interest feature using line transect data***. JNCC Report No. 344. JNCC, Peterborough.
- Powell, R.A. 2000. Animal home ranges and territories and home range estimators. In ***Research Techniques in Animal Ecology: Controversies and Consequences*** (eds. L. Boitani & T.K. Fuller), pp.65-110. Columbia University, New York.
- Skov H., Durinck J., Leopold M.F. & Tasker M.L. 1995. ***Important bird areas for seabirds in the North Sea including the Channel and the Kattegat***. BirdLife International, Cambridge .
- Stroud D.A., Chambers D., Cook S., Buxton N., Fraser B., Clement P., Lewis I., McLean I., Baker H. & Whitehead S. 2001. ***The UK SPA network: its scope and content.*** Volumes 1-3. JNCC, Peterborough.
- Webb A. & Durinck J. 1992. Counting birds from ship. In ***Manual for aeroplane and ship surveys of waterfowl and seabirds*** (eds. J. Komdeur, J. Bertelsen & G. Cracknell), pp. 24-37. IWRB Special Publication No. 19, Slimbridge.
- Webb A., McSorley C.A., Dean B.J., & Reid J.B.. 2004a. ***Modelling the distribution and abundance of black scoter*** Melanitta nigra ***in Carmarthen Bay in winter 2001/02: a method for identifying potential boundaries for a marine Special Protection Area.*** JNCC Report No. 330. JNCC, Peterborough.

- Webb A., McSorley C.A., Dean B.J., Reid J.B., Cranswick P.A., Smith L. & Hall C. 2004b. ***An assessment of the numbers and distributions of inshore aggregations of waterbirds using Liverpool Bay during the non-breeding season in support of possible SPA identification.*** Unpublished JNCC Report, JNCC, Peterborough.
- Webb A., McSorley C.A., Dean B.J. & Reid J.B. 2004c. ***Recommendations for the selection of, and boundary options for, an SPA in Liverpool Bay***. Unpublished JNCC Report, JNCC, Peterborough.

## Marine species

- ACCOBAMS. Cetacean species occurring in the Mediterranean and Black Seas. **http://www.accobams.org/species/index.htm**
- Birkun A Jr andKrivokhizhin S. 1998. **Distribution of small cetaceans in the northern part of the BlackSea**, **a preliminary atlas.** Volume presenting the stranding database and the stranding distribution maps (1989-1996 data) according to the CIESM protocol. 67 pages
- Cetaceans of the Mediterranean and Black Seas: State of Knowledge and Conservation Strategies SECTION 3. Cetacean Species Occurring in the Mediterranean and Black Seas. Giuseppe Notarbartolo di Sciara. Istituto Centrale per la Ricerca Applicata al Mare, via di Casalotti 300, 00166 Roma, Italy **http://www.accobams.org/index_science.htm**
- Frantzis A., Alexiadou P., Paximadis G., Politi E., Gannier A. & Corsini-Foka M., 2003. Current knowledge of the cetacean fauna of the Greek Seas. J. Cetacean Research Management. 5(3): 219-232.
- Hammond, PS; Benke,H; Berggren, DL; Borchers, D L; Buckland, ST; Collet, A; Heide-Jorgensen, MP; Heimlich-Boran, S; Hiby, Ar; Leopold, MF; Oiein,N. (1995) Distribution and abundance of the harbour porpoise and other small cetaceans in the North Sea and adjacent waters. EC project LIFE 98-2/UK/027. Final report
- Hoyt, E. 2005. Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation. Earthscan, London. 512pp. ISBN: 1844070638 (hardback) and 1844070646 (paperback).
- ICES (1996) Report of the study group on seals and small cetaceans in European saes. ICES, Copenhagen. (ICES CM 1996/N:1)
- Reid JR, Evans PGH and Northridge SP 2003 Atlas of cetacean distribution in north-west European waters. Joint Nature Conservation Committee, Peterborough, UK, 75pp. **http://www.jncc.gov.uk/PDF/CetaceansAtlas_web.pdf**
- Rice D.W. 1998. Marine mammals of the world: systemat-ics and distribution. Special Publication Number 4, The Society for Marine Mammalogy. 231 p.
- Wilson, B; Hammond, PS; Thompson, PM. (1999) Estimating size and assessing trends in a coastal bottlenose dolphin population. Ecological Applications. 9: 288-300.
- Herr H, Gilles A, Scheidat M, Siebert U (2005) Distribution of harbour porpoise (***Phocoena phocoena***) in the German North Sea in relation to density of sea traffic. ACSCOBANS 12/Doc. 8

## BIRDS FOCUS DOCUMENTS

- Brereton T. M., Weir C., Hobbs M. and Williams A. D. 2003 A low-cost, year-round seabird monitoring programme in the English channel and Bay of Biscay: preliminary results 1995-2001. Ornis Hungarica 12-13: 105-113.
- Durinck J. et al. 1994. Important marine areas for wintering birds in the Baltic Sea. Ornis Consult, Copenhagen.

- Fishpool L.D.C. & Evans M.I. 2001. Important Bird Areas in Africa and Associated Islands. Priority Sites for Conservation. (BirdLife Conservation Series No. 11) Pisces Publications and BirdLife International, Newbury and Cambridge.

- Heath M. & Evans M.I. 2000., Important Bird Areas in Europe. Priority Sites for Conservation. Vol. I-II. (BirdLife Conservation Series No. 8) BirdLife International, Cambridge. [referred to as "IBA2000"]

- Huggett D. 2001. Identification and demarcation of marine IBAs and their relationship to the Birds Directive. In H. von Nordheim & D. Boedeker, Application of NATURA 2000 in the Marine Environment. Workshop at the International Academy for Nature Conservation (INA) on the Isle of Vilm (Germany) from 27 June to 1 July 2001, p. 56-62. Bundesamt für Naturschutz, Bonn. [available at http://www.noordzee.nl/natuur/bfn-skripten-1.pdf]

- [similar papers were presented to the Committee of North Sea Officials (CONSSO) in Oslo, September 2001 and to the Biodiversity Committee (BDC) of the OSPAR Convention in London, November 2001.]

- Mitchell, P.I., Newton, S.F., Ratcliffe, N. & Dunn, T.E. Seabird Populations of Britain and Ireland (2004) Summarises the findings of Seabird 2000, a national initative to census all the breeding seabirds in Britain and Ireland which incorporated the work of over 400 individuals counting seabird numbers at coastal and inland sites over 15 years.

- Johnston C.M., Turnbull C.G. & Tasker M.L. 2002. Natura 2000 in UK Waters: Advice to support the implementation of the EC Habitats and Birds Directives in UK offshore waters. (JNCC Report 325) JNCC, Peterborough. [available at http://www.jncc.gov.uk/marine/offnat]

- Pollock, C.M., Reid, J.B., Webb, A. & Tasker, M.L. (1997) The distribution of seabirds and cetaceans in the waters around Ireland. JNCC

- Pollock C.M, Mavor R,Weir C.R, Reid A, White R.W, Tasker M.L, Webb A, & Reid J.B. (2000) The distribution of seabirds and marine mammals in the Atlantic Frontier, north and west of Scotland. JNCC

- RSPB 2000. The development of boundary selection criteria for the extension of breeding seabird special protection areas into the marine environment. Discussion paper presented by BirdLife International to the Meeting of the Biodiversity Committee (BDC), OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic, Vlissingen, 20-24 november 2000.

- Skov H., Durinck J., Leopold M.F. & Tasker M.L. 1995. Important Bird Areas for seabirds in the North Sea. BirdLife International, Cambridge. [Ornis Consult, Copenhagen.]

- Skov H. et al. 2000. Inventory of inshore and marine Important Bird Areas in the Baltic Sea. BirdLife International, Cambridge.[Ornis Consult, Copenhagen.]

- Stone, C.J., Webb, A., Barton, C., Ratcliffe, N., Reed, T.C., Tasker, M.L.,

- Camphuysen, C.J. and Pienkowski, M.W. (1995) An atlas of seabird distribution in north-west European water. JNCC, Peterborough.

- Tucker G.M. & Evans M.I. 1997. Habitats for Birds in Europe. A Conservation Strategy for the Wider Environment. (BirdLife Conservation Series No. 6) BirdLife International, Cambridge.

- Turnbull C., Audcent G., Baker H. & Johnston C. 2002. Natura 2000 in Offshore Waters: Note of the European Seminar on 17-18 June 2002 at Gatwick, UK, on the Implementation of the EC Habitats and Birds Directives in offshore waters and Concluding Principles. JNCC, Peterborough. [available at http://www.jncc.gov.uk/marine/offnat/pdf/meeting_0602.pdf]

## Other Species focus Documents

- D. C. Gillespie and O. Chappell (2002). An automatic system for detecting and classifying the vocalisations of harbour porpoises. Bioacoustics 13:37-61.

- M-P. Heide-Jørgensen, A. Mosbech, J. Teilmann, H. Benke, and W. Schultz (1992). Harbour porpoise (Phocoena phocoena) densities obtained from aerial surveys north of Fyn and in the Bay of Kiel. Ophelia 35 (2):133-146.

- M-P. Heide-Jørgensen, J. Teilmann, H. Benke, and J. Wulf (1993). Abundance and distribution of harbour porpoises Phocoena phocoena in selected areas of the western Baltic and the North Sea. Helgoländ.Meeresuntersuch. 47:335-346.

- C. C. Kinze, T. Jensen, and R. Skov. Focus på hvaler i Danmark 2000-2002 (2003) Biological Papers No. 2. S. Tougaard (ed.) Esbjerg, Denmark: Fisheries and Maritime Museum.

- P. T. Madsen, M. Wahlberg, J. Tougaard, K. Lucke, and P. L. Tyack. Wind turbine underwater noise and marine mammals: Implications of current knowledge and data needs. Mar.Ecol.Prog.Ser. in press, 2005.

## LOCATING AND SELECTING MARINE NATURA2000 SITES.

- Bäck S, Ekebom J, Kangas P, Kautsky H, Mäkinen A, and Rönnberg O 1996 Mapping and monitoring of phytobenthic biodiversity in the northern Baltic Sea – background, methods and recommendations. Tema Nord 1996: 559, 91pp

- Bäck S, Ekebom J, Johansson C, Kangas P, Kautsky H, Krause-Jensen D, Mäkinen A, and Nielsen K 1998 Operative methods for mapping and monitoring phytobenthic zone biodiversity in the Baltic Sea. II report of the PHYTOBIOS project Tema Nord 1998

- Dahl K et al 2004 Tools to assess the conservation status of marine Annex I habitats in Special Areas of Conservation. Phase I: Identification of potential indicators and available data. NERI Technical Report No 488 http://www.dmu.dk/1_Viden/2_Publikationer/3_Fagrapporter/rapporter/FR488.pdf

- Davies J, Baxter J, Bradley M, Connor D, Khan J, Murray E, Sanderson W, Turnbull C and Vincent M. 2001 Natura 2000: Marine Monitoring Handbook. UK Marine SACs Project, Joint Nature Conservation Committee, Peterborough. ISBN 1 86107 5243. http://www.jncc.gov.uk/page-2430

- EC (2001) Interpretation note: Selection of sites for the species of Annex II Phocoena Phocaea. Habitats Committee, Hab. 01/05.

- Garthe S. and Skov H. 2004 Selection of suitable sites for marine protected areas for seabirds: a case study with Special Protection Areas (SPAs) under the EU Birds Directive in the Baltic Sea. Biological Conservation

- Hammond PS, Berggren P, Benke H, Borchers DL, Buckland ST, Collet A, Heide-Jørgensen MP, Heimlich, S, Hiby AR, Leopold MF and Øien N 2002 Abundance of harbour porpoise and other cetaceans in the North Sea and adjacent waters. Journal of Applied Ecology 39, 361-376.

- Hopkins JJ & Buck AL 1995 The Habitats Directive Atlantic Biogeographical Region. Report of Atlantic Biogeographical Region Workshop, Edinburgh, Scotland, 13-14th October 1994. Joint Nature Conservation Committee Report 247, Peterborough, 31pp.

- ICES 2004 ICES response to EC request for information and advice about appropriate ecoregions for the implementation of an ecosystem approach in European waters. Paper for Rotterdam Stakeholder meeting on the European Marine Strategy, November 2004.

- IOC, IHO, and BODC 2003 "Centenary Edition of the GEBCO Digital Atlas", published on CD-ROM on behalf of the Intergovernmental Oceanographic Commission and the International Hydrographic Organization as part of the General Bathymetric Chart of the Oceans; British Oceanographic Data Centre, Liverpool. See http://www.bodc.ac.uk/projects/gebco/ and http://www.ngdc.noaa.gov/mgg/gebco/gebco.html

- Joint Nature Conservation Committee 1999 The Birds Directive: selection guidelines for Special Protection Areas. JNCC, Peterborough, UK.

- Krause Jochen C., Dieter Boedeker, Ina Backhausen, Kathrin Heinicke, Annette Groß and Henning von Nordheim 2006. Rationale behind site selection for the NATURA 2000 network in the German EEZ. In: von Nordheim et al. (eds.) Progress in Marine Conservation in Europe, NATURA 2000 Sites in German Offshore Waters: chapter 4, 65 - 96.

- Matthiopoulos, J., McConnell, B.J., Duck, C. & Fedak, M.A. (2004) Using satellite telemetry and aerial counts to estmate space use by grey seals around the British Isles. Journal of Applied Ecology, 41.

- McConnell BJ, Fedak MA, Lovell P and Hammond PS. 1999 Movements and foraging areas of grey seals in the North Sea. Journal of Applied Ecology, 36, 573-590.

- McLeod CR, Yeo M, Brown AE, Burn AJ, Hopkins JJ, & Way SF (Eds) 2002 The Habitats Directive: selection of Special Areas of Conservation in the UK 2nd Edition. Joint Nature Conservation Committee, Peterborough UK. (see www.jncc.gov.uk/SACselection)

- von Nordheim Henning, Dieter Boedeker & Jochen C. Krause (eds) 2006: Progress in Marine Conservation in Europe, NATURA 2000 Sites in German Offshore Waters. 263pp.

- Reid JR, Evans PGH and Northridge SP 2003 Atlas of cetacean distribution in north-west European waters. Joint Nature Conservation Committee, Peterborough, UK, 75pp.

- Scheidat M, Kock K-H and Siebert U in press Summer distribution of harbour porpoise (Phocoena phocoena) in the German North and Baltic Sea. Journal of Cetacean Research and Management.

- Skov, H., Durinck, J., Leopold M.F. and Tasker, M.L. 1995. Important bird areas for seabirds in the North Sea including the Channel and the Kattegat. Birdlife International, Cambridge.

- Skov, H., Durinck, J., Leopold M.F. and Tasker, M.L. in prep. A quantitative method for evaluating the importance of marine areas for the conservation of birds. Submitted to Conservation Biology

- Teilmann et al. 2004 NEED FULL REFERENCE Germany

- Vincent MA, Atkins SM, Lumb CM, Golding N, Lieberknecht LM and Webster M 2004 Marine Nature Conservation and sustainable development – the Irish Sea Pilot. Report to Defra by the Joint Nature Conservation Committee, Peterborough, UK. 172pp. (http://www.jncc.gov.uk/marine/irishsea_pilot/pdfs/finalreports_2004/pilot/default.htm)

## MANAGEMENT OF MARINE PROTECTED AREAS

- IUCN Marine and Coastal Protected Areas. IUCN, Gland: 370pp. and Kellerher, G. 1999. Guidelines for Marine Protected Areas, IUCN, Gland: 107pp.

- IUCN – The World Conservation Union. How is your MPA doing? A Guidebook of Natural and Social Indicators for Evaluating Marine Protected Area Management Effectiveness. Robert S. Pomeroy. John E. Parks. Lani M. Watson. 2004. **http://www.panda.org/downloads/marine/mpascompiled.pdf** **http://panda.org/downloads/marine/bro2005b.pdf**

- Managing Across Boundaries. The Dogger Bank – a future international marine protected area.Sebastian UNGER. WWF Germany, Marine & Coastal Division, Phone:+49 421 65846-22, Fax: +49 421 65846-12 **http://www.ngo.grida.no/wwfneap/Projects/Reports/Transboundary_MPAs.pdf**

- Technic of Matrix : De Groot R.S., M.A. Wilson & R.M.J. Boumans 2002. A typology for the classification, description and evaluation of ecosystemfunctions, goods and services. Ecol. Econ 41: 393-408

## Noise

ANDREW, R.K.; HOWE, B.M.; MERCER, J.A. & DZIECIUCH, M.A. 2002: ***Ocean ambient sound: Comparing the 1960s with the 1990 for a receiver off the California coast***. – Acoustics Research Letters Online 3(2): 65-70.

**http://scitation.aip.org/getabs/servlet/GetabsServlet?prog=normal&id=ARLOFJ000003000002000065000001&idtype=cvips&gifs=Yes**

BALCOMB, K.C. 2001: ***Letter to the Navy. c/o Mr. J.S. Johnson, Program Manager for SURTASS LFA Sonar – OEIS/EIS, US-Navy, dated 23 February 2001***.
**http://www.oceanmammalinst.org/kenbalcombletter.htm** ,
**http://www.whaleresearch.com/news/balcomblettertonavy.shtml**

BALCOMB, K.C. & CLARIDGE, D.E. 2001: ***A mass stranding of cetaceans caused by naval sonar in the Bahamas***. – Bahamas Journal of Science, 8(2): 2-12.

BALCOMB, K.C. & ORCA NETWORK 2003:

**http://orcanetwork.org/news/shoup.html** ; **http://www.komotv.com/stories/26542.htm** ;

BALCOMB, K.C. 2003: ***Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues"***. – 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

CENTER FOR BIOLOGICAL DIVERSITY 2002: ***High intensity airgun blasts linked to whale deaths in the Gulf of California*** – Letter of Intent to Sue – Lawsuit.
**http://www.biologicaldiversity.org/swcbd/species/beaked/beak11.pdf** ;
**http://www.biologicaldiversity.org/swcbd/species/beaked/mmpacompp.pdf** .

**BOWLES, A. E.; SMULTEA, M.; WURSIG, B.; DEMASTER, D. P. & PALKA, D. 1994:** ***Relative abundance and behaviour of marine mammals exposed to transmissions from the Heard Island Feasibility Test.* – Journal of the Acoustical Society of America, 93, 2469–2484.**

BUCK, E. H. 1995: ***CRS Report for Congress 95-603 ENR***. – Congressional Research Service Reports. **http://cnie.org/NLE/CRSreports/Marine/mar-2.cfm**

D'AMICO, A. (ed.). 1998: ***Summary Record, SACLANTCEN Bioacoustics Panel***, La Spezia, Italy, 15 June 1998. – SACLANTCEN M-133 with Annex A-CCC, Unclassified.

DEGOLLADA, E.; ARBELLO, M.; ANDRÉ, M.; BLANCO, A. & FERNÁNDEZ, A. 2003: ***Preliminary ear analysis report of the 2002 Canary Islands Ziphius mass stranding***. – European Cetacean Society (ECS) 17th Annual Conference, Gran Canaria, 9-13 March 2003.

DINTER, W.P. 2004: ***Auswirkungen von anthropogenem Unterwasserschall auf Meeressäugetiere (Impacts of Anthropogenic Water-Bome Noise on Marine Mammals)***. – pp. 115-127 in: Proceedings zum 13. Symposium „Aktuelle Probleme der Meeresumwelt (Current problems of the marine environment) 3.-4. Juni 2003", BSH Hamburg, im Auftrag des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit.

ECFSO, EUROPEAN COALITION FOR SILENT OCEANS 2003: ***Petition for Action on the Use of High-Intensity Active Sonar.*** **http://www.oceanmammalinst.org/epp/ep_petition061303.htm**

ECOUS 2003: ***Symposium "Environmental Consequences of Underwater Sound (ECOUS)***", San Antonio, Texas 12-16 May 2003, U.S. Office of Naval Research-ONR, Science and Technology, Human Systems.

ECS/COUNCIL OF THE EUROPEAN CETACEAN SOCIETY 2003: ***European Cetacean Society Statement on Marine Mammals and Sound***. **HTTP://WWW.BROEKEMAWEB.NL/ECS/ECS-SOUND-STATEMENT.HTM**

FERNÁNDEZ, A. 2004: ***Pathological findings in stranded beaked whales during the naval military manoeuvres near the Canary Islands***. – pp. 37-40 in: EVANS, P.G.H. & MILLER, L.A. (eds.): European Cetacean Society 17th Annual Conference. Proceedings of the workshop on Active Sonar and Cetaceans. Las Palmas, 8.03.2003. – ECS Newsletter No. 42 - Special Issue Feb. 2004.

FRANTZIS, A. 1998: ***Does acoustic testing strand whales?*** – Nature (Lond.), 392: 29.

FRANTZIS, A. 2004: ***The first mass stranding that was associated with the use of active sonar (Kyparissiakos Gulf, Greece, 1996)***. – pp. 14-20 in: EVANS, P.G.H. & MILLER, L.A. (eds.): European Cetacean Society 17th Annual Conference. Proceedings of the workshop on Active Sonar and Cetaceans. Las Palmas, 8.03.2003. – ECS Newsletter No. 42 - Special Issue Feb. 2004.

FRANTZIS A. & CEBRIAN, D. 1999: ***A rare, atypical mass stranding of Cuvier's beaked whales. Cause and implications for the species biology***. – In: European Research on Cetaceans - 12**.** Proc. 12th Ann. Conf. ECS, Monaco, 20-24 January 1998, pp. 332-335.

FREITAS, L. 2004: ***The stranding of three Cuvier's Beaked Whales Ziphius cavirostris in Madeira Archipelago – May 2000***. – pp. 28-32 in: EVANS, P.G.H. & MILLER, L.A. (eds.): European Cetacean Society 17th Annual Conference. Proceedings of the workshop on Active Sonar and Cetaceans. Las Palmas, 8.03.2003. – ECS Newsletter No. 42 - Special Issue Feb. 2004.

GENTRY, R.L. 2004: ***Mitigation measures for use with military sonar***. – pp. 66-69 in: EVANS, P.G.H. & MILLER, L.A. (eds.): European Cetacean Society 17th Annual Conference. Proceedings of the workshop on Active Sonar and Cetaceans. Las Palmas, 8.03.2003. – ECS Newsletter No. 42 - Special Issue Feb. 2004.

HILDEBRAND, J. 2003: ***Marine Mammals and Sound***. – Report CA 92093-0205 prepared for the Marine Mammal Commission. Scripps Institution of Oceanography, University of California San Diego, LA Jolla, CA.

InterMARGINS Newsletter No.2, June 2003: ***Marine mammals and ocean acoustics: still a whale of a problem?*** pp 3-4. **HTTP://WWW.INTERMARGINS.ORG/DOWNLOADS/NEWSLETTER2.PDF**

IRISH WHALE AND DOLPHIN GROUP, IWDG (2003)
**HTTP://WWW.IWDG.IE/SPECIES_PROFILES.ASP?SPECIESID=2114**
**HTTP://WWW.IWDG.IE/STRANDINGS_PHOTOS.ASP?ID=2163**
**HTTP://WWW.IWDG.IE/STRANDINGS_PHOTOS.ASP?ID=1959**

IWC, International Whaling Commission 2001: ***Marine Mammal Program of the National Museum of Natural History at the Smithsonian Institution, Historical Mass Mortalities of Ziphiids (Apr. 6, 2000)***. – Report of the Scientific Committee of the International Whaling Commission (raw data on beaked whale strandings and multispecies beaked whale strandings).

JEPSON, P.D.; ARBELO, M.; DEAVILLE, R.; PATTERSON, I.A.P.; CASTRO, P.; BAKER, J.R.; DEGOLLADA, E.; ROSS, H.M.; HERRÁEZ, P.; POCKNELL, A.M.; RODRÍGUEZ, F.; HOWIE, F.E.; ESPINOSA, A.; REID, R.J.; JABER, J.R.; MARTIN, V.; CUNNINGHAM, A.A.; FERNÁNDEZ, A. 2003: ***Gas-bubble lesions in stranded cetaceans. Was sonar responsible for a spate of whale deaths after an Atlantic military exercise?*** – NATURE, Vol. 425, 9 October 2003, pp 575-576.

MALAKOFF, D. 2002: ***Suit ties whale deaths to research cruise***. – Science 298:722-723.

MARTÍN, V.; SERVIDIO, A. & GARCÍA, S. 2004: ***Mass strandings of Beaked Whales in the Canary Islands***. – pp. 33-36 in: EVANS, P.G.H. & MILLER, L.A. (eds.): European Cetacean Society 17th Annual Conference. Proceedings of the workshop on Active Sonar and Cetaceans. Las Palmas, 8.03.2003. – ECS Newsletter No. 42 - Special Issue Feb. 2004.

MCCARTHY, E. & MILLER, J.H. 2002: ***Is anthropogenic sound in the ocean increasing?*** – Journal of the Acoustical Society of America 112(5):2262.

MILLER, J.H. 2003: ***Physics of Sound in the Sea***. - Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues". 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

NIEUKIRK, S.L.; MELLINGER, D.K.; HEIMLICH, S.L.; DZIAK, R.P.; HAXEL, J.H.; LAU, T.K.A.; & FOX, C.G. 2003 : ***Seismic airgun sounds recorded on moored hydrophones in the Mid-Atlantic and eastern tropical Pacific Oceans***. – 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

NOAA & US-NAVY (2001): ***Joint interim report Bahamas marine mammals stranding event of 15-16 March 2000***. – U.S. Department of Commerce, NOAA, NMFS, US-Navy.
**http://www.nmfs.noaa.gov/prot_res/overview/Interim_Bahamas_Report.pdf**

NORMAN, S. ; MCLELLAN, B.; PABST, A.; KETTEN, D.; RAVERTY, S.; FLEETWOOD, M.; GAYDOS, J.K.; JEFFRIES, S.; COX, T.; HANSON, B.; NORBERG, B.; BARRE, L.; LAMBOURN, D. & CRAMER, S. 2004: ***Multidisciplinary Investigation of Harbour Porpoises (Phocoena phocoena) Stranded in Washington State from 2 May-2 June 2003 Coinciding with the Mid-Range Sonar Exercises of the USS Shoup. Preliminary Report, February 2004***.

NMFS 2002: U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS): Final rule Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar. 50 CFR Part 216, Docket No. 990927266-2137-03; I.D. 072699A, RIN 0648-AM62. **http://www.manyrooms.net/fedreglfafinalrule.html**

Ocean Studies Board – OSB 2003: ***Ocean Noise and Marine Mammals***. – National Academies Press, Washington D.C. 192 pp.

PMEL-NOAA (Pacific Marine Environmental Laboratory - National Oceanic & Atmospheric Administration) 2001: ***http://www.pmel.noaa.gov/vents/acoustics/env-noise/airguns.html ;***

***http://oceanexplorer.noaa.gov/explorations/sound01/background/seasounds/seasounds.html#Anchor-1515***

REYNOLDS, J./Natural Resources Defence Council (NRDC) 2003: ***Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues"***. – 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

ROSE, N./Humane Society of the United States (HSUS) 2001: ***Interpreting research results: Government regulation of anthropogenic noise sources***. – Journal of the Acoustical Society of America, November 2001, Volume 110, No. 5, Pt. 2 of 2, p. 2714.
**http://files.hsus.org/web-files/PDF/ASA_presentation.pdf**

ROSE, N./Humane Society of the United States (HSUS) 2003: ***Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues"***. – 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

ROSSITER, W. 2003: ***Sonar Kills Whales, So What?*** – Cetacean Society International, Whales Alive! Vol. XII No. 3, July 2003. **http://csiwhalesalive.org/csi03303.html**

ROWLES, T. 2003: ***Presentation on "Atypical mass stranding incidents – Bahamas case***". – European Cetacean Society 17th Annual Conference. Workshop on Active Sonar and Cetaceans. Las Palmas, Gran Canaria, 8.03.2003.

SIMMONDS, M. & DOLMAN, S. 1999: ***A note on the vulnerability of cetacean to acoustic disturbance***. – International Whaling Commission meeting, IWC paper 51/E 15.

SIMMONDS, M.P. & LOPEZ-JURADO, L.F. (1991): ***Whales and the military***. Nature (London), 351: 448.

STOP LFAS WORLDWIDE NETWORK (2002): ***http://manyrooms.net/fishattorney.html ; http://www.manyrooms.net/AUV_.html***

THE PUBLIC CAUSE NETWORK (2001): ***'Loud' SONARs: Questioning Their Effectiveness and Necessity, Exploring Their Impact on Marine Life and Humans – Sonar Incidents.***
**http://www.thepubliccause.net/LoudSONARS6.html**

TORTONESE, E. 1963: ***Insolita scomparsade cetacei (Ziphius cavirostris G. Cuv.) nel Golfo di Genoa***. – Natura 54:120-122.

TYACK, P. 2003: ***Behavioral responses of marine mammals to noise/sound, how scientists are measuring these effects/responses, and interpreting the biological significance of these behavior changes"***. - Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues". 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

URICK, R.J. 1983: ***Principles of Underwater Sound***, 3rd ed. – New York: McGraw-Hill.

VAN BREE, P.J.H. & KRISTENSEN, I. 1974: ***On the intriguing stranding of four Cuvier's beaked whales, Ziphius cavirostris G. Cuvier, 1823, on the Lesser Antillean Island of Bonaire***. – Bijdragen tot de Dierkunde, 44(2) pp. 235-238.

VONK R. & MARTÍN-MARTEL V. 1989: ***Goose-beaked whales Ziphius cavirostris mass stranding in the Canary Islands***. – Proceedings of the 3rd annual conference of the European Cetacean Society, La Rochelle (France) 24-26 February 1989:73-77.

WDCS, WHALE AND DOLPHIN CONSERVATION SOCIETY (2002): ***http://www.wdcs-de.org/dan/de-publishing.nsf/(allweb)/6EF4E749295EE178C1256CB6007EB81E?opendocument***

WEILGART, L. 2002: ***The threat of underwater noise on whales: management in light of scientific limitations***. – Conference of Impact of Acoustics on Marine Organisms. Berlin, 17-19 June 2002.

WEILGART, L. 2003: ***LFA Sonar and Marine Mammals: Scientific Limitations, Credibility, and Management***. – European Cetacean Society (ECS) 17th Annual Conference, Gran Canaria, 9-13 March 2003.

WHITEHEAD, H. 2003 a: ***Learning from the LFA fiasco: Whither the credibility of marine mammal bioacoustics?*** – Symposium "Environmental Consequences of Underwater Sound (ECOUS)", San Antonio, Texas 12-16 May 2003.

WHITEHEAD, H. 2003 b: ***Panel discussion "The Science Behind Noise and Marine Mammals: An update and discussion of the issues"***. – 15th Biennial Conference on the Biology of Marine Mammals, Greensboro N.C. USA, December 14-19, 2003.

## Gravel extraction

HERRMANN C., KRAUSE J.C., TSOUPIKOVA N. & HANSEN K. (1999): Marine Sediment Extraction in the Baltc Sea – Status Report. Baltic Sea Environment Proceedings, No. 76.

ICES WG EXT (EDS.) (2001): Effects of Extraction of Marine Sediments on the Marine Ecosystem. ICES Cooperative Research Report No. 247.

## Darwin Mounds

European Habitats Directive 92/43/EEC: Darwin Mounds - candidate Special Area of Conservation. DEFRA. Sep.2003. **http://www.defra.gov.uk/corporate/consult/darwin-mounds/letter.htm**

WWF. The Darwin Mounds. Sep2001. Oct 2002.
**http://www.wwf.org.uk/filelibrary/pdf/darwin_mounds.pdf**

WWF Fact sheet. Coral reefs threatened off Britain. Oct.2001.
**http://www.ngo.grida.no/wwfneap/Projects/Reports/Darwin_Mounds_Facts.pdf**

JUDGMENT OF THE COURT (Third Chamber)

11 April 2013 (*)

(Environment – Directive 92/43/EEC – Article 6 – Conservation of natural habitats – Special areas of conservation – Assessment of the implications for a protected site of a plan or project – Criteria to be applied when assessing the likelihood that such a plan or project will adversely affect the integrity of the site concerned – Lough Corrib site – N6 Galway City Outer Bypass road scheme)

In Case C-258/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 13 May 2011, received at the Court on 26 May 2011, in the proceedings

**Peter Sweetman,**

**Ireland,**

**Attorney General,**

**Minister for the Environment, Heritage and Local Government**

v

**An Bord Pleanála,**

notice parties:

**Galway County Council,**

**Galway City Council,**

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as the President of the Third Chamber, K. Lenaerts, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

– Mr Sweetman, by B. Harrington, Solicitor, and R. Lyons SC,

– Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government, by D. O'Hagan and G. Simons, acting as Agents, and M. Gray BL,

– An Bord Pleanála, by A. Doyle and O. Doyle, Solicitors, and N. Butler SC,

– Galway County Council and Galway City Council, by V. Raine and A. Casey, acting as Agents, E. Keane SC and B. Kennedy BL,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the United Kingdom Government, by H. Walker, acting as Agent, and K. Smith, Barrister,

– the European Commission, by S. Petrova and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2012,

gives the following

**Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

2 The request has been made in proceedings between (i) Mr Sweetman, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government and (ii) An Bord Pleanála (the Irish Planning Board), supported by Galway County Council and Galway City Council, concerning An Bord Pleanála's decision to grant development consent for the N6 Galway City Outer Bypass road scheme.

**Legal context**

*European Union law*

3 The third recital in the preamble to the Habitats Directive states:

'… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

4 Article 1(d), (e), (k) and (l) of the Habitats Directive provide:

'For the purpose of this Directive:

…

(d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

– its natural range and areas it covers within that range are stable or increasing, and

– the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

– the conservation status of its typical species is favourable as defined in (i);

...

(k) *site of Community importance* ["SCI"] means a site which, in the biogeographical region or regions to which is belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

5 Article 2 of the Habitats Directive is worded as follows:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

6 Article 3(1) of the Habitats Directive states:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network … shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].'

7 Article 6(2) to (4) of the Habitats Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Annex I to the Habitats Directive, entitled 'Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation', designates '[l]imestone pavements' as a priority habitat type, under code 8240.

*Irish law*

9 The European Communities (Natural Habitats) Regulations, 1997, in the version applicable at the material time ('the 1997 Regulations'), implement the obligations of the Habitats Directive in Irish law.

10 Regulation 30 of the 1997 Regulations, which transposed the requirements of Article 6 of the Habitats Directive, provides:

'(1) Where a proposed road development in respect of which an application for the approval of the [competent authority] has been made in accordance with section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the [competent authority] shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

(2) An environmental impact assessment as required under subsection (2) of section 51 of the Roads Act, 1993, in respect of a proposed road development referred to in paragraph (1) shall be an appropriate assessment for the purposes of this Regulation.

(3) [The competent authority] shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.

(4) In considering whether the proposed road development will adversely affect the integrity of the European site concerned, the [competent authority] shall have regard to the manner in which the proposed development is being carried out or to any conditions or restrictions subject to which the approval is given.

(5) [The competent authority] may, notwithstanding a negative assessment and where [it] is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

(6) (a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be –

(i) those relating to human health or public safety,

(ii) beneficial consequences of primary importance for the environment, or

(iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

11 By decision of 20 November 2008, An Bord Pleanála decided to grant development consent for the N6 Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI. Following an enlargement of the extent of the SCI, it hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types, including karstic limestone pavement, the specific protected habitat forming the subject-matter of the main proceedings.

12 The road scheme involves the permanent loss within the Lough Corrib SCI of approximately 1.47 hectares of that limestone pavement. Those 1.47 hectares will be lost from an area which was described by An Bord Pleanála's inspector as constituting a 'distinct sub-area and an area having the particular characteristic of possessing substantial areas of a priority habitat', and which contains a total of 85 hectares of limestone pavement. That surface of 85 hectares itself forms part of a total of 270 hectares of such limestone pavement – which constitutes a priority habitat type referred to in Annex I to the Habitats Directive – in the entire SCI.

13 At the time when An Bord Pleanála's decision was taken, that area had already been included as a potential SCI on a list of sites transmitted by Ireland to the Commission. The extended Lough Corrib site was formally classified as an SCI by a Commission decision of 12 December 2008. According to the referring court, although the extended Lough Corrib site was not formally classified by the Commission as an SCI before that date, An Bord Pleanála was required under national law to apply legal protections equivalent to those under Article 6(2) to (4) of the Habitats Directive to that site from December 2006.

14 In its decision of 20 November 2008, An Bord Pleanála stated, inter alia, that 'it is considered that the part of the road development being approved would be an appropriate solution to the identified traffic needs of the city and surrounding area … and, while having a localised severe impact on the Lough Corrib candidate Special Area of Conservation, would not adversely affect the integrity of this candidate special Area of Conservation. The development, hereby approved, would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area.'

15 Mr Sweetman applied to the High Court for leave to issue judicial review proceedings against, in particular, An Bord Pleanála's decision of 20 November 2008. He submitted that An Bord Pleanála had erred in its interpretation of Article 6 of the Habitats Directive in concluding, in particular, that the effect of the road scheme on the Lough Corrib protected site would not constitute an 'adverse effect on the integrity of the site'.

16 By decision of 9 October 2009, the High Court dismissed the application for leave to issue judicial review proceedings and upheld An Bord Pleanála's decision. On 6 November 2009 Mr Sweetman was granted leave to appeal to the Supreme Court against the decision of 9 October 2009.

17 The Supreme Court observes that it has doubts as to when and in what circumstances, where an appropriate assessment of a plan or project is carried out pursuant to Article

6(3) of the Habitats Directive, such a plan or project is likely to have 'an adverse effect on the integrity of the site'. In that regard, the Supreme Court states that the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 has not fully dispelled its doubts.

18 It is in those circumstances that the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having "an adverse effect on the integrity of the site"?

2. Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?

3. What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?'

## Consideration of the questions referred

### *Jurisdiction of the Court*

19 Galway County Council and Galway City Council plead, in essence, that the Court lacks jurisdiction to answer the questions referred for a preliminary ruling given that Article 6(3) of the Habitats Directive is not applicable to the main proceedings because An Bord Pleanála's decision approving the N6 Galway City Outer Bypass road scheme was adopted before the Commission decision to classify as an SCI the Lough Corrib site extension which is affected by the scheme.

20 It is indeed apparent from the order for reference that, on the date of An Bord Pleanála's decision, 20 November 2008, the extension of the Lough Corrib site had been notified within Ireland, under Regulation 4 of the 1997 Regulations, but had not yet been designated as an SCI in the list of sites adopted by the Commission. Such a decision was adopted by the Commission on 12 December 2008, that is to say, three weeks after An Bord Pleanála's decision.

21 In the main proceedings, as the referring court itself states, Regulation 30 of the 1997 Regulations largely replicates the wording of Article 6 of the Habitats Directive. It follows, furthermore, from the title of the 1997 Regulations that the Irish legislature intended by their adoption to transpose that directive into domestic law. Finally, as the referring court observes, by according a notified site protection equivalent to that under Article 6(2) to (4) of the Habitats Directive before its designation as an SCI in the list adopted by the Commission, Ireland considered itself to have complied with its obligation to take appropriate protective measures pending designation of a site as an SCI.

22 On that last point, it should be recalled that the Court has already held that, whilst the protective measures prescribed in Article 6(2) to (4) of the Habitats Directive are

required only as regards sites which are placed on the list of sites selected as SCIs drawn up by the Commission, this does not mean that the Member States do not have to protect sites as soon as they propose them, under Article 4(1) of the directive, as sites eligible for identification as SCIs on the national list transmitted to the Commission (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraphs 25 and 26, and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 36 and 37).

23 Therefore, as soon as a site is proposed by a Member State, pursuant to Article 4(1) of the Habitats Directive, on the national list transmitted to the Commission as a site eligible for identification as an SCI, and at least until the Commission adopts a decision in that regard, that Member State is, by virtue of the Habitats Directive, required to take protective measures of such a kind as to safeguard the ecological interest referred to (see, to this effect, *Dragaggi and Others*, paragraph 29, and *Bund Naturschutz in Bayern and Others*, paragraph 38). The situation of such a site thus cannot be categorised as a situation not falling within the scope of European Union law.

24 It accordingly follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Supreme Court.

*Substance*

25 By its questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that in a situation such as that in the main proceedings a plan or project not directly connected with or necessary to the management of a site adversely affects the integrity of that site. For the purposes of such an interpretation, the referring court raises the question of the possible effect of the precautionary principle and the question of the relationship between Article 6(3) and Article 6(4) of the Habitats Directive.

26 It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI's limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive. Following assessment of the impact of the road scheme on the Lough Corrib SCI, An Bord Pleanála established that it would have a locally significant negative impact on the SCI, but decided that such an impact did not adversely affect the integrity of that site.

27 According to Mr Sweetman, Ireland, the Attorney General, the Minister for the Environment, Heritage and Local Government and the Commission, a negative impact of that kind on the site caused by that road scheme necessarily entails an adverse effect on the site's integrity. By contrast, An Bord Pleanála, Galway County Council and Galway City Council and the United Kingdom Government submit that the finding of damage to that site is not necessarily incompatible with there being no adverse effects on its integrity.

28 Article 6(3) of the Habitats Directive establishes an assessment procedure intended to ensure, by means of a prior examination, that a plan or project not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the

integrity of that site (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 34, and Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 66).

29 That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43).

30 Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 49).

31 The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4).

32 In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09 *Commission* v *Spain* [2011] ECR I-0000, paragraph 142), whilst Article 6(4) merely derogates from the second sentence of Article 6(3).

33 The Court has already held that Article 6(2) of the Habitats Directive makes it possible to comply with the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration as well as disturbance which could have significant effects in the light of the directive's objectives (Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 49 and the case-law cited).

34 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 81, and *Solvay and Others*, paragraph 72).

35 As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see *Solvay and Others*, paragraphs 73 and 74).

36 It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.

37 In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

38 In this context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (see Case C-308/08 *Commission* v *Spain* [2010] ECR I-4281, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

39 Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

40 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 99, and *Solvay and Others*, paragraph 67).

41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58).

42 Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as 'natural habitat types in danger of

disappearance' for whose conservation the European Union has 'particular responsibility'.

43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 *Commission* v *Spain*, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

45 In the main proceedings, the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced. Having regard to the criteria referred to above, the conservation objective thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 60).

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

**Costs**

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.**

[Signatures]

---

* Language of the case: English.

JUDGMENT OF THE COURT (Fourth Chamber)

15 March 2012 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Articles 4(1) and 12(1) – Failure to include Paralimni Lake as a site of Community importance within the time-limit laid down – System of protection for the species Natrix natrix cypriaca (Cypriot grass snake))

In Case C-340/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 7 July 2010,

**European Commission,** represented by G. Zavvos and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Republic of Cyprus,** represented by K. Lykourgos and M. Chatzigeorgiou, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its application, the European Commission requests the Court to declare that,

– by not having included the site of Paralimni Lake in the national list of proposed sites of Community importance ('SCIs'),

– by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the

population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and

– by not having taken the requisite measures to establish and apply a system of strict protection for that species,

the Republic of Cyprus has failed to fulfil its obligations under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368, 'the Habitats Directive'), under the Habitats Directive as interpreted by the judgments in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, and under Article 12(1) of that directive respectively.

**Legal context**

2 Under the first subparagraph of Article 3(1) of the Habitats Directive, '[a] coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

3 Article 4(1) and (2) of the Habitats Directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) … , the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

…

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

4 Article 5 of that directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species

which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

5 Article 12(1) of the Habitats Directive is worded as follows:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 The Cypriot grass snake is a priority species referred to in Annex II and Annex IV(a) of the Habitats Directive.

**The facts of the dispute and the pre-litigation procedure**

7 On 16 May 2006 the Commission received a complaint from the Federation of environmental and ecological organisations of Cyprus regarding the inadequate protection of the Cypriot grass snake. According to that complaint, the Republic of Cyprus had wrongly failed, inter alia, to include the area of Paralimni Lake in the national list of SCIs.

8 In the light of the information it had available to it, the Commission, on 23 March 2007, sent to the Republic of Cyprus a letter of formal notice by which it drew the latter's attention to the inadequate protection of that species because of the failure to include the site of Paralimni Lake in the national list of SCIs and the failure to protect that site as well as Xyliatos Dam.

9 By letter of 18 May 2007, the Republic of Cyprus replied to the letter of formal notice indicating that the competent authority was in discussion with the relevant parties in order to arrive at a commonly accepted proposition to include the site of Paralimni Lake in the national list of SCIs before the end of 2007. That Member State also set out the different measures which had been taken to reinforce the protection of that site and the Xyliatos Dam.

Finally, it claimed that sending the letter of formal notice had been premature and unlawful because the Commission should have followed the procedure laid down in Article 5 of the Habitats Directive and not the procedure in Article 258 TFEU.

10 By letter of 6 June 2008, the Commission issued a reasoned opinion in which it stated that, by not adopting the laws, regulations and administrative provisions necessary to comply with the Habitats Directive, the Republic of Cyprus had failed to fulfil its obligations under that directive. As a consequence, the Commission requested the Republic of Cyprus to take the measures necessary to comply with that reasoned opinion within two months of its receipt.

11 By letter of 21 November 2008, the Republic of Cyprus responded to the reasoned opinion and set out the measures which had been taken to protect the Cypriot grass snake and the progress made in relation to the inclusion of the site of Paralimni Lake in the national list of SCIs.

12 By letter of 18 December 2009, the Commission referred in particular to the complaints relating to the property development in the northern part of the site of Paralimni Lake.

13 By letter of 23 December 2009, the Republic of Cyprus informed the Commission that the site had been officially included in the national list of SCIs on 24 November 2009. However, that Member State had not included the northern end of the lake in that list.

14 Subsequently, the Republic of Cyprus rejected the complaints referred to by the Commission in relation to the property development of the northern part of that lake.

**The action**

*Failure to include the site of Paralimni Lake in the national list of SCIs*

Arguments of the parties

15 The Commission takes the view that, by not having included the site of Paralimni Lake in the national list of SCIs before expiry of the period set in the reasoned opinion, the Republic of Cyprus has failed to fulfil its obligations under Article 4(1) of the Habitats Directive.

16 As regards Article 5(1) of the Habitats Directive, which the Republic of Cyprus claimed, during the pre-litigation stage, should have been applied where the Commission found that there was a failure to include a site which appears to be essential to the survival of the Cypriot grass snake in the national list of SCIs, the Commission claims that that provision presupposes the existence of a scientific disagreement between it and the Member State concerned, which, in this case, is lacking. In the present case, the information used by each party was the same and was not disputed. In its letters of 12 August and 21 November 2008, the Republic of Cyprus undertook to include the site of Paralimni Lake in the national list of SCIs. Consequently, the question of a scientific disagreement and a comparison of data does not arise.

17 In the alternative, the Commission claims that there are strong indications that the site boundaries which were finally disclosed to it concerning the designation of the SCIs, in so far as they do not include the important area situated at the northern end of Paralimni Lake,

which was transformed into a residential area during 2009, are not sufficient for the protection and conservation of the Cypriot grass snake and, therefore, that the infringement is ongoing.

18 The Republic of Cyprus reiterates that it has never disputed that the site of Paralimni Lake should constitute an SCI. It contends, however, that the boundary of the current area as an SCI is sufficient for the protection and conservation of the species at issue. That species is to be found only in the southern and eastern parts of the SCI. Moreover, the study carried out by the Austrian expert, to which the Commission refers, does not contain clear guidance regarding the demarcation of the SCI which she considers necessary for sufficient protection of the Cypriot grass snake.

19 Since the Republic of Cyprus is claiming, citing scientific data in support, that the demarcation of the SCI is sufficient for the preservation of the Cypriot grass snake and its habitats, which is called in question by the Commission, there is a scientific disagreement relating to the evaluation of the scientific data. That disagreement justifies the application of the bilateral consultation procedure provided for in Article 5 of the Habitats Directive.

Findings of the Court

20 As regards the subject-matter of the action, it must be remembered that under Article 92(2) of the Rules of Procedure of the Court the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

21 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of the action brought under Article 258 TFEU is, therefore, delimited by the pre-litigation procedure provided for by that article. Accordingly, the action cannot be founded on any objections other than those stated in the pre-litigation procedure (see, inter alia, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23).

22 In the present case, it should be noted that it is not apparent from the documents before the Court that, during the pre-litigation stage, whether at the stage of the formal notice or that of the reasoned opinion, the question of demarcation of the site of Paralimni Lake was addressed by the parties, nor that the Commission raised any argument specifically relating to the northern part of the site. As regards the failure to include the site of Paralimni Lake in the national list of SCIs, the Commission merely called for the inclusion of that site, identified in general terms and without any indication as regards its demarcation, in the national list of SCIs, and the Republic of Cyprus undertook to include it in that list, which it did, more than 17 months after the reasoned opinion was issued.

23 Since the pre-litigation procedure in no way related to the demarcation of the site of Paralimni Lake nor, in particular, to the question of inclusion of the northern part of the site in it, the action is inadmissible in so far as it refers to that subject.

24 As regards the complaint alleging failure to include the site of Paralimni Lake in the national list of SCIs, the Court notes that it has never been disputed that, in general, that site should have been included in that list.

25 Therefore, it must be held, first, that the conditions for the application of Article 5 of the Habitats Directive were not, in any event, met for either of the two complaints.

26 Second, as regards the complaint alleging failure to include the site of Paralimni Lake in the national list of SCIs, it is not disputed that it was not included in the list before expiry of the period set in the reasoned opinion.

27 Since the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 17, and judgment of 11 November 2010 in Case C-164/09 *Commission* v *Italy*, paragraph 19), it must be held that the Commission's action is well founded as regards that complaint.

*Tolerance of activities which degrade or damage the habitat of the species concerned*

Admissibility

– Arguments of the parties

28 The Republic of Cyprus claims that neither the letter of formal notice nor the reasoned opinion refer to the operation of a firing range and excavation works. Therefore, the Commission extended the subject-matter of the dispute by referring, in its action, to the firing range and excavation works as activities which degrade or damage the habitat of the species concerned.

29 The Republic of Cyprus claims that, since it was unable to make comments in response to those arguments they cannot be taken into account by the Court during the consideration of the Commission's complaints. The subject-matter of the dispute may be extended to events which took place after the reasoned opinion was delivered only if they are of the same kind as the events to which the opinion referred and constitute the same conduct, which is not the situation in the present case.

30 As regards the residential development of the 'northern part of the lake', the reasoned opinion did not clearly identify the arguments relied upon more generally in the letter of formal notice. Specifically, the residential development at the location in question was mentioned for the first time in the Commission's letter of 18 December 2009. The 'northern part of the lake' was mentioned neither in the letter of formal notice nor in the reasoned opinion.

31 Consequently, the Republic of Cyprus considers that the Commission's arguments regarding the operation of a firing range, excavation works and residential development in the northern part of Paralimni Lake must be rejected as inadmissible.

32 The Commission points out that, both in its letter of formal notice and its reasoned opinion, it criticises the conduct of the Republic of Cyprus, which tolerates activities seriously compromising the ecological characteristics of the lake as well as the fact that it has not taken the protective measures necessary to maintain the population of the Cypriot grass snake, in breach of European Union law. In that context, and in support of that complaint, the

Commission refers more specifically to the excessive extraction of water, residential development and moto-cross racing.

33 Even if the operation of the firing range and the excavation works took place after the reasoned opinion, the Commission submits that the subject-matter of the dispute may be extended to events which took place after that opinion if they are of the same kind as the events to which the opinion referred and constitute the same conduct. The events at issue are of the same kind as the events to which the opinion referred and constitute the same conduct.

34 As regards the alleged failure to set out arguments clearly in relation to the property development, the Commission points out that it defined the general concept as property development 'beside the lake but also within its boundaries'. That definition manifestly also encompasses the northern part of the lake, given that it is situated 'within the boundaries' of the lake. In any event, the Commission did not have any real possibility of including the issue of the recent property development affecting the northern part of the lake in its letter of formal notice or its reasoned opinion given that the Republic of Cyprus did not include that area in the urban development plan until March 2009, that is to say well after expiry of the period for replying to the reasoned opinion.

– Findings of the Court

35 As regards the excavation works, it must be noted that they are among the matters which the Commission raised, in its letter of formal notice and in its reasoned opinion, against the Republic of Cyprus.

36 Accordingly, the argument regarding tolerance of the excavation works is admissible.

37 As regards the operation of the firing range, it should be noted that, as the Commission itself accepts, that matter was not mentioned during the pre-litigation procedure. While it is true that even events which took place after the reasoned opinion, but of the same kind as the events to which the opinion referred and constitute the same conduct, may be taken into account in the context of infringement proceedings (see, to that effect, Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20, and Case 113/86 *Commission* v *Italy* [1986] ECR 607, paragraph 11), that is not the case with the operation of a firing range when compared with excessive extraction of water, residential development, excavation works or the organisation of moto-cross racing.

38 Therefore, the argument regarding the operation of the firing range is not admissible.

39 As regards the argument concerning the residential development in the northern part of Paralimni Lake and its effects in that area, it should be noted that, in view of what is stated at paragraph 23 of this judgment and the fact that the argument was not, in any event, invoked by the Commission in its letter of formal notice or its reasoned opinion, it is also inadmissible.

Substance

– Arguments of the parties

40 The Commission takes the view that the case-law of the Court, which accepts the necessity of protecting SCIs and safeguarding the objectives of the Habitats Directive, in

particular regarding the formation of a coherent European ecological network, also applies to sites which satisfy the necessary ecological criteria to be included in the list of SCIs.

41 The Commission states that the Republic of Cyprus tolerates the unlawful excessive extraction of water, which is the cause, in particular, of destruction of the habitat of the species concerned or the elimination of its representative characteristics. In addition, the residential development on the site at issue reduces the surface of that habitat and has, therefore, very substantial adverse effects on the conservation of the site and the species concerned. Furthermore, the organisation of moto-cross racing is particularly harmful to the Cypriot grass snake because of the continuous disturbance caused and is a hazard because it leads to injury and even death of the animals.

42 The Republic of Cyprus states that it has stopped the removal of water from where the Cypriot grass snake has its habitat, and that, therefore, the concerns regarding a drop in water level in the habitat of that species and the destruction of that habitat through the extraction of water are no longer justified. As regards the construction of residential buildings 'beside the lake', the defendant Member State states that there is no residential development within the SCI at issue and that the residential development on the outskirts of that site does not restrict the habitat of the Cypriot grass snake and will not have harmful consequences, contrary to what the Commission claims. As for the operation of a moto-cross track, the Republic of Cyprus notes that it has been terminated and the track has been demolished.

– Findings of the Court

43 It should be noted that, in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (see *Draggagi and Others*, paragraph 30).

44 The appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Habitats Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics (see *Bund Naturschutz in Bayern and Others*, paragraphs 46 and 47).

45 If that were not the case, the European Union decision-making process, which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned, namely, in particular, to draw up the list of selected sites as sites of Community importance in order to form a coherent European ecological network (see *Bund Naturschutz in Bayern and Others*, paragraphs 41 and 42).

46 The above considerations also apply, in any event, mutatis mutandis, to the sites which the Member State at issue does not dispute satisfy the ecological criteria in Article 4(1) of the Habitats Directive and which, therefore, should have been included in the national list of SCIs sent to the Commission.

47 It cannot be permitted, under the Habitats Directive and the objectives which it pursues, that a site such as that at issue in the present case, which the Member State concerned does not dispute must be included in that list, does not enjoy any protection.

48 As regards the conduct of the Republic of Cyprus of which the Commission complains and which it claims is the cause of destruction of the habitat of the Cypriot grass snake in the site of Paralimni Lake and of the endangerment, on the same site, of the maintenance of the population of that species, it is not disputed that the organisation of moto-cross racing on the site at issue, which the defendant Member State claims to have terminated after expiry of the period set in the reasoned opinion, constitutes conduct likely to seriously compromise the ecological characteristics of the site.

49 In that respect, the complaint is therefore well founded.

50 As regards the excessive extraction of water on the site at issue, it is apparent from the documents before the Court that it had not terminated upon the expiry of the two month period set in the reasoned opinion. It is clear that, in the present case, that type of operation is capable of having a considerable negative impact on the habitat of the Cypriot grass snake and on the conservation of that species, particularly during years of drought.

51 Accordingly, the complaint must also be upheld in that respect.

52 As regards the property development other than in the northern part of the SCI at issue, which allegedly causes a reduction of the area of habitat of the species concerned and which the Commission raised against the Republic of Cyprus, the latter accepts that such a development took place around the SCI but not within it and disputes the harmful effects alleged by the Commission.

53 In that regard, it is established case-law that, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, *Commission* v *Ireland*, paragraph 39, and judgment of 22 September 2011 in Case C-90/10 *Commission* v *Spain*, paragraph 25).

54 In the absence of any evidence of the impact of that property development on the area of habitat of the Cypriot grass snake in the part of the SCI concerned, such an argument, like the related argument on the tolerance of excavation works, cannot, in any event, be considered well founded.

55 Therefore, the complaint alleging infringement of the Habitats Directive, due to the tolerance of activities which degrade and damage the habitat of the species concerned in respect of the site of Paralimni Lake, must be upheld, subject to what is stated at paragraph 54 of the present judgment.

*Failure to establish and apply a system of strict protection for the Cypriot grass snake*

Arguments of the parties

56 The Commission takes the view that, by tolerating the abovementioned activities such as, in particular, the excessive extraction of water and the organisation of moto-cross racing, and by not applying protective measures, the Republic of Cyprus has failed to fulfil its obligations under Article 12(1) of the Habitats Directive. As a consequence of those activities the area of habitat of the Cypriot grass snake and the population of that species have declined at the site of Paralimni Lake.

57 The Commission is of the opinion that the building projects on that site have serious consequences as a result of the earthworks and the debris which damage the habitat of that species. The division of the northern part of Paralimni Lake also infringes Article 12(1)(a) and (b) of the Habitats Directive.

58 Except for the illegal operation of a racing circuit, the Republic of Cyprus claims to have taken the necessary measures to implement a system of strict protection of the Cypriot grass snake and to have not therefore breached its obligations under Article 12(1) of the Habitats Directive.

Findings of the Court

59 It should be remembered that Article 12(1) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) of the same directive, in their natural range, prohibiting all forms of deliberate capture or killing of specimens of these species in the wild, deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, deliberate destruction or taking of eggs from the wild as well as deterioration or destruction of breeding sites or resting places.

60 The transposition of that provision requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (*Commission* v *Ireland*, paragraph 29).

61 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (judgment of 16 March 2006 in Case C-518/04 *Commission* v *Greece*, paragraph 16, and *Commission* v *Ireland*, paragraph 30).

62 Such a system of strict protection must therefore enable the effective avoidance of all forms of deliberate capture or killing of specimens of animal species listed in Annex IV(a) of the Habitats Directive in the wild, deliberate disturbance of the species, particularly during the period of breeding, rearing, hibernation and migration, deliberate destruction or taking of eggs from the wild as well as deterioration or destruction of breeding sites or resting places of those species (see, to that effect, Case C-383/09 *Commission* v *France* [2011] ECR I-0000).

63 In this case the defendant Member State accepts that, by tolerating the organisation of moto-cross racing, it infringed Article 12(1) of the Habitats Directive.

64 Regarding the excessive extraction of water, having regard to paragraph 50 of this judgment and the fact that the presence of the Cypriot grass snake on the site of Paralimni Lake was well known, the inevitable conclusion is that it constitutes, in any event, a deliberate disturbance in accordance with Article 12(1) of the Habitats Directive.

65 As regards the argument alleging harmful consequences for the Cypriot grass snake linked to the property development on the site of Paralimni Lake, it is apparent from the evidence in the documents before the Court that the property development and the construction in or near the site of Paralimni Lake, in particular in or near its northern part, which are associated with excavation works, is likely to lead to disturbances affecting that protected species in the whole ecosystem of that site.

66 In those circumstances, it is therefore apparent that the Republic of Cyprus did not put a system of strict protection in place to enable the effective avoidance of all matters set out at paragraph 62 of this judgment.

67 Consequently, the complaint alleging infringement of Article 12(1) of the Habitats Directive is well founded.

68 Having regard to the foregoing, the Commission's action must be upheld, subject to the reservation made at paragraph 55 of this judgment.

69 Accordingly, it must be held that the Republic of Cyprus,

– by not having included the site of Paralimni Lake in the national list of SCIs,

– by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and

– by not having taken the requisite measures to establish and apply a system of strict protection for that species,

has failed to fulfil its obligations under Article 4(1) of the Habitats Directive, under the Habitats Directive and under Article 12(1) of that directive respectively.

**Costs**

70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Cyprus has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that the Republic of Cyprus,**

– **by not having included the site of Paralimni Lake in the national list of proposed sites of Community importance,**

– **by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and**

– **by not having taken the requisite measures to establish and apply a system of strict protection for that species,**

**has failed to fulfil its obligations under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, under Directive 92/43, as amended, and under Article 12(1) of Directive 92/43, as amended, respectively;**

2. **Orders the Republic of Cyprus to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

16 February 2012 (*)

(Assessment of the effects of projects on the environment – Concept of legislative act – Force and effect of the guidance in the Aarhus Convention Implementation Guide – Consent for a project given without an appropriate assessment of its effects on the environment – Access to justice in environmental matters – Extent of the right to a review procedure – Habitats Directive – Plan or project affecting the integrity of the site – Imperative reason of overriding public interest)

In Case C-182/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 30 March 2010, received at the Court on 9 April 2010, in the proceedings

**Marie-Noëlle Solvay and Others**

v

**Région wallonne,**

intervening parties:

**Infrabel SA,**

**Codic Belgique SA,**

**Federal Express European Services Inc. (FEDEX),**

**Société wallonne des aéroports (Sowaer),**

**Société régionale wallonne du transport (SRWT),**

**Société Intercommunale du Brabant wallon (IBW),**

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2011,

after considering the observations submitted on behalf of:

– Ms Solvay and Others, by T. Vandenput and M.-L. Giovannelli, avocats,

– Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), by A. Lebrun, avocat,

– Association Inter-Environnement Wallonie and Others, by J. Sambon, avocat,

– Association Charleroi South Air Pur and Others, by D. Brusselmans, avocat,

– Mr Boxus and Others, by L. Misson and A. Kettels, avocats,

– Ms Laloux and Others, by L. Dehin, avocat,

– Région wallonne, by F. Haumont, avocat,

– the European Commission, by O. Beynet, J.-B. Laignelot and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 3, 6 and 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), Articles 1, 9 and 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337'), and Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The reference has been made in proceedings brought by persons residing near Liège-Bierset and Brussels South Charleroi airports and the Brussels-Charleroi railway against the Région wallonne (Region of Wallonia) concerning development consents for works relating to those airports and railway.

**Legal context**

*International law*

3 Under Article 2(2) of the Aarhus Convention, the definition of 'public authority' 'does not include bodies or institutions acting in a … legislative capacity'.

4 Article 3(9) of the Aarhus Convention provides:

‘Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.’

5 Article 6(9) of the Aarhus Convention provides:

‘Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.’

6 Under Article 9(2) to (4) of the Aarhus Convention:

‘2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'

*European Union law*

Directive 85/337

7 In Article 1(2) of Directive 85/337 the term 'project' is defined as 'the execution of construction works or of other installations or schemes' or 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. The term 'development consent' is defined as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. The terms 'public' and 'public concerned' are defined as follows:

'"public" means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"public concerned" means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

8 Article 1(5) of Directive 85/337 states:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

9 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. …'

10 Article 5(4) of Directive 85/337 provides:

'Member States shall, if necessary, ensure that any authorities holding relevant information … shall make this information available to the developer.'

11 Article 9(1) of Directive 85/337 states:

'When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.'

12 Article 10a of Directive 85/337 provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

The Habitats Directive

13 In accordance with Article 6(3) and (4) of the Habitats Directive:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with

other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

*National law*

14 Articles 1 to 4 of the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the public interest (Décret du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général) (*Moniteur belge*, 25 July 2008, p. 38900), in their original version, provide:

'Article 1. Overriding reasons in the public interest have been established for the grant of town-planning consents, environmental consents and combined consents relating to the following acts and works:

1. Acts and works for the improvement of the infrastructure and public buildings of the regional airports of Liège-Bierset and Brussels South Charleroi, as follows:

(a) as regards Liège-Bierset airport:

– the extension of the north freight zone for aircraft parking positions and future freight buildings;

– the orbital road and the south taxiway;

– the installation of a fourth tank for the fuel storage area;

– the TGV freight station;

– the extension of the car park south of the motorway;

– the future office building;

(b) as regards Brussels South Charleroi airport:

– the extension of the runway, including the construction of access ways and the extension of the north taxiway between the access ways;

– the control tower and radar;

– the extension of aircraft parking positions;

– the installation of de-icing areas;

– the R3-airport road link;

– the perimeter road and the south taxiway;

– the extension of the terminal;

– the extension of the car parks;

– the railway station and infrastructure;

2. Pursuant to the cooperation agreement of 11 October 2001 between the Federal State and the Flemish, Walloon and Brussels Capital Regions relating to the Belgian Railways investment plan for the years 2001-2012, the acts and works in the Region of Wallonia relating to the RER rail network;

3. In connection with the implementation of the regional development scheme (Part 3, point 1.4) adopted by the Walloon Government on 27 May 1999, the acts and works relating to structural modes of public transport for Charleroi, Liège, Namur and Mons;

4. The missing road and waterway links in the Region of Wallonia of the trans-European transport network referred to in Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network.

Article 2. Where the acts and works listed in Article 1 are referred to in Article 84 of the Walloon Code of rural planning, urban planning, heritage and energy (Code wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Énergie), the consent shall be granted by the Government or the person designated by it in accordance with the detailed conditions laid down in Article 127 of that code, including those in Article 127(3).

Where the acts and works listed in Article 1 concern an establishment within the meaning of the Decree of 11 March 1999 on environment consents (Décret du 11 mars 1999 relatif au permis d'environnement), Article 13(2) of that decree shall be applied.

By way of exception to the first and second paragraphs, an application for consent whose receipt was acknowledged or which was lodged before the entry into force of this decree shall continue to be examined in accordance with the provisions in force at that date.

Article 3. Within 45 days of their being granted the Government shall submit planning consents, environmental consents and combined consents relating to the acts and works referred to in Article 1 to the Walloon Parliament. The consents referred to in the third

paragraph of Article 2 shall be submitted to the Parliament within 45 days of their receipt by the Government.

The Walloon Parliament shall ratify the consents submitted to it within 60 days of the lodging of the file relating to the consents at its Bureau. Where no ratifying decree is approved within that time-limit, the consent shall be deemed not to have been granted.

The time-limits referred to in the first and second paragraphs are suspended between 16 July and 15 August.

A consent ratified by the Walloon Parliament shall be enforceable from the publication of the decree in the *Moniteur belge* and the consent shall be sent by the Government in accordance with the provisions of the code or the decree of 11 March 1999.

Article 4. Where an application for a consent relates to a minor alteration to a consent ratified by the Walloon Parliament, the application shall follow the general rules of the code or the decree.'

15 Articles 5 to 9 of the Decree of the Walloon Parliament of 17 July 2008 provide:

'Article 5. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 August 2005 on the environmental consent granted to SAB SA for Liège-Bierset airport.

Article 6. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 13 September 2006 granting planning consent to Société régionale wallonne des Transports for the extension of the runway of Liège-Bierset airport.

Article 7. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the planning consent of 16 September 2003 issued by the designated official of the Charleroi Directorate General for Town and Country Planning, Housing and Heritage to SOWAER SA for the implementation of works to culvert the Tintia stream and alteration of the ground relief in the north-eastern part of the airport area.

Article 8. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 July 2005 on the combined consent issued to SOWAER SA for Brussels South Charleroi Airport (terminal: 3 000 000 passengers per year),

car parks (1 600 spaces at ground level and 1 000 in multi-storey car parks), car park access roads, aircraft traffic surfaces, aircraft parking positions linked to the terminal, water treatment plant, technical buildings, fuel storage area (storage of 2 420$m^3$ of kerosene and 30$m^3$ of motor vehicle fuel) and opening of new local roads.

Article 9. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 27 July 2005 relating to the environmental consent issued to SOWAER SA for the operation of Brussels South Charleroi Airport.'

16 Article 14 to 17 of the decree provide:

'Article 14. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards the RER network and the associated structures, access ways and connecting ways, the Ministerial Order of 9 February 2006 relating to the combined consent issued to SNCB (Belgian National Railways) for the construction and operation of the third and fourth tracks on Infrabel line 124 Brussels-Charleroi in the municipalities of Waterloo, Braine-l'Alleud and Nivelles.

Article 15. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 19 June 2008 relating to the combined consent issued to IBW for the construction and operation of the Hain treatment plant of 92 000 population equivalent in the municipality of Braine-le-Château.

Article 16. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 7 July 2008 relating to the environmental consent issued to Codic Belgique SA for the operation of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.

Article 17. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 4 June 2008 relating to the planning consent issued to Codic Belgique SA for the construction of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.'

17 According to the documents submitted to the Court, the Conseil d'État (Council of State) essentially has jurisdiction to rule on actions for annulment brought against administrative acts and regulations of the administrative authorities and against administrative acts of the legislative assemblies or their organs.

18 It does not, on the other hand, have jurisdiction to hear actions brought against acts of a legislative character.

19 The ratification by decree of the Walloon Parliament of building consents and consents for works gives those acts legislative status. The Conseil d'État consequently ceases to have jurisdiction to hear actions for annulment brought against the acts thus ratified, which can now be challenged only before the Cour constitutionnelle (Constitutional Court), before which, however, only certain grounds may be pleaded.

**The actions in the main proceedings and the questions referred for a preliminary ruling**

20 The Cour constitutionelle has before it a number of actions seeking annulment of the decree of the Walloon Parliament of 17 July 2008 which 'ratified' the building consents for various works relating to Liège-Bierset airport, Brussels South Charleroi airport and the Brussels-Charleroi railway, that is to say, authorised them in view of 'overriding reasons in the public interest'.

21 The Cour constitutionelle further has before it questions referred by the Conseil d'État for a ruling on the lawfulness of that decree. The Conseil d'État had previously itself raised the question of the compatibility of the decree with European Union law and the Aarhus Convention and referred questions on that point to the Court for a preliminary ruling, on which the Court gave judgment on 18 October 2011 in Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] ECR I-0000.

22 The effect of that legislative act is that those building consents may no longer be contested before the Conseil d'État, but only before the Cour constitutionelle, and only on grounds of their failure to comply with the rules whose observance it is for the Cour constitutionelle to review.

23 Thus in each of the cases in the main proceedings, the referring court is asked inter alia to rule on whether it was possible for the contested decree to withdraw the consents in question from review by the Conseil d'État and subject them to review by the Cour constitutionelle, even though the possibilities of review before that court are less extensive than before the Conseil d'État. By so doing, the legislature is said to have infringed the Belgian Constitution, read in conjunction with Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337.

24 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Articles 2(2) and 9(4) of the Aarhus Convention … be interpreted in accordance with the guidance provided in the Aarhus Convention Implementation Guide?

2. (a) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of the Decree of the Walloon [Parliament] of 17 July 2008 …?

(b) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

(c) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of that decree?

(d) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

3. (a) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which the legislature adopting the decree grants planning and environmental consents which have been prepared by an administrative authority and which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

(b) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the retroactive ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

4. (a) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which a decree granting planning or environmental consents need not itself contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

(b) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which do not themselves contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

5. Must Article 6(3) of [the Habitats] Directive … be interpreted as permitting a legislative authority to authorise projects such as those referred to in Articles 16 and 17 of that decree, even though the impact assessment carried out in that connection has been held by the Conseil d'État, in a judgment given under the emergency procedure, to be incomplete and has been contradicted in an opinion of the authority of the Walloon Region responsible for the ecological management of the natural environment?

6. In the event of a negative reply to Question 5, must Article 6(4) of [the Habitats] Directive … be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of a private company and a large number of employees to be regarded as an imperative reason of overriding public interest?'

**Consideration of the questions referred**

*Question 1*

25 By its first question the referring court asks whether Articles 2(2) and 9(4) of the Aarhus Convention must be interpreted in accordance with the guidance in the Aarhus Convention Implementation Guide.

26 It is apparent from the wording of that Guide, in particular the observations in the section headed 'How to use this Guide', that the aim of the document, drawn up by international experts, is solely to provide an analysis of the Aarhus Convention which 'introduces the reader to the Convention and to what it can mean in practice'.

27 While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.

28 The answer to Question 1 is therefore that, for the interpretation of Articles 2(2) and 9(4) of the Aarhus Convention, it is permissible to take the Aarhus Convention Implementation Guide into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention.

*Question 2*

29 By its second question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that an act such as the Decree of the Walloon Parliament of 17 July 2008 which 'ratifies', by giving them legislative status, planning, environmental or works consents previously granted by the administrative authorities, in respect of which it is declared that 'overriding reasons in the public interest have been established', is excluded from the scope of that convention and that directive.

30 It follows from Article 1(5) of Directive 85/337 that, where the objectives of that directive, including that of supplying information, are achieved through a legislative process, the directive does not apply to the project in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 51, and *Boxus and Others*, paragraph 36).

31 That provision lays down two conditions for the exclusion of a project from the scope of Directive 85/337. The first requires the details of the project to be adopted by a specific act of legislation. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 57, and *Boxus and Others*, paragraph 37).

32 As regards the first condition, it entails, first, the adoption of the project by a specific act of legislation. It should be observed here that the terms 'project' and 'consent' are defined in Article 1(2) of Directive 85/337. A legislative act adopting a project must therefore, if it is to come within the scope of Article 1(5) of the directive, be specific and display the same characteristics as a consent of that kind. In particular, it must grant the developer the right to

carry out the project (see *WWF and Others*, paragraph 58, and *Boxus and Others*, paragraph 38).

33 The project must also be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see *WWF and Others*, paragraph 59, and *Boxus and Others*, paragraph 39). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see *Linster*, paragraph 56, and *Boxus and Others*, paragraph 39).

34 It follows that the details of a project cannot be considered to be adopted by a legislative act within the meaning of Article 1(5) of Directive 85/337 if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to carry out the project (see *WWF and Others*, paragraph 62; *Linster*, paragraph 57; and *Boxus and Others*, paragraph 41).

35 As regards the second condition, Article 2(1) of Directive 85/337 shows that the essential objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment of their effects on the environment before consent is given (see *Linster*, paragraph 52, and *Boxus and Others*, paragraph 41).

36 In addition, the sixth recital in the preamble to Directive 85/337 states that the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question (see *WWF and Others*, paragraph 61; *Linster*, paragraph 53; and *Boxus and Others*, paragraph 42).

37 Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. It is apparent from Article 5(3) of and Annex IV to Directive 85/337 that the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see *Linster*, paragraph 55, and *Boxus and Others*, paragraph 43).

38 Having regard to the characteristics of procedures for the approval of a plan in more than one phase, Directive 85/337 does not preclude a single project from being approved by two acts of national law which are considered, as a whole, to be a development consent within the meaning of Article 1(2) of the directive (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 102). Consequently, the legislature can, when adopting the final act authorising a project, take advantage of the information gathered during a prior administrative procedure (see *Boxus and Others*, paragraph 44).

39 The existence of such an administrative procedure cannot, however, have the effect of enabling a project to be regarded as a project the details of which are adopted by a specific legislative act in accordance with Article 1(5) of Directive 85/337 if that legislative act does

not fulfil the two conditions set out in paragraph 31 above. As the Court held in *Boxus and Others*, paragraph 45, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act within the meaning of that provision and is not therefore sufficient to exclude a project from the scope of Directive 85/337.

40 In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 37 above cannot fall within the scope of Article 1(5) of Directive 85/337 (see *Boxus and Others*, paragraph 46).

41 It is for the national court to determine whether those conditions have been satisfied. For that purpose, it must take account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates (see *Boxus and Others*, paragraph 47).

42 That interpretation arrived at in *Boxus and Others* in relation to Article 1(5) of Directive 85/337 may be applied in the case of Article 2(2) of the Aarhus Convention. First, Article 2(2) of the Convention has substantially the same content as Article 1(5) of the directive. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

43 The answer to Question 2 is therefore that Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of the Convention and the directive.

*Question 3*

44 By its third question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 9(2) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as precluding the right to implement a project which falls within their scope from being granted by a legislative act against which, under national law, no review procedure is available before a court of law or another independent and impartial body established by law that enables that act to be challenged as to the substance and the procedure.

45 It follows from Article 2(2) of the Aarhus Convention, read together with Articles 6 and 9 of the Convention, and from Article 1(5) of Directive 85/337 that neither the Convention

nor the directive applies to projects adopted by a legislative act satisfying the conditions set out in paragraph 31 above (see *Boxus and Others*, paragraph 50).

46 For other projects, that is to say, those adopted either by an act which is not legislative in nature or by a legislative act which does not fulfil those conditions, it follows from the very terms of Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 that the Member States must provide for a review procedure before a court of law or another independent and impartial body established by law for challenging the substantive or procedural lawfulness of decisions, acts or omissions subject respectively to Article 6 of the Aarhus Convention or to Directive 85/337 (see *Boxus and Others*, paragraph 51).

47 The Member States, by virtue of their procedural autonomy and subject to compliance with the principles of equivalence and effectiveness, have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedures referred to in those provisions and what procedural rules are applicable (see *Boxus and Others*, paragraph 52).

48 Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness, however, if the mere fact that a project is adopted by a legislative act which does not satisfy the conditions set out in paragraph 31 above were to make it immune to any review procedure for challenging its substantive or procedural lawfulness within the meaning of those provisions (see *Boxus and Others*, paragraph 53).

49 The requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 presuppose in this regard that, when a project falling within the scope of Article 6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive and set out in paragraph 31 above must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law (see *Boxus and Others*, paragraph 54).

50 If no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act (see *Boxus and Others*, paragraph 55).

51 In the present case, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 and set out in paragraph 31 above, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it (see *Boxus and Others*, paragraph 56).

52 The answer to Question 3 is therefore that Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that:

– when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and

– if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

*Question 4*

53 By its fourth question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as precluding the adoption of legislative acts which do not themselves contain all the reasons for their adoption, reasons which make it possible to review whether the acts were adopted after an adequate prior evaluation carried out in accordance with the requirements of the Convention and the directive.

54 It has been held that Article 4 of Directive 85/337 must be interpreted as not requiring that a decision not to subject a project falling within Annex II to that directive to an assessment should itself contain the reasons for the competent authority's decision that an assessment was unnecessary; if, however, an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the decision or the relevant information and documents in response to the request made (see Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 61).

55 That interpretation can be applied to Article 9(1) of Directive 85/337.

56 Thus, although Article 9(1) of Directive 85/337 requires that the public must be informed, in accordance with the appropriate procedures, of the decision taken by the competent authority and the reasons on which the decision is based, it does not follow that the decision must itself contain the competent authority's reasons for deciding that it was necessary (see, by analogy, *Mellor*, paragraph 56).

57 It follows from that provision, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority was aware, in accordance with the rules laid down by national law, that an adequate prior evaluation had been carried out in accordance with the requirements of Directive 85/337 (see *Mellor*, paragraph 57).

58 Moreover, interested parties, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with that obligation of the competent authority as to an evaluation (see *Mellor*, paragraph 58).

59 In that regard, effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by European Union law, interested parties must also be able to defend that

right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and *Mellor*, paragraph 59).

60 That subsequent communication may take the form not only of an express statement of the reasons but also of the making available of relevant information and documents in response to the request made (see *Mellor*, paragraph 60).

61 While the reasons need not necessarily be contained in the decision itself, the competent authority may none the less, pursuant to the applicable national legislation or of its own motion, indicate in the decision the reasons on which it is based (see *Mellor*, paragraph 63).

62 In that case, the decision must enable interested parties to decide whether to make use of a review procedure to contest it, taking into account any factors which might subsequently be brought to their attention (see *Mellor*, paragraph 64).

63 That interpretation may be applied in the case of Article 6(9) of the Aarhus Convention. First, that provision has substantially the same content as Article 9(1) of Directive 85/337. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

64 The answer to Question 4 is therefore that Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.

*Question 5*

65 By its fifth question, the referring court asks essentially whether Article 6(3) of the Habitats Directive must be interpreted as allowing a legislative authority to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

66 Article 6(3) of the Habitats Directive establishes an evaluation procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary for the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34).

67 A plan or project may be authorised only on condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such

effects (see Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183, paragraph 20). Moreover, it is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see *Commission* v *Portugal*, paragraph 24).

68 Furthermore, in the case of sites eligible for identification as sites of Community importance, in particular sites hosting priority natural habitat types, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of that directive's objective of conservation, for safeguarding the ecological interest which those sites have at national level (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 30, and Case C-491/08 *Commission* v *Italy*, paragraph 30).

69 Those obligations are incumbent on the Member States by virtue of the Habitats Directive regardless of the nature of the national authority with competence to authorise the plan or project concerned. Article 6(3) of the Habitats Directive, which refers to the 'competent national authorities', does not lay down any special rule for plans or projects approved by a legislative authority. That status consequently has no effect on the extent or scope of the obligations imposed on the Member States by Article 6(3) of the Habitats Directive.

70 The answer to Question 5 is therefore that Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

*Question 6*

71 By its sixth question, the referring court essentially asks whether Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate the management centre of a private company may be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

72 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 81).

73 Article 6(4) of that directive must, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly (see Case C-304/05 *Commission* v *Italy*, paragraph 82).

74 Moreover, it can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Habitats Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4), since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see Case C-304/05 *Commission* v *Italy*, paragraph 83).

75 An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora.

76 Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.

77 It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.

78 In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive.

79 The answer to Question 6 is therefore that Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

**Costs**

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention.**

2. **Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.**

3. **Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:**

– **when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and**

– **if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.**

4. **Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.**

5. **Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.**

6. **Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.**

[Signatures]

## Judgment of the Court (Third Chamber) of 9 June 2011 — Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Central Bank

**(Case C-401/09 P)** [1]

***(Appeal — Admissibility — Power of attorney — Consortium — Public contracts — Negotiated procedure — IT consultancy and IT development services — Rejection of the tender — Rules of Procedure of the General Court — Interest in bringing proceedings — Ground for exclusion — Permit required by national law — Obligation to state reasons)***

(2011/C 226/05)

*Language of the case: English*

### Parties

*Appellant:* Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE (represented by: N. Korogiannakis, dikigoros)

*Other party to the proceedings:* European Central Bank (represented by: F. von Lindeiner and G. Gruber, Agents)

### Re:

Appeal brought against the order of the Court of First Instance (Fourth Chamber) of 2 July 2009 in Case T-279/06 *Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE* v *European Central Bank (ECB)* dismissing an action for annulment of the decision of the European Central Bank (ECB) of 31 July 2006 rejecting the tender submitted by the applicant in the negotiated procedure for the provision of IT consultancy and IT development services to the ECB (OJ 2005 S 137-135345) and of the decision to award the contract to another tenderer

### Operative part of the judgment

*The Court:*

1. *Dismisses the appeal;*

2. *Orders Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE to pay the costs.*

[1] OJ C 11, 16.1.2010.

## Judgment of the Court (Third Chamber) of 9 June 2011 (reference for a preliminary ruling from the Supremo Tribunal de Justiça (Portugal)) — José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA

**(Case C-409/09)** [1]

***(Insurance against civil liability in respect of the use of motor vehicles — Directives 72/166/EEC, 84/5/EEC and 90/232/EEC — Right to compensation by means of compulsory insurance against civil liability in respect of the use of motor vehicles — Conditions for limitation — Victim's contribution to his own loss or injury — Liability for risk — Provisions applicable to a child third party who is the victim of an accident)***

(2011/C 226/06)

*Language of the case: Portuguese*

### Referring court

Supremo Tribunal de Justiça

### Parties to the main proceedings

*Applicants:* José Maria Ambrósio Lavrador, Maria Cândida Olival Ferreira Bonifácio

*Defendant:* Companhia de Seguros Fidelidade-Mundial SA

### Re:

Reference for a preliminary ruling — Supremo Tribunal de Justiça — Interpretation of Article 1 of the Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33) — Extent of compulsory third party insurance cover — Provisions applicable to third party victims of an accident who are minors

### Operative part of the judgment

*The Court (Third Chamber) hereby rules:*

*Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, must be interpreted as not precluding national provisions falling within civil liability law that allow exclusion or limitation of the right of the victim of an accident to claim compensation under the civil liability insurance of*

*the motor vehicle involved in the accident, on the basis of an individual assessment of the exclusive or partial contribution of that victim to his own loss or injury.*

---

([1]) OJ C 11, 16.1.2010.

---

**Judgment of the Court (Third Chamber) of 9 June 2011 — Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya (C-465/09 P and C-468/09 P), Territorio Histórico de Álava — Diputación Foral de Álava (C-466/09 P and C-469/09 P), Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa (C-467/09 P and C-470/09 P) v European Commission, Comunidad autónoma del País Vasco — Gobierno Vasco, Comunidad autónoma de La Rioja, Confederación Empresarial Vasca (Confebask)**

**(Case C-465/09 P)** ([1])

***(Appeals — State aid — Action for annulment — Decision initiating the formal investigation procedure under Article 88(2) EC — Subsequent final decisions finding that State aid schemes implemented by Spain in 1993 for certain newly established firms in Álava, Vizcaya and Guipúzcoa were not compatible with the common market — Corporation tax exemptions — Lis pendens — Concept of 'authorised aid' — Legitimate expectations — Compliance with a reasonable time-limit — No notification)***

(2011/C 226/07)

*Language of the case: Spanish*

**Parties**

*Appellants:* Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya (C-465/09 P and C-468/09 P), Territorio Histórico de Álava — Diputación Foral de Álava (C-466/09 P and C-469/09 P), Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa (C-467/09 P and C-470/09 P) (represented by: I. Sáenz-Cortabarría Fernández and M. Morales Isasi, abogados)

*Other parties to the proceedings:* European Commission (represented by: F. Castillo de la Torre and C. Urraca Caviedes, Agents), Comunidad autónoma del País Vasco — Gobierno Vasco (I. Sáenz-Cortabarría Fernández and M. Morales Isasi, abogados), Comunidad autónoma de La Rioja (J. Criado Gámez and M. Martínez Aguirre, abogados), Confederación Empresarial Vasca (Confebask)

*Intervener in support of the appellants:* Kingdom of Spain (N. Díaz Abad)

**Re:**

Appeal against the judgment of the Court of First Instance (Fifth Chamber, Extended Composition) of 9 September 2009 in Cases T-30/01 to T-32/01 and T-86/02 to T-88/02 *Diputación Foral de Álava and Others* v *Commission*, by which the Court held, in Cases T-30/01 to T-32/01, that there was no longer any need to adjudicate on an application for annulment of Commission Decision of 28 November 2000 to initiate the procedure under Article 88(2) EC in relation to the tax advantages in the form of corporation tax exemption for certain newly established firms granted by provisions adopted by the Diputación Foral de Álava, the Diputación Foral de Guipúzcoa and the Diputación Foral de Vizcaya, in the form of corporation tax exemption for certain newly established firms and, in Cases T-86/02 to T-88/02, dismissed an application for annulment of Commission Decisions 2003/28/EC, 2003/86/EC and 2003/192/EC of 20 December 2001 on a State aid scheme in the form of corporation tax exemption implemented by Spain in 1993 for certain newly established firms in Álava (T-86/02), Vizcaya (T-87/02) and Guipúzcoa (T-88/02) (OJ 2003 L 17, p. 20, OJ 2003 L 40, p. 11, and OJ 2003 L 77, p. 1, respectively)

**Operative part of the judgment**

*The Court:*

1. *Dismisses the appeals.*

2. *Orders the Territorio Histórico de Vizcaya — Diputación Foral de Vizcaya, the Territorio Histórico de Álava — Diputación Foral de Álava and the Territorio Histórico de Guipúzcoa — Diputación Foral de Guipúzcoa to pay in equal shares the costs relating to the present appeals.*

3. *Orders the Kingdom of Spain to bear its own costs.*

---

([1]) OJ C 37, 13.02.2011.

---

**Judgment of the Court (Third Chamber) of 9 June 2011 (reference for a preliminary ruling from the Simvoulio tis Epikratias (Greece)) — Eleftheri tileorasi AE 'ALTER CHANNEL', Konstantinos Giannikos v Ipourgos Tipou kai Meson Mazikis Enimerosis, Ethniko Simvoulio Radiotileorasis**

**(Case C-52/10)** ([1])

***(Directive 89/552/EEC — Television broadcasting activities — Article 1(d) — 'Surreptitious advertising' — Intentional nature — Presentation of cosmetic dental treatment during a television broadcast)***

(2011/C 226/08)

*Language of the case: Greek*

**Referring court**

Simvoulio tis Epikratias

**Re:**

Failure of a Member State to fulfil obligations — Infringement of Articles 56 EC and 40 EEA — Different treatment given to dividends distributed to domestic and foreign shareholders

**Operative part of the judgment**

*The Court:*

1. *Declares that, by making the exemption of dividends distributed by companies resident in Spain subject to a level of holding by the recipient companies in the distributing companies which is higher for recipient companies residing in another Member State than for recipient companies resident in Spain, the Kingdom of Spain has failed to fulfil its obligations under Article 56(1) EC.*

2. *Dismisses the action as to the remainder.*

3. *Orders the European Commission and the Kingdom of Spain to bear their own costs.*

---

([1]) OJ C 19, 24.1.2009.

---

**Judgment of the Court (Fourth Chamber) of 10 June 2010 — European Commission v Italian Republic**

**(Case C-491/08)** ([1])

***(Failure of a Member State to fulfil obligations — Directive 92/43/EEC — Conservation of natural habitats — Wild fauna and flora — Sites of Community importance — Tourism complex 'Is Arenas')***

(2010/C 209/09)

*Language of the case: Italian*

**Parties**

*Applicant:* European Commission (represented by: D. Recchia, acting as Agent)

*Defendant:* Italian Republic (represented by: I. Bruni, Agent, and G. Aiello, lawyer)

**Re:**

Failure of a Member State to fulfil obligations — Infringement of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) — Sites of Community importance — Site 'Is Arenas' — Development of a golf course.

**Operative part of the judgment**

*The Court:*

1. *Declares that, having regard to the tourism and property complex 'Is Arenas', which affects the site 'Is Arenas';*

   — *by failing to adopt, before 19 July 2006, date when the site 'Is Arenas' was included on the list of sites of Community importance, preservation measures which, having regard to the conservation aim of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, are suitable for the purposes of preserving the relevant ecological interest represented at national level by the proposed site of Community importance, and in particular by failing to prevent an activity likely seriously to endanger the ecological characteristics of the site; and*

   — *by failing to adopt, after 19 July 2006, appropriate measures to prevent the deterioration of natural habitats in respect of which that site of Community importance was designated;*

   *the Italian Republic has failed to fulfil its obligations under Council Directive 92/43 and, more specifically, with regard to the second plea in law, Article 6(2) thereof;*

2. *Orders the Italian Republic to pay the costs.*

---

([1]) OJ C 44, 21.02.2009.

---

**Judgment of the Court (Second Chamber) of 3 June 2010 (reference for a preliminary ruling from the Oberster Gerichtshof — Austria) — Internetportal und Marketing GmbH v Richard Schlicht**

**(Case C-569/08)** ([1])

***(Internet — eu Top Level Domain — Regulation (EC) No 874/2004 — Domain names — Phased registration — Special characters — Speculative and abusive registrations — Concept of 'bad faith')***

(2010/C 209/10)

*Language of the case: German*

**Referring court**

Oberster Gerichtshof, Austria

JUDGMENT OF THE COURT (Second Chamber)

4 March 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Article 6(2) and (3) – Incorrect transposition – Special areas of conservation – Significant effect of a project on the environment – 'Non-disturbing' nature of certain activities – Assessment of the effects on the environment)

In Case C‑241/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 June 2008,

European Commission, represented by D. Recchia and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and A.-L. During, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the laws and regulations necessary to transpose correctly Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive'), the French Republic has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 Article 2(3) of the Habitats Directive provides that measures taken pursuant to that directive are to take account of economic, social and cultural requirements and regional and local characteristics.

3 Article 6(2) to (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

…'

National legislation

4 Article L. 414-1(V) of the Code de l'environnement (Environmental Code) provides:

'Natura 2000 sites shall be the subject of measures intended to conserve or restore, in a state favourable to their long-term maintenance, the natural habitats and populations of species of wild fauna and flora which have justified the designation of those sites. Natura 2000 sites shall also be subject to appropriate preventive measures to avoid deterioration of those natural habitats and disturbances likely significantly to affect those species.

Those measures shall be defined in consultation with, inter alia, the local authorities and groupings concerned, and with the representatives of the owners, operators and users of the lands and spaces within the site.

They shall take account of economic, social, cultural and defence requirements and of regional and local characteristics. They shall be adapted to the specific dangers which threaten those natural habitats and those species. They shall not result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of those natural habitats

and those species at a favourable conservation status. Fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or having such an effect.

The measures shall be taken in the context of the contracts or agreements provided for in Article L. 414-3 or in implementation of legislative and regulatory provisions, in particular those concerning national parks, natural marine parks, nature reserves, biotopes or listed sites.'

5 The first subparagraph of Article L. 414-2(I) of the Code de l'environnement provides that, for each Natura 2000 site, a statement of objectives is to establish the management policies, the measures provided for in Article L. 414-1, the means of implementing them and the accompanying financial provisions.

6 Article L. 414-3(I) of the code states:

'To implement the statement of objectives, the owners of rights in rem and personal rights over the lands within the site and professionals and users of the marine spaces within the site may conclude contracts with the administrative authority, called "Natura 2000 contracts". …

A Natura 2000 contract shall contain a series of commitments consistent with the policies and measures established in the statement of objectives, concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site. …

…'

7 Article L. 414-4(I) of the code states:

'Programmes and projects for works and developments which are subject to administrative authorisation or approval, the completion of which is likely significantly to affect a Natura 2000 site, shall be subject to an assessment of their implications in view of the site's conservation objectives. For any of those programmes which are provided for in legislative or regulatory provisions and are not subject to an impact study, the assessment shall be carried out in accordance with the procedure laid down in Article L. 122-4 et seq. of this code.

The works and developments provided for in Natura 2000 contracts shall be exempt from the assessment procedure referred to in the foregoing paragraph.'

8 Pursuant to point 1 of Article R. 414-21(III) of the Code de l'environnement, the person making the application must indicate the reasons for which there are no other satisfactory solutions for the completion of the plan or project, where that plan or project may have significant injurious effects on the conservation status of natural habitats and of species.

Pre-litigation procedure

9 On 18 October 2005, the Commission sent a letter of formal notice to the French Republic in which the Commission expressed its doubts as to whether the French legislation complied with Article 6(2) and (3) of the Habitats Directive.

10 As the Commission found the French Republic's reply of 7 February 2006 unconvincing, it sent a reasoned opinion to the French Republic on 15 December 2006, calling on it to take the measures necessary to comply with that opinion within a period of two months of receipt. The French authorities replied to that reasoned opinion by letter of 28 February 2007.

11 On 2 June 2008, the Commission brought the present action.

The action

Article 6(2) of the Habitats Directive

Admissibility

12 It must be noted that, while Law No 2006-1772 of 30 December 2006 on water and aquatic areas (JORF, 31 December 2006, p. 20285) amended the national provisions at issue, the amendments, as the Commission has pointed out without being contradicted by the French Republic, make no substantial change to those provisions and have no effect on the Commission's complaints set out in the letter of formal notice and in the reasoned opinion.

13 It follows that the complaints alleging that the third and fourth sentences of the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement do not comply with the Habitats Directive are admissible.

The first complaint: application of the 'significant effect' criterion indifferently to the deterioration of habitats and the disturbance of species.

– Arguments of the parties

14 The Commission claims that, by providing that human activities are prohibited in Natura 2000 sites only if they significantly affect the maintenance or restoration of natural habitats and species at a favourable conservation status, the third sentence of the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement applies the 'significant effect' criterion indifferently both to the deterioration of habitats and the disturbance of species, and is therefore imprecise and less strict than Article 6(2) of the Habitats Directive. Article 6(2) requires the Member States to take appropriate steps to avoid, in the special areas of conservation, first, the deterioration of natural habitats and the habitats of species and, second, the disturbance of species in so far as such disturbance could be significant in relation to the objectives of that directive. In other words, disturbances of species, which occur most often over a short period of time, may be tolerated up to a certain level, in contrast to the deterioration of habitats, which can be defined as a physical degradation affecting those habitats and which is systematically prohibited because placing a habitat in danger is more serious than disturbing a species.

15 Even though the Commission recognises that the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement distinguishes, in accordance with Article 6(2) of the Habitats Directive, between the need to avoid the deterioration of habitats and the need to avoid disturbance of species with the 'significant effect' criterion only being laid down in respect of disturbance of species, it nevertheless criticises the French legislation at issue for not making that distinction when, in the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement, it specifically regulates human activities, which cannot be prohibited by the competent authorities where they do not have a significant effect.

16 The French Republic contends that, under the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement, the deterioration of habitats must in all cases be avoided, in accordance with the requirements of Article 6(2) of the Habitats Directive. However, the third subparagraph of Article L. 414‑1(V) of that code means that an outright prohibition need not be imposed on human

activities which do not have a significant effect on the conservation of habitats. Such activities may, under the first subparagraph of Article L. 414‑1(V) of that code, be the subject of specific measures to prevent the deterioration of habitats and disturbance of species.

17 According to the French Republic, by reconciling the requirement of conservation of habitats and species with the maintenance of human activities which respect that requirement, the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement is consistent with the objectives pursued by the Habitats Directive, and with Article 2(3) of that directive, which provides that measures taken are to take account of economic, social and cultural requirements and regional and local characteristics. The Commission's position, by contrast, is not consistent with the requirements of the Habitats Directive.

– Findings of the Court

18 Article 6(2) of the Habitats Directive establishes a general obligation to take appropriate protective steps to avoid the deterioration of habitats and the disturbance of species, in so far as such disturbance could be significant in relation to the objectives of that directive.

19 It should be pointed out, in that regard, that the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement provides that Natura 2000 sites are to be the subject of appropriate preventive measures to avoid the deterioration of natural habitats and disturbances likely significantly to affect the populations of species of wild fauna and flora which justified the designation of the sites.

20 As regards human activities, the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement states that such measures are not to result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of natural habitats and species at a favourable conservation status.

21 In that regard, the third subparagraph of Article L. 414-1(V) of the Code de l'environnement must be read in conjunction with the first subparagraph of that provision and in the light thereof.

22 For the purposes of determining whether the complaint raised by the Commission is well founded, it should be borne in mind that, according to settled case‑law, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish

that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, judgment of 11 December 2008 in Case C-293/07 Commission v Greece, paragraph 32 and the case-law cited).

23 In the present case, however, the Commission merely alleges, in essence, that, in order to ensure a correct transposition of Article 6(2) of the Habitats Directive, the third subparagraph of Article L. 414-1(V) of the Code de l'environnement must prohibit all deteriorations, even if they do not have a significant effect. By isolating that provision in that way, and not taking sufficient account of its immediate legislative context, the Commission has, inter alia, failed to show that the appropriate measures adopted pursuant to the first subparagraph of Article L. 414-1(V) of that code do not, in fact, allow the deterioration of habitats within the meaning of Article 6(2) of the Habitats Directive to be avoided.

24 In those circumstances, it has not been established that Article L. 414-1(V) of the Code de l'environnement, considered in its entirety, does not constitute a correct transposition of Article 6(2) of the Habitats Directive, as alleged in the first complaint.

25 Consequently, the first complaint must be rejected.

The second complaint: the general assertion that certain activities do not cause disturbance

– Arguments of the parties

26 The Commission claims that the fourth sentence of the third subparagraph of Article L. 414-1(V) of the Code de l'environnement, which provides that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or activities having such an effect, does not ensure a clear, precise and complete transposition of Article 6(2) of the Habitats Directive. Compliance with rules without any assurance that those rules take account of the requirements specific to a particular site cannot, a priori, lead to the general assertion that those activities cause no disturbance.

27 The Commission takes the view, in particular, that the statement of objectives, on which the regulatory power is based, is not such as to take account of the requirements specific to a particular

site, inasmuch as that document, established on a contractual basis, is not intended to regulate activities such as hunting or fishing and has no binding force, as it has no accompanying sanction.

28 The French Republic contends that it correctly transposed Article 6(2) of the Habitats Directive by laying down the principle that, in so far as aquatic and hunting-related activities are carried out in accordance with the laws and regulations in force, they are not causing disturbance, and that, therefore, they are presumed to comply with the conservation objectives pursued in the context of the Natura 2000 European Ecological Network.

29 While recognising that the statement of objectives does not contain directly applicable regulatory measures, the French Republic submits that the necessary regulatory measures, specific to the site concerned, are approved subsequently by decision of the competent authorities, supplementing the existing general rules. It states, moreover, that the general rules on fishing and hunting-related activities can relate to areas which are delimited and demarcated according to ecological criteria and give rise to the setting of quotas.

– Findings of the Court

30 It should be recalled, first, that, in accordance with the Court's case-law, Article 6(2) and (3) of the Habitats Directive seek to ensure the same level of protection (see, to that effect, Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging [2004] ECR I-7405, paragraph 36, and Case C-418/04 Commission v Ireland [2007] ECR I-10947, paragraph 263).

31 Second, it should be noted that, as regards Article 6(3) of the Habitats Directive, the Court has already held that the option of exempting generally certain activities, in accordance with the rules in force, from the need for an assessment of the implications for the site concerned does not comply with that provision. Such an exemption is not such as to guarantee that those activities do not adversely affect the integrity of the protected site (see, to that effect, Case C-98/03 Commission v Germany [2006] ECR I-53, paragraphs 43 and 44).

32 Accordingly, taking into account the similar levels of protection required by Article 6(2) and 6(3) of the Habitats Directive, the fourth sentence of the third subparagraph of Article L. 414-1(V) of the Code de l'environnement by providing generally that certain activities such as fishing or hunting do not cause disturbance, can be regarded as consistent with Article 6(2) of that directive only if it is ensured that those activities cause no disturbance likely significantly to affect the objectives of the directive.

33 The French Republic submits in that regard that a statement of objectives is drawn up for each site and serves as the basis for the adoption of targeted measures taking account of the ecological requirements specific to the site concerned. It adds that where the activities in question are carried out in accordance with the general rules applicable to those activities, that allows account to be taken of areas which are delimited and demarcated according to ecological criteria and allows for quotas to be set.

34 It is therefore necessary to examine whether such measures or rules guarantee, in fact, that the activities in question do not cause any disturbance likely to have a significant effect.

35 As regards the statement of objectives, the French Republic indicates that it does not contain directly applicable regulatory measures and that it is a diagnostic tool which allows, on the basis of available scientific knowledge, measures to be proposed to the competent authorities which will enable the conservation objectives set by the Habitats Directive to be met. It adds that, currently, only half the sites concerned have a statement of objectives.

36 It follows that the statement of objectives cannot systematically guarantee in all cases that the activities in question will not cause disturbances likely significantly to affect those conservation objectives.

37 Such a conclusion applies all the more as regards targeted measures which take account of the ecological requirements specific to a particular site, since the adoption of those measures is based on the statement of objectives.

38 In relation to the general rules applicable to the activities in question, it must be held that, while those rules can admittedly reduce the risk of significant disturbance, they can however remove that risk altogether only it they provide for mandatory compliance with Article 6(2) of the Habitats Directive. The French Republic does not claim that that is the situation in this case.

39 It follows from the foregoing that by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an affect, the French Republic has failed to fulfil its obligations under Article 6(2) of the Habitats Directive.

Article 6(3) of the Habitats Directive

First complaint: the exemption of works or developments under Natura 2000 contracts from the procedure of assessment of their implications for the site

– Arguments of the parties

40 The Commission criticises the second subparagraph of Article L. 414‑4(1) of the Code de l'environnement for not constituting a correct transposition of Article 6(3) of the Habitats Directive in that it systematically exempts works or developments provided for in the Natura 2000 contracts from the procedure of assessment of their implications for the site referred to in Article 6(3).

41 Under French law, Natura 2000 contracts are concluded 'to implement the statement of objectives' which contains, inter alia, one or more specifications applicable to Natura 2000 contracts, establishing good practice to be followed when executing contractual measures and defining the objective pursued and the species and habitats concerned. Although those contracts must comply with the statement of objectives, there is no indication, according to the Commission, that they are comprised exclusively of measures directly connected with or necessary for the management of the site.

42 The French Republic accepts that works and developments provided for in Natura 2000 contracts are exempt from the assessment of implications procedure and considers that Article 6(3) of the Habitats Directive does not require that those works and developments be subject to that assessment procedure since, in its view, they do not adversely affect the site in a significant way.

43 Natura 2000 contracts are concluded, in accordance with Article L. 414‑3 of the Code de l'environnement, to implement the statements of objectives and it is impossible for them to contravene the conservation objectives of habitats and species or to involve actions which are unnecessary for maintaining the conservation status of the site.

– Findings of the Court

44 It should be borne in mind that, under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a

significant effect thereon must be subject to appropriate assessment of its implications for the site in view of that site's conservation objectives.

45 In that regard, it is not in dispute that works or developments provided for in Natura 2000 contracts can be categorised as plans or projects within the meaning of Article 6(3) of the Habitats Directive.

46 It is therefore necessary to examine whether the works or developments provided for in Natura 2000 contracts are directly connected with or necessary for the management of the site, so that their authorisation is not subject to the obligation to carry out the assessment of implications referred to in Article 6(3) of the Habitats Directive.

47 In accordance with Article L. 414‑3(I) of the Code de l'environnement a Natura 2000 contract is concluded 'to implement the statement of objectives', and comprises 'a series of commitments consistent with the policies and measures established in the statement of objectives concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site'.

48 Under the first subparagraph of Article L. 414‑2(I) of that code, the statement of objectives establishes, inter alia, the management policies and the conservation or restoration measures.

49 According to the French Republic, the systematic exemption of works and developments provided for in Natura 2000 contracts from the obligation, laid down in Article 6(3) of the Habitats Directive, to carry out an assessment of their implications for the site is justified by the notion that, in so far as those contracts are intended to achieve fixed conservation and restoration objectives for the site, they are directly connected with or necessary for the management of the site.

50 Such an approach presupposes therefore that the measures provided for in Natura 2000 contracts which seek to attain conservation and restoration objectives are also, under all circumstances, measures directly connected with or necessary for the management of the site.

51 However, it cannot be ruled out that, while they may have as their objective the conservation or restoration of a site, the works or developments provided for in those contracts may, nevertheless, not be directly connected with or necessary for the management of that site.

52 In that regard, the French Republic accepts, moreover, in the context of the complaint alleging a uniform application of the 'significant effect' criterion, that conservation measures for habitats may prove favourable for some habitats concerned but involve a deterioration in other types of habitats. It cites salt production as an example: the creation of basins called 'œillets' for the purposes of industrialised salt production leads to the deterioration of the habitat formed by lagoons, even if, otherwise, that activity may have beneficial effects for regenerating that environment owing to the retention of certain types of marsh.

53 It follows that determining the conservation and restoration objectives in the context of Natura 2000 may require, as the Advocate General pointed out in point 71 of her Opinion, the reconciliation of various conflicting objectives.

54 In order to ensure fully the attainment of the conservation objectives referred to in the Habitats Directive, it is therefore necessary, in accordance with Article 6(3) of the Habitats Directive, that each plan or project, not directly connected with or necessary for the management of the site, which is likely significantly to affect the site be subject to an individual assessment of its implications for the site concerned in view of the site's conservation objectives.

55 It follows that the mere fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites.

56 Accordingly, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

The second complaint: the existence of activities not subject to authorisation

– Arguments of the parties

57 The Commission claims that the first subparagraph of Article L. 414‑4(I) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive, in that only activities which require administrative authorisation or approval are subject to the procedure of assessment of their implications for the site laid down in Article 6(3). Programmes or projects subject to a declaratory scheme are excluded. Those programmes or projects have a significant effect on the site

in view of the conservation objectives, which is the decisive criterion when applying Article 6(3) of the Habitats Directive.

58 The French Republic does not dispute the merits of that complaint and merely points to the legislative amendments which it has undertaken in order to comply with the Community rules, amendments which were introduced by Law No 2008-757 of 1 August 2008 concerning environmental liability and various provisions for adaptation to Community law in the environmental sector (JORF, 2 August 2008, p. 12361).

– Findings of the Court

59 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see judgment of 25 July 2008 in Case C-504/06 Commission v Italy, paragraph 24 and the case-law cited).

60 In the present case, the French Republic does not dispute that on 15 February 2007, at the end of the period laid down in the reasoned opinion, namely before Law No 2008-757 was adopted, the national provision at issue did not constitute a correct transposition of Article 6(3) of the Habitats Directive.

61 In those circumstances, without it being necessary to examine whether Law No 2008-757 complies with the Habitats Directive, it is sufficient to note that that law was adopted after the period laid down in the reasoned opinion had expired.

62 Accordingly, by systematically exempting works and development programmes and projects which are subject to a declaratory system from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

The third complaint: failure to examine alternative solutions

– Arguments of the parties

63 The Commission criticises point 1 of Article R. 414-21(III) of the Code de l'environnement for not requiring the person making the application, in the context of an appropriate assessment of the implications for the site laid down in Article 6(3) of the Habitats Directive, to provide a description of the various alternative solutions which can be envisaged for carrying out the plan or project. That assessment requires, first, that a description be made of the various alternative solutions examined and an analysis of their implications for the site be carried out and, second, that the public authorities, even in the absence of an adverse affect on the integrity of the site, study those alternative solutions before making a decision on the basis of Article 6(3) of the Habitats Directive.

64 The Commission considers that the mere obligation on the person making the application to indicate the reasons for which there is no other satisfactory solution does not suffice to ensure an examination of alternative solutions in the context of assessment of the implications for the site. The French legislation does not therefore comply with the obligation, arising from Article 6(3) of the Habitats Directive, to make sure that there are no alternative solutions.

65 The French Republic contends that the disputed provision represents a correct transposition of Article 6(3) of the Habitats Directive. Furthermore, the French legislation actually results in the person making the application studying, describing and mapping alternative solutions and explaining the advantages and drawbacks of each solution in view of the site's conservation objectives.

66 The French Republic states that, in any event, in order to remove all doubt in that regard, the decrees implementing Law No 2008-757 expressly lay down the obligation on the person making the application to describe the alternative solutions.

– Findings of the Court

67 By this complaint, the Commission claims that the appropriate assessment which must be carried out pursuant to Article 6(3) of the Habitats Directive must also include an examination of alternative solutions.

68 It must be held, in that regard, that that complaint arises from an incorrect interpretation of Article 6(3) of the Habitats Directive both in relation to the concept of appropriate assessment and in relation to the stage in the procedure at which the examination of alternative solutions must be carried out.

69 First, according to settled case-law, the appropriate assessment of the implications for the site which must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (Waddenvereniging and Vogelbeschermingsvereniging, paragraph 54, and Commission v Ireland, paragraph 243). Such an assessment does not therefore involve an examination of the alternatives to a plan or project.

70 Second, it must be pointed out that the obligation to examine alternative solutions to a plan or project does not come within the scope of Article 6(3) of the Habitats Directive, but within the scope of Article 6(4) (see, to that effect, Case C-441/03 Commission v Netherlands [2005] ECR I-3043, paragraph 27 et seq.).

71 In accordance with Article 6(4) of the Habitats Directive, the examination referred to in that provision, which concerns, in particular, the absence of alternative solutions, can only be undertaken where the assessment required under Article 6(3) of that directive is negative and where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest (see, to that effect, Commission v Netherlands, paragraphs 26 and 27).

72 Thus, following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, the competent authorities have the choice of either refusing authorisation for the plan or project or of granting authorisation under Article 6(4) of that directive, provided that the conditions laid down in that provision are satisfied (see Case C-239/04 Commission v Portugal [2006] ECR I-10183, paragraph 25, and, to that effect, Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 60).

73 In those circumstances, the examination of alternative solutions, which is a requirement set out in Article 6(4) of the Habitats Directive, cannot constitute a factor which the competent national authorities are obliged to take into account when they undertake the appropriate assessment laid down in Article 6(3) of that directive (see, to that effect, Commission v Netherlands, paragraph 28).

74 It follows that the Commission is not justified in claiming that point 1 of Article R. 414-21(III) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive in that regard.

75 Accordingly, this complaint cannot be upheld.

76 In the light of the foregoing considerations, it must be held that,

– first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and

– second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, and

– by systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure,

the French Republic has failed to fulfil its obligations under Article 6(2) and Article 6(3) respectively of the Habitats Directive.

Costs

77 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, inter alia, where each party succeeds on some and fails on other heads.

78 In the present case, it must be taken into account that some of the Commission's complaints have not been upheld.

79 Accordingly, the French Republic should be ordered to pay two thirds of the costs and the Commission to pay the other third.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that,

– first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and

– second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, and

– by systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure,

the French Republic has failed to fulfil its obligations under Article 6(2) and Article 6(3) respectively of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

2. Dismisses the action as to the remainder;

3. Orders the French Republic to pay two thirds of the costs and the European Commission to pay the other third.

[Signatures]

* Language of the case: French.

JUDGMENT OF THE COURT (Second Chamber)

14 January 2010 (*)

(Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Decision of the Member State concerned to give its agreement to the draft list of sites of Community importance drawn up by the Commission – Interests and points of view which must be taken into account)

In Case C-226/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Oldenburg (Germany), made by decision of 13 May 2008, received at the Court on 26 May 2008, in the proceedings

**Stadt Papenburg**

v

**Bundesrepublik Deutschland,**

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 March 2009,

after considering the observations submitted on behalf of:

– Stadt Papenburg, by K. Füßer, Rechtsanwalt,

– Bundesrepublik Deutschland, by W. Ewer, Rechtsanwalt,

– the Commission of the European Communities, by B. Eggers and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(3), 4(2) and 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of

natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').

2 The reference was made in the course of proceedings between Stadt Papenburg (the municipality of Papenburg) and Bundesrepublik Deutschland (the Federal Republic of Germany), concerning the agreement that that State intends to give to the draft list of sites of Community importance ('SCIs') drawn up by the Commission of the European Communities and including a site on the river Ems downriver from that municipality's local authority area.

## Legal context

*Community law*

3 Article 2(3) of the Habitats Directive is worded as follows:

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4 According to Article 3(1) of the Habitats Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

5 Article 4(1) and (2) of that directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [SCIs] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory.

The list of sites selected as [SCIs] … shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

6 Annex III to the Habitats Directive states in Stage 2, entitled 'Assessment of the Community importance of the sites included on the national lists':

'1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.'

7 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety,

to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

*National law*

8 Article 28(2) of the Basic Law (Grundgesetz) is worded as follows:

'Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by law, associations of municipalities shall also have the right to administrative autonomy according to the laws. The guarantee of administrative autonomy shall extend to the basic elements of financial autonomy; these basic elements shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.'

9 The referring court interprets that provision as meaning that the administrative autonomy which is constitutionally guaranteed to the municipalities grants them a right to have their interests taken into account where measures going beyond the level of the municipal territory have a lasting effect on their development or cause lasting interference with plans which are sufficiently concrete and established. That also applies to measures implemented outside the municipal territory, in so far as the municipality is clearly and particularly affected.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

10 Papenburg is a port town in Lower Saxony on the river Ems, where there is a shipyard.

11 In order to enable ships with a draught of 7.3 metres to navigate between the shipyard and the North Sea, the Ems must be deepened by means of 'required dredging operations'. By a decision of 31 May 1994 of the Wasser und Schifffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region), Stadt Papenburg, Landkreis Emsland (the district of Emsland) and the Wasser und Schifffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge that river, where required. That decision is definitive and means, in accordance with German law, that future 'required dredging operations' are considered to have been granted permission.

12 On 17 February 2006, the Federal Republic of Germany indicated to the Commission that parts of the Ems situated downriver from Stadt Papenburg's local authority area, under the description 'Unterems und Außenems' (Lower Ems and Outer Ems), could be accepted as a possible SCI within the meaning of the Habitats Directive.

13 The Commission included those parts of the Ems in its draft list of SCIs. It requested the Federal Republic of Germany to give its agreement thereto, pursuant to the first subparagraph of Article 4(2) of the Habitats Directive.

14 On 20 February 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg) seeking to prevent the Federal Republic of Germany from giving its agreement. It claimed that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it has under German constitutional law.

15 According to Stadt Papenburg, as a seaport with a shipyard its planning and investments and its economic development depend on the Ems remaining navigable for large seagoing ships. It fears that, if the Lower Ems and Outer Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in Article 6(3) and (4) of the Habitats Directive.

16 The Federal Republic of Germany contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by Stadt Papenburg when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under the first subparagraph of Article 4(2) of the Habitats Directive, the Member State is permitted to take the decision whether to give agreement only on the basis of nature conservation criteria.

17 By order of 31 March 2008, which has become definitive, the Verwaltungsgericht Oldenburg granted Stadt Papenburg interim relief and prohibited the Federal Republic of Germany from giving its agreement until judgment has been delivered in the main proceedings.

18 In those circumstances, the Verwaltungsgericht Oldenburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?

(2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?

(3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?

(4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?'

**The request to have the oral procedure reopened**

19 By document lodged at the Court Registry on 17 September 2009, Stadt Papenburg requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.

20 In support of its request, Stadt Papenburg states that the Advocate General, in her Opinion, expressed the answer that she proposes the Court should give to the fifth question on the basis of a description of the facts which in such as to mislead the Court. In particular, Stadt Papenburg states that, contrary to what the Advocate General suggests, the approval of the Wasser- und Schifffahrstsdirektion Nordwest of 31 May 1994 by which Stadt Papenburg, Landkreis Emsland and the Wasser- und Schifffahrstsamt Emden were granted permission to dredge the Ems where required is not the first such decision concerning the navigability of the river Ems. Furthermore, the Ems cannot be considered to be a river which naturally enables ships with a draught of 6.3 metres to be navigated. Such a situation is the result of previously authorised dredging operations. Finally, Stadt Papenburg also disputes the arguments raised by the Advocate General in support of her reply to the first question referred.

21 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 31).

22 In the present case, it is evident that Stadt Papenburg is contending, in essence, first, that certain facts underlying the Advocate General's assessment are incorrect, and, second, that the view expressed by the Advocate General concerning the interpretation of the first subparagraph of Article 4(2) of the Habitats Directive is incorrect.

23 As regards the first point, it should be noted that, under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it (see, inter alia, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 31); those facts, in conjunction with the legal material provided by the referring court, are to enable the Court to give a useful answer to the questions submitted to it (see, to that effect, inter alia, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28).

24 The order for reference contains all the information necessary to enable the Court to give a useful answer to the questions submitted to it and, in particular, to the first question.

25 With regard to the second point, suffice it to state that Stadt Papenburg's request contains nothing to indicate that it would be useful or necessary to reopen the oral procedure.

26 Therefore, the Court, after hearing the Advocate General, holds that there is no need to order that the oral procedure be reopened.

**The questions referred for a preliminary ruling**

*The first question*

27 The first subparagraph of Article 4(2) of the Habitats Directive provides that, on the basis of the criteria set out in Annex III (Stage 2) to that directive, the Commission is to

establish, in agreement with each Member State, a draft list, drawn from the Member States' lists, of SCIs for each of the biogeographical regions referred to in Article 1(c)(iii) of the directive.

28 Annex III to the Habitats Directive, which relates to the criteria for selecting sites eligible for identification as SCIs and designation as special areas of conservation, lists, so far as concerns Stage 2 in that annex, criteria for assessing the Community importance of the sites included on the national lists.

29 Those assessment criteria were defined on the basis of the objective of conserving the natural habitats or the wild fauna and flora listed respectively in Annex I or Annex II to the Habitats Directive, and of the objective of coherence of Natura 2000, namely the European ecological network of special areas of conservation which is provided for in Article 3(1) of the Habitats Directive.

30 It follows that the first subparagraph of Article 4(2) of the Habitats Directive, as such, does not provide for requirements other than those relating to the conservation of natural habitats and wild fauna and flora or to the setting up of the Natura 2000 network to be taken into account when the Commission, in agreement with each of the Member States, draws up a draft list of SCIs.

31 If, in the phase of the classification procedure that is governed by the first subparagraph of Article 4(2) of the Habitats Directive, the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in Article 3(1) of the Habitats Directive would be put in danger, namely the setting up of the Natura 2000 network, which is composed of sites hosting the natural habitat types listed in Annex I to the directive and habitats of the species listed in Annex II and which must enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

32 That would, in particular, be the case were the Member States able to refuse to give their agreement on the basis of economic, social and cultural grounds and regional and local characteristics as referred to in Article 2(3) of the Habitats Directive, a provision which, moreover, as was stated by the Advocate General in point 38 of her Opinion, does not constitute an autonomous derogation from the general system of protection put in place by that directive.

33 The answer to the first question is therefore that the first subparagraph of Article 4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of SCIs drawn up by the Commission.

*The second, third and fourth questions*

34 In the light of the answer given to the first question, it is not necessary to reply to the second, third and fourth questions.

*The fifth question*

35 By its fifth question, the referring court asks, in essence, whether ongoing maintenance works in respect of the navigable channel of the estuary at issue in the main proceedings, which are not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to Article 6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

36 Under the first sentence of Article 6(3) of the Habitats Directive, a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for the site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 22).

37 Therefore, it is necessary, first, to assess whether the dredging works at issue in the main proceedings are covered by the concept of 'plan' or 'project' referred to in the first sentence of Article 6(3) of the Habitats Directive.

38 It should be recalled that the Court, after noting that the Habitats Directive does not define the terms 'plan' and 'project', has stated that the definition of 'project' in the second indent of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) is relevant to defining the concept of 'plan' or 'project' as provided for in the Habitats Directive (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 23, 24 and 26).

39 An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

40 Therefore, such an activity may be considered to be covered by the concept of 'project' in Article 6(3) of the Habitats Directive.

41 Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive.

42 If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of Article 6(3) of the Habitats Directive, and from the procedure provided for in Article 6(4).

43 Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved.

44 Contrary to what Stadt Papenburg and the Commission claim, no reason based on the principle of legal certainty or the principle of protection of legitimate expectations precludes the dredging works at issue in the main proceedings, although they have been permanently

authorised under national law, from being subject to the procedure provided for in Article 6(3) and (4) of the Habitats Directive as distinct and successive projects.

45 With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). The Habitats Directive fulfils those requirements with regard to the situation in the main proceedings.

46 With regard to the principle of the protection of legitimate expectations, it follows from settled case-law that a new rule applies immediately to the future effects of a situation which arose under the old rule and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 50 and 55).

47 Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

48 In that case, as such a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive, it would not be subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that directive (see, to that effect, Case C-209/04 *Commission* v *Austria* [2006] ECR I-2755, paragraphs 53 to 62).

49 Nevertheless, if the site concerned were, pursuant to the third subparagraph of Article 4(2) of the Habitats Directive, included in the list adopted by the Commission of sites chosen as SCIs, the implementation of such a project would be covered by Article 6(2) of that directive, a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 37 and 38, and Case C-117/03 *Dragaggiand Others* [2005] ECR I-167, paragraph 25). Before the Commission adopts that list, in so far as such a site is already included in a national list transmitted to the Commission for the purpose of being included in the Community list, it must not, by virtue of Article 4(1) of the Habitats Directive, be subject to interventions which risk seriously compromising its ecological characteristics (Case C-244/05 *Bund Naturschutzin Bayern and Others* [2006] ECR I-8445, paragraphs 44 and 47).

50 In the light of the above, the answer to the fifth question is that Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they

constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

51 If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

**Costs**

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The first subparagraph of Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.**

2. **Article 6(3) and (4) of Directive 92/43, as amended by Directive 2006/105, must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing Directive 92/43, as amended by Directive 2006/105, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that directive.**

**If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of Directive 92/43, as amended by Directive 2006/105.**

[Signatures]

V

*(Announcements)*

# COURT PROCEEDINGS

# COURT OF JUSTICE

## Judgment of the Court (Second Chamber) of 23 April 2009 — Markku Sahlstedt, Juha Kankkunen, Mikko Tanner, Toini Tanner, Liisa Tanner, Eeva Jokinen, Aili Oksanen, Olli Tanner, Leena Tanner, Aila Puttonen, Risto Tanner, Tom Järvinen, Runo K. Kurko, Maa- ja metsätaloustuottajain Keskusliitto MTK ry, MTK:n säätiö v Commission of the European Communities, Republic of Finland, Kingdom of Spain

**(Case C-362/06 P)** ([1])

***(Appeals — Conservation of natural habitats — List, adopted by a Commission decision, of sites of Community importance for the Boreal biogeographical region — Admissibility of an action for annulment brought by natural or legal persons against that decision)***

(2009/C 141/02)

*Language of the case: Finnish*

### Parties

*Appellants:* Markku Sahlstedt, Juha Kankkunen, Mikko Tanner, Toini Tanner, Liisa Tanner, Eeva Jokinen, Aili Oksanen, Olli Tanner, Leena Tanner, Aila Puttonen, Risto Tanner, Tom Järvinen, Runo K. Kurko, Maa- ja metsätaloustuottajain Keskusliitto MTK ry, MTK:n säätiö (represented by: K. Marttinen, asianajaja)

*Other parties to the proceedings:* Commission of the European Communities (represented by: M. Huttunen and M. van Beek, acting as Agents) Republic of Finland

*Intervener in support of the Commission of the European Communities:* Kingdom of Spain (represented by: F. Díez Moreno)

### Re:

Appeal against the order of the Court of First Instance of the European Communities (First Chamber) of 22 June 2006 in Case T-150/05 *Sahlstedt and Others* v *Commission of the European Communities* dismissing as inadmissible an application for annulment of Commission Decision 2005/101/EC of 13 January 2005 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Boreal biogeographical region (OJ 2005 L 40, p. 1) — Concept of 'direct concern' within the meaning of Article 230 EC

### Operative part of the judgment

*The Court:*

1. *Dismisses the appeal;*

2. *Orders Mr Sahlstedt and Others to pay the costs;*

3. *Orders the Kingdom of Spain and the Republic of Finland to bear their own costs.*

---

([1]) OJ C 261, 28.10.2006.

---

## Judgment of the Court (First Chamber) of 2 April 2009 — France Télécom SA v Commission of the European Communities

**(Case C-202/07 P)** ([1])

***(Appeals — Abuse of dominant position — Market for services in high-speed Internet access — Predatory pricing — Recoupment of losses — Right to align)***

(2009/C 141/03)

*Language of the case: French*

### Parties

*Appellant:* France Télécom SA (represented by: J. Philippe, H. Calvet, O.W. Brouwer, T. Janssens, lawyers)

*Other party to the proceedings:* Commission of the European Communities (represented by: E. Gippini Fournier, Agent)

### Re:

Appeal against the judgment of the Court of First Instance (Fifth Chamber, Extended Composition) of 30 January 2007 in Case T-340/03 *France Télécom* v *Commission*, in which the Court dismissed France Télécom's appeal against the Commission Decision of 16 July 2003 relating to a proceeding under Article 82 EC (Case COMP/38.233 — Wanadoo Interactive) — Market for services in high-speed internet access (ADSL) — Abuse of a dominant position — Concept of predatory pricing, alignment of prices with those of competitors and recoupment of losses suffered

# JUDGMENT OF THE COURT (Second Chamber)
13 December 2007 *

Table of contents

Legal framework ..... I - 11004

Community legislation ..... I - 11004

The Birds Directive ..... I - 11004

The Habitats Directive ..... I - 11007

National legislation ..... I - 11009

The European Communities Act ..... I - 11009

The Wildlife Act ..... I - 11009

The Birds Regulations ..... I - 11010

The Habitats Regulations ..... I - 11010

Pre-litigation procedure and written procedure before the Court ..... I - 11020

The action ..... I - 11021

Preliminary observations ..... I - 11021

The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive ..... I - 11022

Preliminary observations ..... I - 11022

IBA 2000 ..... I - 11023

* Language of the case: English.

The first part of the first complaint ..... I - 11031

— Arguments of the parties ..... I - 11031

— Findings of the Court ..... I - 11032

A — The sites identified in IBA 2000 ..... I - 11032

1. The Cross Lough area ..... I - 11034

(a) Arguments of the parties ..... I - 11034

(b) Findings of the Court ..... I - 11035

2. The three suitable areas for conservation of the corncrake ..... I - 11037

(a) Arguments of the parties ..... I - 11037

(b) Findings of the Court ..... I - 11038

B — The birds to be protected in other sites ..... I - 11040

1. Suitable sites for conservation of the kingfisher ..... I - 11042

2. Suitable sites for conservation of the corncrake ..... I - 11043

The second part of the first complaint ..... I - 11046

— Arguments of the parties ..... I - 11046

— Findings of the Court ..... I - 11047

The second complaint: failure to establish the necessary legal protection regime in accordance with Article 4(1) and (2) of the Birds Directive ..... I - 11052

Arguments of the parties ..... I - 11052

Findings of the Court ..... I - 11053

The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs ..... I - 11057

Arguments of the parties ..... I - 11057

Findings of the Court ..... I - 11058

The fourth complaint: failure to transpose and apply the second sentence of Article 4(4) of the Birds Directive ..... I - 11059

Arguments of the parties ..... I - 11059

Findings of the Court ..... I - 11060

The fifth complaint: inadequate transposition and application of Article 6(2) to (4) of the Habitats Directive ..... I - 11063

Preliminary observations ..... I - 11064

Inadequate transposition and application of Article 6(2) of the Habitats Directive ..... I - 11064

— Arguments of the parties ..... I - 11064

— Findings of the Court ..... I - 11066

Inadequate transposition of Article 6(2) of the Habitats Directive in the field of recreational activities ..... I - 11069

— Arguments of the parties ..... I - 11069

— Findings of the Court ..... I - 11070

Inadequate transposition and application of Article 6(3) and (4) of the Habitats Directive ..... I - 11072

— Arguments of the parties ..... I - 11072

— Findings of the Court ..... I - 11073

The sixth complaint: failure to transpose Article 10 of the Birds Directive ..... I - 11083

Arguments of the parties ..... I - 11083

Findings of the Court ..... I - 11084

Costs ..... I - 11087

In Case C-418/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 September 2004,

**Commission of the European Communities,** represented by B. Doherty and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland,** represented by D. O'Hagan, acting as Agent, assisted by E. Cogan, Barrister, and G. Hogan SC,

defendant,

supported by:

**Hellenic Republic,** represented by E. Skandalou, acting as Agent, with an address for service in Luxembourg,

and

**Kingdom of Spain,** represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, R. Schintgen, R. Silva de Lapuerta and P. Kūris (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 July 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

## Judgment

1 By its application the Commission of the European Communities is seeking a declaration from the Court that, by failing:

— to classify, since 1981, in accordance with Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9) ('the Birds Directive'), all the most suitable territories in number and size for the species in Annex I to that directive ('Annex I'), as well as regularly occurring migratory species;

— to establish, since 1981, in accordance with Article 4(1) and (2) of the Birds Directive, the necessary legal protection regime for those territories;

— to ensure that, since 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as special protection areas ('SPAs') under that directive;

— to transpose and apply the requirements of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— in respect of classified SPAs under the Birds Directive, to take all the measures necessary to comply with the provisions of Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive'), and, in respect of recreational use of all sites intended to be subject to Article 6(2) of that directive, to take all the necessary measures to comply with the provisions of the said Article 6(2); and

— to take all the measures necessary to comply with Article 10 of the Birds Directive;

Ireland has failed to fulfil its obligations under those articles of the said directives.

2 By order of the President of the Court of 17 March 2005, the Hellenic Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by Ireland, which has asked the Court to dismiss the action or, in the alternative, to limit the scope of any order made to the specific issues upon which it finds that Ireland has failed to comply with its obligations under the relevant directives.

## Legal framework

*Community legislation*

The Birds Directive

3 The ninth recital in the preamble to the Birds Directive states that 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds; ... certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution; ... such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole'.

4 According to Article 4 of the Birds Directive:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

5 Article 10 of the Birds Directive provides:

'1. Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1.

2. Particular attention shall be paid to research and work on the subjects listed in Annex V. Member States shall send the Commission any information required to enable it to take appropriate measures for the coordination of the research and work referred to in this Article.'

6 The topics of research and work listed in Annex V to the Birds Directive are as follows:

'(a) National lists of species in danger of extinction or particularly endangered species, taking into account their geographical distribution.

(b) Listing and ecological description of areas particularly important to migratory species on their migratory routes and as wintering and nesting grounds.

(c) Listing of data on the population levels of migratory species as shown by ringing.

(d) Assessing the influence of methods of taking wild birds on population levels.

(e) Developing or refining ecological methods for preventing the type of damage caused by birds.

(f) Determining the role of certain species as indicators of pollution.

(g) Studying the adverse effect of chemical pollution on population levels of bird species.'

The Habitats Directive

7 Article 6 of the Habitats Directive is worded as follows:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

*National legislation*

The European Communities Act

8 The European Communities Act 1972 empowers ministers to legislate independently of the national Parliament where obligations under Community law so require.

The Wildlife Act

9 Section 11(1) and (3) of the Wildlife Act 1976, as amended by the Wildlife (Amendment) Act 2000 ('the Wildlife Act'), provides:

'1. It shall be a function of the Minister to secure the conservation of wildlife and to promote the conservation of biological diversity.

...

3. The Minister may, either directly or in association with or through the agency of another person:

(a) carry out or cause to be carried out research which he considers desirable for the performance of his functions under this Act;

...'

10 Sections 15 to 17 of the Wildlife Act give the competent minister the power to create nature reserves on State-owned land by means of establishment orders. It also gives the minister a power to recognise nature reserves on other land and to designate areas of land as refuges for fauna.

The Birds Regulations

11 The European Communities (Conservation of Wild Birds) Regulations 1985 ('the Birds Regulations') prohibit the deposit of food, waste and deleterious matter in the SPAs concerned.

The Habitats Regulations

12 The preamble to the European Communities (Natural Habitats) Regulations 1997, as amended by the Wildlife (Amendment) Act 2000 ('the Habitats Regulations'), states that the regulations were enacted with a view to giving effect to the Habitats Directive in domestic law.

13 Regulation 2 of the Habitats Regulations defines 'European site' as: (a) a site notified for the purposes of Regulation 4; (b) a site adopted by the Commission as a site of Community importance for the purposes of Article 4(2) of the Habitats Directive, in accordance with the procedure laid down in Article 21 of that directive; (c) a special area of conservation; (d) an area classified pursuant to Article 4(1) and (2) of the Birds Directive.

14 Regulation 4 of those regulations provides:

'1. The Minister shall cause a copy of the candidate list of European sites or a modified list under Regulation 3(3) to be sent to the Minister for the Environment, the Minister for Agriculture, Food and Forestry, the Minister for the Marine, the Minister for Transport, Energy and Communications, the Commissioners of Public Works in Ireland, the Environmental Protection Agency and to any planning authority within whose functional area the land to which the list relates, or any part of such land, is situated and the Minister shall, where appropriate, consult with all or any of them.

2. (a) The Minister by notice shall notify every owner and occupier of any land mentioned in the candidate list of European sites and any holder of a valid prospecting licence or exploration licence duly issued under any enactment which relates to such land of the proposal to include the land in such a list and to transmit the list to the Commission pursuant to the provisions of the Habitats Directive;

(b) Where the address of any person to whom subparagraph (a) of this paragraph relates cannot be found after reasonable inquiry, notices and maps showing the site concerned shall be displayed in a conspicuous place:

(i) in one or more Garda Síochána stations, local authority offices, local offices of the Department of Social Welfare, local offices of the Department of Agriculture, Food and Forestry and offices of Teagasc which are located within or contiguous to the site concerned, or

(ii) where in any case there is no such station or office so located, in one or more of each such station or office within the vicinity or closest to such site, and

advertisements shall be broadcast on at least one radio station duly broadcasting in the area of the site concerned and be placed in at least one newspaper circulating in that area and every such advertisement shall request any person affected by the candidate list of European sites to contact the Department of Arts, Culture and the Gaeltacht.

...

3. The candidate list of European sites sent by the Minister under paragraph (1) and the notification issued by the Minister under paragraph (2) shall, in respect of each site:

(a) be accompanied by an ordnance map of appropriate scale in the circumstances, upon which is marked the site, so as to identify the land comprising the site to which the notice relates and the boundaries thereof;

(b) indicate the operation or activity which the Minister considers would be likely to alter, damage, destroy or interfere with the integrity of the site;

(c) indicate the habitat type, or types, the site hosts or the species the site hosts and for which the site is proposed to be identified as a site of Community importance;

(d) indicate the procedures by which a person may object.

...'

15 Regulation 5 provides that any person to whom notice is given under Regulation 4(2) has the right to object to the inclusion of the site in the candidate list of European sites, and defines the procedure for deciding on objections.

16 Regulation 7 of the Habitats Regulations provides that the minister may appoint 'authorised officers' to enter onto land and inspect it.

17 Regulation 9 provides:

'1. Not later than six years from the date a site is adopted by the Commission in accordance with the procedure laid down in paragraph 2 of Article 4 of the Habitats Directive the Minister shall designate the site as a special area of conservation and the Minister shall publish, or cause to be published, in the *Iris Oifigiúil* a copy of every such designation.

...'

18 Regulation 13 is worded as follows:

'1. The Minister shall establish the conservation measures which the Minister considers appropriate in respect of special areas of conservation designated under Regulation 9 including, if necessary, management plans ... either specifically designated for the sites or integrated into appropriate plans.

2. The Minister shall establish the administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I to the Habitats Directive and the species in Annex II to that Directive present on the sites.

3. The Minister shall take the appropriate steps to avoid, in the special areas of conservation designated under Regulation 9, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.'

19 According to Regulation 14 of the Habitats Regulations:

'1. A person shall not carry out, cause to be carried out or continue to carry out, on any land included in a special area of conservation or a site placed on a list in accordance with Chapter I of this Part an operation or activity mentioned in a notice issued under Regulation 4(2) unless the operation or activity is carried out, or caused

or permitted to be carried out or continued to be carried out, by the owner, occupier or user of the land and:

(a) one of them has given the Minister written notice of a proposal to carry out the operation, or activity, specifying its nature and the land on which it is proposed to carry it out, and

(b) one of the conditions specified in paragraph (2) is fulfilled.

2. The conditions referred to in paragraph (1) are as follows:

(a) that the operation or activity is carried out with the written consent of the Minister, or

(b) that the operation or activity is carried out in accordance with the terms of a management agreement provided for under Regulation 12.

3. A person who, without reasonable excuse, contravenes paragraph (1) shall be guilty of an offence.

4. The provisions of this Regulation shall not apply to an operation or activity to which Regulation 15(2) relates.'

20 Regulation 15(1) provides that, where an application to the Irish authorities for consent under Regulation 14 relates to a proposed activity which is likely to have a significant effect on the site, those authorities are to assess the implications for the site in view of that site's conservation objectives. Regulation 15(2) further provides that, where the proposed activity has already been authorised under other legislation, the competent minister under whose authority the authorisation was issued is to assess that activity and, where appropriate, modify or revoke the authorisation in question.

21 Regulation 16 states that if, in the light of the assessment under Regulation 15, the proposed activity would harm the site, the activity must not be allowed. There is, however, an exception for 'imperative reasons of overriding public interest'.

22 Regulation 17 provides:

'1. Where the Minister considers that an operation or activity is being carried out or may be carried out on:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

which is neither directly connected with nor necessary to the management of such sites but likely to have a significant effect thereon either individually or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. An environmental impact assessment in respect of a proposed operation or activity shall be an appropriate assessment for the purposes of this Regulation.

3. If the Minister, having regard to the conclusions of the assessment undertaken under paragraph (1), is of the opinion that the operation or activity will adversely affect the integrity of the site concerned, the Minister shall make application to a court of competent jurisdiction to prohibit the continuance of the operation or activity.

4. An application to a court of competent jurisdiction for a prohibition under this Regulation shall be in a summary manner and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate having regard to paragraph 4 of Article 6 of the Habitats Directive and to the overall requirement of safeguarding the integrity of the site concerned and ensuring that the overall coherence of Natura 2000 is protected.

5. For the purposes of this section "a court of competent jurisdiction" means either a Judge of the Circuit Court within whose Circuit the lands or part of the lands concerned are situated or the High Court.'

23 Regulation 18 is worded as follows:

'1. Where an operation or activity is being carried out, or is proposed to be carried out, on any land that is not within:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

and is liable to have an adverse effect on the integrity of the site concerned either alone or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. Having regard to the conclusions of the assessment undertaken under paragraph (1) the provisions of paragraphs (2) to (5) of Regulation 17 shall apply.'

24 Regulation 34 provides:

'The provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive.'

25 Regulation 35 is worded as follows:

'The Minister shall:

(a) promote education and general information on the need to protect species of wild flora and fauna and to conserve their habitats and natural habitats;

(b) encourage the necessary research and scientific work for the purpose of meeting the requirements of Article 11 of the Habitats Directive with particular attention to scientific work necessary for the implementation of Articles 4 and 10 of that Directive;

(c) supply information, where appropriate, for the purpose of proper co-ordination of research carried out at Member State and Community level to other Member States and the Commission.'

**Pre-litigation procedure and written procedure before the Court**

26 After receiving complaints, the Commission initiated two sets of infringement proceedings against Ireland and sent it, between 11 November 1998 and 18 April 2002, four letters of formal notice relating, first, to a failure fully and correctly to transpose and apply the Birds and Habitats Directives and, secondly, to specific infringements concerning damage caused to habitats by recreational users.

27 As the explanations provided by the Irish authorities in their replies were not considered to be satisfactory, and following bilateral meetings between Ireland and the Commission, the latter sent Ireland, on 24 October 2001, a reasoned opinion and, on 11 July 2003, an additional reasoned opinion and a reasoned opinion concerning recreational activities.

28 As it took the view that the arguments put forward by Ireland in its replies to the reasoned opinions were not wholly satisfactory and, accordingly, that there was a continuing failure on Ireland's part to comply with a number of its obligations under the Birds and Habitats Directives, the Commission decided to bring the present action.

29 Given the close connection between the two cases, the Commission decided to join both infringements in a single set of proceedings before the Court.

## The action

30 In support of its application, the Commission relies on six complaints concerning the failure of Ireland to comply with a number of obligations imposed on it by Articles 4(1), (2) and (4) and 10 of the Birds Directive and by Article 6(2) to (4) of the Habitats Directive.

*Preliminary observations*

31 Under Article 18(1) of the Birds Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Birds Directive into national law expired on 6 April 1981.

32 Under Article 23(1) of the Habitats Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Habitats Directive into national law expired on 10 June 1994.

33 It is not disputed that, in the present case, the date of expiry of the period laid down in the reasoned opinions must be set at 11 September 2003.

*The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive*

34 The Commission claims that Ireland has failed, since 1981, to classify, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable areas in number and size for the conservation of the species referred to in Annex I as well as regularly occurring migratory species not listed in that annex. There are two aspects to the first complaint. The Commission states, firstly, that there has been a failure to make any classification in respect of certain sites and, secondly, that there has been a failure to make a complete classification of other sites.

35 Ireland denies the alleged failure to comply with its obligations. It states that when it informs the Commission of its intentions regarding SPA classification, it does so as part of the cooperation and consultation between the Member States, as provided for by the Birds and Habitats Directives. Moreover, when it informs the Commission that research is being carried out, it does not follow that the present SPA network is inadequate or that Ireland has failed to fulfil its obligations under the Birds Directive.

Preliminary observations

36 The Court notes, as a preliminary point, that, according to its settled case-law, Article 4(1) and (2) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 14 and case-law cited).

37 Secondly, Member States are obliged to classify as SPAs all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for conservation of the species in question (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 62).

38 Thirdly, the obligation imposed on Member States to classify sites as SPAs cannot be avoided by the adoption of other special conservation measures (see, to that effect, *Commission* v *Netherlands*, paragraph 55).

39 Fourthly and lastly, although Member States do have a certain margin of discretion with regard to the choice of SPAs, the classification of those areas is nevertheless subject exclusively to the ornithological criteria determined by the Birds Directive (see, to that effect, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26). The economic requirements mentioned in Article 2 of that directive may therefore not be taken into account when selecting an SPA and defining its boundaries (*Commission* v *Netherlands*, paragraph 59 and case-law cited).

IBA 2000

40 In support of its complaint the Commission refers, inter alia, to the judgment in *Commission* v *Netherlands*, in which the Court took account of the *Inventory of Important Bird Areas in the European Community*, published in 1989 ('IBA 89'), finding that, although it was not legally binding on the Member States concerned, it could, by reason of its scientific value in that case, be used by the Court as a basis of reference for assessing the extent to which a Member State had complied with its obligation to classify SPAs. According to the Commission, a similar inventory is under consideration in the present case.

41 Ireland disagrees with the Commission on certain aspects of the *Review of Ireland's Important Bird Areas*, drawn up in 1999 in the context of a European census and published in 2000 ('IBA 2000'). It argues that neither the existence of such a list alone nor the existence of such disagreement is evidence of a failure on Ireland's part to comply with its obligations under the Birds Directive.

42 The Hellenic Republic and the Kingdom of Spain take the view that IBA 2000 is deficient and therefore cannot be attributed the same value as IBA 1989.

43 The Greek and Spanish Governments contend that IBA 2000 differs from IBA 89 on a number of points. In their view, IBA 2000 contains scientific data which may well provide a reference attesting to the existence of species in each territory, but which are merely indicative and general in nature in terms of the size of the population of the various species and boundaries and, therefore, the size of the areas to be classified as SPAs. IBA 2000, by contrast, does not contain scientific information sufficient to enable a delimitation of areas important for bird conservation to be made with certainty, it includes areas which are too large and of limited ornithological interest and the list of areas should be updated in accordance with the most recent scientific analysis. Accordingly, the content of the list in question cannot be used in the present case to draw certain conclusions as to the populations and exact boundaries of the SPAs.

44 The Hellenic Republic and the Kingdom of Spain infer therefrom that IBA 2000 is not a sufficient or unique basis on which to establish that Ireland has failed to fulfil its obligations, as alleged by the Commission.

45 Since the merits of the first complaint depend in large measure on whether the discrepancy between IBA 2000 and the SPAs actually classified by Ireland establishes that that Member State has not fulfilled its obligation to classify sites as SPAs to a sufficient degree, it is appropriate to consider whether IBA 2000 carries scientific value comparable to that of IBA 89 and whether it may thus be used as a reference to appraise the alleged failure to fulfil obligations.

46 It must be borne in mind that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (Case C-191/05 *Commission* v *Portugal* [2006] ECR I-6853, paragraph 9 and case-law cited). Furthermore, it is clear from the ninth recital in the preamble to that directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The Member States are therefore required to adopt the measures necessary for the conservation of those species (Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 23).

47 For that purpose, the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs. It is therefore necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion (Case C-235/04 *Commission* v *Spain*, paragraph 24).

48 In that regard, it should be borne in mind that the national inventories, including IBA 2000 prepared by BirdLife International, revised the initial Europe-wide study carried out in IBA 89 by presenting more specific and up-to-date scientific data. IBA 2000 states that that inventory lists 48 new sites in Ireland in comparison with IBA 89.

49 As noted by the Advocate General in point 20 of her Opinion, the areas listed in both inventories result from the application of specific criteria to information on the presence of birds. The criteria of IBA 2000 are largely the same as those of IBA 89. It follows that the increase in the number and territory of the areas stems essentially from better knowledge of the presence of birds.

50 Ireland maintains that the Commission is wrong to argue that IBA 2000 is not exhaustive. It adds that IBA 2000 is merely a reference for establishing correctly a network of areas of importance for the conservation of birds and that other ornithological studies may serve as a basis for the classification of the most suitable areas for the conservation of certain bird species.

51 That lack of completeness, as pointed out by the Advocate General in point 25 of her Opinion, does not undermine the probative value of IBA 2000. The situation would be different if Ireland had adduced scientific evidence tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area (see *Commission* v *Italy*, paragraph 18).

52 In view of the scientific nature of IBA 89 and of the absence of any scientific evidence adduced by a Member State tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, the Court has held that that inventory, although not legally binding, could be used by the Court as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of the abovementioned provisions of that directive (Case C-235/04 *Commission* v *Spain*, paragraph 26 and case-law cited).

53 In the present case, it is common ground that Ireland has not put forward any other ornithological criteria which are objectively verifiable, as compared with those used in IBA 2000, to serve as a basis for a different classification; nor has it presented a complete national inventory contradicting IBA 2000, established according to scientific methods and designating all the most suitable areas with a view to classification as SPAs.

54 The Court accordingly finds that IBA 2000 provides an up-to-date inventory of the areas of importance for the conservation of birds in Ireland which, in the absence of scientific evidence to the contrary, provides a point of reference which makes it possible to assess whether that Member State has classified as SPAs sufficient areas of territory in terms of number and size to provide protection to all the species of birds listed in Annex I and also to migratory species not listed in that annex.

55 This finding cannot be affected by the Spanish Government's argument that the various non-governmental organisations involved in bird conservation chose to modify unilaterally the previous inventory concerning the various Member States, without any competent State environmental body having supervised that process or having guaranteed the accuracy and correctness of the data contained therein.

56 The Court finds in that regard, firstly, that IBA 2000 was published by BirdLife International, an association of national organisations for the protection of birds which had already been involved in drawing up IBA 89 under the designation of the International Council for Bird Preservation. The Eurogroup for the Conservation of Birds, which was also involved at that time, was an ad hoc group of experts of that council. Consequently, BirdLife International provides continuity in respect of the work on the area inventories, as noted by the Advocate General in point 22 of her Opinion.

57 Secondly, it is common ground that the IBA 2000 chapter on Ireland was drawn up in collaboration with Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and the Islands (now National Parks and Wildlife Service of the Department of the Environment, Heritage and Local Government) ('National Parks and Wildlife'). That part of the inventory was drawn up with the help of high-level Irish ornithological experts and is based mostly on available data on numbers and distribution of birds and on studies carried out with the financial support of the competent authorities. The list of scientific references shows, moreover, that the experts relied largely on studies published and carried out with the participation of scientists from the competent conservation authorities.

58 At the hearing, Ireland maintained its position that the nature of a Member State's obligation in the light of Article 4(1) of the Birds Directive and the recitals in the preamble thereto must be assessed at European level and not in the light of the territory of the Member State concerned alone. It is thus possible that a specific area may be eligible but may not be the most suitable area for classification as an SPA.

59 Yet even if, as Ireland correctly points out, the Member States' obligation under Article 4(1) of that directive concerns only the classification of the most suitable areas for the conservation of birds and it is possible that areas which, in the light of species protection requirements, would in fact be suitable for such conservation never become classified as SPAs, it nevertheless follows from Article 4(1) of the Birds Directive, as interpreted by the Court, that, if species mentioned in Annex I occur on the territory of a Member State, it is obliged inter alia to define SPAs for them (see *Commission* v *Netherlands*, paragraph 56 and case-law cited).

60 As noted by the Advocate General in point 32 of her Opinion, in the Member States in which these species occur relatively frequently, the SPAs ensure above all that large sections of the overall population are conserved. However, SPAs are also necessary where these species are rather rare. In that case the SPAs help the geographical distribution of the species.

61 Indeed, if each Member State could escape the obligation to classify SPAs to ensure protection of the species listed in Annex I and present on its territory on the sole ground that there were numerous other sites in other Member States which were much more appropriate for the conservation of those same species, the objective of creating a coherent network of SPAs, as referred to in Article 4(3) of the Birds Directive, might not be achieved (see, by analogy, *Commission* v *Netherlands*, paragraph 58).

62 The Greek Government submits that the obligation on Ireland, within the framework of cooperation with the competent Commission departments, and the timetable which Ireland set for delimiting new SPAs and extending existing SPAs must be taken into account, as that Member State must verify the content of IBA 2000 for the suppose of being able to determine areas of importance for the conservation of birds and classification as SPAs.

63 The Court finds on this point that, although any classification presupposes that the competent authorities are convinced, based on the best scientific knowledge available, that the site in question is among the most suitable areas for the protection of birds (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 27), that does not however mean that the obligation to classify does not, as a rule, arise so long as those authorities have not completed their evaluation and check of the new scientific knowledge.

64 On the contrary, as the Court has held previously, faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories (see Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53).

65 In view of the fact that the obligation to classify the most suitable areas for species conservation as SPAs has been in place for Ireland since 6 April 1981, Ireland's request for an additional period in which to assess the best scientific source available cannot succeed, as that request is not compatible with the objectives pursued by the Birds Directive or with the responsibility which that directive imposes on the Member States to manage the common heritage on their territory.

66 Moreover, as has just been held in paragraph 47 of this judgment, it is necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion.

67 It follows from all the foregoing that, in the absence of scientific studies capable of rebutting the results of IBA 2000, that inventory is the most up-to-date and accurate reference for identifying the most suitable sites in number and in size for the conservation of the species listed in Annex I and for the regularly occurring migratory species not listed in that annex.

The first part of the first complaint

— Arguments of the parties

68 The Commission acknowledged, during the pre-litigation procedure, that Ireland had classified a relatively high number of sites as SPAs. It takes the view, however, that other areas also should have been thus classified. After noting that IBA 2000 listed a total of 140 areas of importance for the conservation of birds covering an area of 4 309 km$^2$, or approximately 6% of Ireland's total land area (approximately 60% of those areas are coastal areas, in line with the fact that Ireland has 7 100 km of coast; internal waters account for another 20%), the Commission maintains that 42 of those areas had not been classified as SPAs. It its view, even if all of those areas were to be classified as SPAs, Ireland's SPA network would still suffer from shortcomings with regard to a number of bird species referred to in Annex I and regularly occurring migratory species because they are not entirely covered by the classification made in IBA 2000.

69 It further observes that, in terms of territorial coverage, Ireland's SPA network is the second smallest of the group of 15 Member States prior to enlargement in 2004. The level of territorial coverage of Ireland's SPA network has in fact already been surpassed by several of the 10 new Member States.

70 Lastly, the Commission notes that, during the pre-litigation procedure, the Irish authorities proposed a timetable for the classification, re-classification and extension of a certain number of sites. In reality that timetable has not been adhered to and Ireland has not made or notified any classification.

71 After stating that it is well aware that its obligation to classify appropriate areas for species conservation follows from the Birds Directive and not from IBA 2000, Ireland replies that the overall research work for extending, if necessary, Ireland's SPA network is currently being carried out and should be completed soon.

72 Ireland adds, however, that the kingfisher (*Alcedo athis*) is the least appropriate species for an attempt at conservation using SPA classification and that there is good reason for not classifying other SPAs for the corncrake (*Crex crex*). Ireland adds that it may lawfully deem the Cross Lough area not to be one of the most suitable territories for classification on the basis of information available to it.

— Findings of the Court

A —
*The sites identified in IBA 2000*

73 The Court finds, as a preliminary point, that the Commission acknowledged, in its additional reasoned opinion, that there was en error in Table 1 in its reasoned opinion notified on 24 October 2001 concerning the Bull and Cow Rocks site, already classified as an SPA, and that, consequently, that site no longer forms part of the subject-matter of the present action.

74 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40).

75 In the present case, it is clear from the indications given as to the abovementioned grounds for failure to fulfil obligations that Ireland does not dispute the allegation that it had not classified 42 of the 140 sites identified in IBA 2000 as SPAs within the period laid down in the additional reasoned opinion notified on 11 July 2003.

76 In the light of what has been stated in paragraph 67 of this judgment, the mere fact that Ireland has embarked upon an extensive SPA classification and re-classification programme cannot justify the failure to classify the sites identified in IBA 2000 as SPAs.

77 By contrast, the interest in classifying the Cross Lough area, as well as the three sites suitable for conservation of the corncrake, namely Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula, is the subject of a detailed challenge by Ireland.

78 Accordingly, the Commission's action must be upheld in respect of 38 of the 42 sites identified in IBA 2000 and it is appropriate to examine the merits of the action in respect of the four sites the ornithological interest of which is specifically challenged by Ireland.

1. The Cross Lough area

(a) Arguments of the parties

79 The Commission has referred to the Cross Lough area for two reasons. Firstly, Ireland has specifically challenged the need to classify that area as an SPA, even though it was, up to quite recently, an important breeding ground for the sandwich tern (*Sterna sandvicensis*). Secondly, the failure to classify the area in a timely manner was likely to have a negative impact on the protection of the species.

80 The Commission states that, according to the information available to it, the disappearance of the sandwich tern colony, which, according to IBA 89, had been present in the area since 1937, can be traced to predatory activity on the part of the American mink (*Mustela vison*) and that no measures were ever put in place to protect the colony. According to the Commission, with appropriate restoration measures, the sandwich tern might resettle this important long-standing breeding ground. Ireland should not be allowed to benefit from the fact that it failed to ensure classification and protection of the Cross Lough area in a timely manner.

81 Ireland states that the Commission has failed to provide scientific substantiation for its assertion that Ireland is required to classify as an SPA an area which is no longer of interest to the species in question and is no longer an important area for bird conservation but to which birds, after having bred and even though they have moved, might return. Although the Commission might be right in believing that, according to its information, the Cross Lough (or any other) area might be recolonised by the sandwich tern and enjoy the protection of classification as an SPA, it has not succeeded in establishing hat that area would be one of the most

suitable for the conservation of the species in question. Ireland adds that the Commission has not proven that the disappearance of the sandwich tern colony was caused by the predatory activity of the American mink in that area.

(b) Findings of the Court

82 It is common ground that the Cross Lough area was identified in both IBA 89 and IBA 2000 as being one of the most suitable areas for conservation of the sandwich tern, a species referred to in Annex I, according to the ornithological criteria drawn up in 1984 and 1995 respectively. It must accordingly be held that the area has featured among the most suitable areas for conservation of that species since 6 April 1981. Consequently, pursuant to the case-law resulting from the judgment in *Commission* v *Netherlands*, paragraph 62, Ireland should have classified that area as an SPA.

83 As noted by the Advocate General in point 58 of her Opinion, that classification obligation does not necessarily cease to apply if the area is no longer most suitable.

84 According to settled case-law, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved (see Case C-355/90 *Commission* v *Spain*, paragraph 22, and Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraphs 47 and 57).

85 It follows that Ireland ought, at the very least, to have adopted appropriate measures pursuant to the first sentence of Article 4(4) of the Birds Directive in order to avoid pollution or deterioration of the habitats in the Cross Lough area or any disturbances affecting the sandwich tern, in so far as those disturbances may have been significant with regard to the objectives of that article.

86 In the present case, having failed to take such measures for that area, Ireland has not provided proof that the area would no longer be suitable even if protection measures had been taken (see, to that effect, Case C-191/05 *Commission* v *Portugal*, paragraphs 13 and 14).

87 Moreover, according to the results of scientific studies and observations submitted by the Commission during the proceedings, which have not been disputed by Ireland, protection measures were possible. Relying on two articles written by an Irish naturalist, the Commission explained the predatory effect of the American mink on the nests of ground-breeding sandwich terns and, referring to recent observations carried out in an area of County Donegal, showed that management (trapping of minks) reduced the problems of predators and that most of the local population of sandwich terns always nest in the same area.

88 Relying on the aforementioned observations, not disputed by Ireland, which confirm the potential for recolonisation of areas by the sandwich tern, the Commission adds that there is a genuine chance that the sandwich tern may resettle in the area. It adds that the species must have a number of nesting sites within one area, not all of which are necessarily used in a given breeding season.

89 In those circumstances, the Court finds that the action is well-founded in respect of the Cross Lough area.

2. The three suitable areas for conservation of the corncrake

(a) Arguments of the parties

90 The Commission states that the corncrake is the only bird species endangered at world level which is present in Ireland. Its population has declined sharply in recent years and it is now to be found only in limited pockets. Only a much reduced population now survives in Ireland, a fact which justifies a high level of site protection.

91 In its view, a Member State may not validly rely on the low number and vulnerability of a corncrake population to justify a failure to classify the most suitable areas for the conservation of that species. In its reply, the Commission adds that the successful conservation and management of core areas are essential for the corncrake to recover and expand from its current, precarious population.

92 Ireland, for its part, contends that any further designation of SPAs must be considered in the context of available species information (which is extensive) and the positive species conservation steps taken by the National Parks and Wildlife Service. The application of the term 'globally endangered' to the corncrake is no longer valid in the light of available species information and it is therefore misleading to describe it as such. The use of the relevant land is changing substantially. The insistence by the Commission that other areas suitable for

conversation of the corncrake must be classified as SPAs is misguided and is in any event not supported by adequate evidence.

93 After observing that there is indeed a small and unpredictable distribution of corncrakes outside current SPAs, Ireland goes on to state that it is the unpredictability, not the precariousness, of a site's occupation by corncrakes which presents the difficulty. In other words, sound ornithological criteria, and not speculation, should form the basis for classification.

(b) Findings of the Court

94 Although new studies on the presence of the corncrake in Europe have changed its classification category, the fact remains that the 'near threatened' category in which it is currently classified, as much as the 'vulnerable' category in which it was classified previously, meets the conditions for identification of areas of importance for the conservation of birds according to the C.1 criterion used in IBA 2000. This also does not affect the application of the C.6 criterion used in that same inventory. The sites identified in IBA 2000 accordingly cannot be called into question.

95 This finding cannot be rebutted by Ireland's argument that the requirements of the Birds Directive are met with regard to the needs of the corncrake by designating as SPAs the lands used by a significant proportion of the corncrake population through the State funding of the Corncrake Grant Scheme, which involves funding for three fieldworkers, administration costs and payments to farmers, funding and facilitating research and the inclusion of a corncrake tier in the latest Rural Environment Protection Scheme.

96 As evidenced by the case-law referred to in paragraphs 37 to 39 of this judgment, such conservation measures cannot be considered to be sufficient.

97 Ireland's argument that the distribution of corncrakes outside current SPAs is small and unpredictable must also be rejected.

98 The Commission submitted, without being contradicted by Ireland on the point, ornithological publications indicating that, between 1999 and 2001, an average of 39% of the corncrake population present on Irish territory was outside SPAs and that, between 2002 and 2004, that figure was closer to 50%.

99 Ireland's argument that major changes have affected the distribution of the species over short periods (less than 10 years), and that it would be premature to recommend classification of other areas as SPAs as long as the situation has not stabilised, must also be rejected.

100 It is clear in this regard that there has been a sufficiently stable presence of the corncrake in the sites in question over brief periods. Ireland has not disputed that, according to the results of a study carried out by BirdWatch Ireland and submitted

by the Commission, in the period from 1993 to 2001, the reduced presence of the corncrake in the area of Falcarragh to Min an Chladaigh accounted for 8% of its population in Ireland, in Malin Head 4% of the population in Ireland, and on the Fanad Head Peninsula 3% of the population in Ireland. According to the same source, the figures are similar for the period 2002 to 2004.

101 As to Ireland's argument that the goodwill and cooperation of landowners is conducive to the success of future conservation schemes and the application of protective instruments, the Court observes that, even if that were the case, that fact does not release a Member State from its obligations under Article 4 of the Birds Directive.

102 In those circumstances, the Court finds that the action is also well-founded in respect of the sites of Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula.

B — *The birds to be protected in other sites*

103 The Commission submits that for the red-throated diver (*Gavia stellata*), the hen harrier (*Circus cyaneus*), the merlin (*Falco columbarius*), the peregrine falcon (*Falco peregrinus*), the golden plover (*Pluvialis apricaria*), the corncrake, the kingfisher, the white-fronted goose (Greenland race) (*Anser albifrons flavirostris*) and the short-eared owl (*Asio flammeus*), protected species referred to in Annex I, and also for the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*), the curlew (*Numenius arquata*) and the dunlin (*Calidris alpina*), regularly occurring migratory species, the areas of importance for the conservation

of birds identified in IBA 2000 clearly do not offer a sufficient set of sites in number and in size to satisfy the conservation needs of those species.

104 Ireland states that studies have been carried out on six of the nine abovementioned species included in Annex I as well as on the dunlin, a regularly occurring migratory species. The completion of that work henceforth allows for the identification of sites which may be classified as SPAs for the conservation of the red-throated diver, the hen harrier, the merlin, the golden plover and the dunlin. During the pre-litigation procedure, Ireland stated that the SPAs which will be proposed for the conservation of the hen harrier would also allow for conservation of the short-eared owl. Moreover, at the current time, the golden plover is already a 'qualifying interest' in three classified SPAs and the merlin is a 'qualifying interest' at four sites with a multi-species interest. The peregrine falcon is likely to be a qualifying species in most of the SPAs concerning the red-billed chough (*Pyrrhocorax pyrrhocorax*).

105 Although Ireland provides evidence of a number of partial initiatives, these had not been completed at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. Since the question whether there has been a failure to fulfil obligations must be examined solely on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion, the Court finds that, in the light of the information referred to in the preceding paragraph of this judgment, Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the red-throated diver, the hen harrier, the merlin, the peregrine falcon, the golden plover and the short-eared owl, species referred to in Annex I, and the protection of the dunlin, a regularly occurring migratory species not listed in Annex I. The complaint is also well-founded on this point.

106 Furthermore, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (Case C-288/02 *Commission* v *Greece* [2004] ECR I-10071, paragraph 35 and case-law cited), has succeeded in

demonstrating to the requisite legal standard that Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the white-fronted goose (Greenland race), a species referred to in Annex I, and the protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I. Consequently, the complaint is not well-founded on this point.

107 As regards the kingfisher and the corncrake, Ireland disputes the need to classify other sites as SPAs for their conservation.

1. Suitable sites for conservation of the kingfisher

108 The Commission takes the view that the Irish SPA network should include a representative set of river corridors that could be used by the kingfisher. Ireland, however, has taken no steps towards classifying the most suitable territories for the conservation of the kingfisher and does not even know the current population of the species.

109 Ireland considers that a species as widely dispersed as the kingfisher is the least appropriate of the dispersed species to attempt to conserve through SPA classification. This conclusion is based on available information including two 'breeding atlases' compiled between 1988 and 1991. Although the current population of the kingfisher is not known, it is understood that BirdWatch Ireland intends to carry out a survey. In the event that the survey shows a more significant kingfisher population, the Irish authorities would reconsider the matter of the creation of SPAs for the purpose of kingfisher conservation in the future.

110 As has just been pointed out in paragraph 59 of this judgment, it is clear from Article 4(1) of the Birds Directive, as interpreted by the Court, that if species listed in Annex I occur on the territory of a Member State, it is obliged to define SPAs for them. It follows that Ireland ought to have identified the most suitable territories for conservation of the kingfisher and classified them as SPAs.

111 It follows that Ireland, which acknowledges that the kingfisher is present in its territory, had failed to comply with that obligation at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. The action is therefore also well-founded as regards the suitable sites for conservation of the kingfisher.

2. Suitable sites for conservation of the corncrake

112 The Commission observes that the current SPA network for protection of the corncrake is weak. It states that IBA 2000 identifies five additional areas: Falcarragh to Min an Chladaigh, Malin Head, the Fanad Head Peninsula, the Mullet Peninsula and the Moy Valley.

113 As regards the five additional areas referred to in the preceding paragraph, the Court finds, first, that they are areas of importance for the conservation of birds and, second, that for three of them — Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula — the failure to fulfil obligations has already been declared in paragraph 102 of this judgment.

114 With regard to the Mullet Peninsula, the Commission states, in its reply, that part of this area is subject to SPA classification for other purposes. It is clear, therefore, that the Mullet Peninsula is an example of part classification.

115 Next, the C.6 criterion is applicable to the Mullet Peninsula. That criterion designates an area which is one of the five most important areas in each European region for a species or subspecies listed in Annex I. Therefore, under the criteria used in IBA 2000, it is sufficient that the area in question hosts a significant number of individuals of such a species or subspecies (at least 1% of the national breeding population of a species referred to in Annex I or 0.1% of the biogeographical population) in order for it to have to be classified as an SPA.

116 Thus, in the present case, in its reply, the Commission submitted results — which were not challenged by Ireland — of a study by BirdWatch Ireland, according to which, in the period from 1993 to 2001, the reduced presence of the corncrake on the Mullet Peninsula accounted for 4% of the national population. According to the same source, similar figures can be shown for the years 2002 to 2004.

117 Accordingly, the Commission's action must be upheld in respect of the Mullet Peninsula.

118 With regard to the Moy Valley, the Commission acknowledges that the census data show an absence of corncrakes for several years. However, the BirdWatch figures indicate that the Moy Valley had important numbers of corncrakes in the 1980s and up to the mid-1990s. In particular, up to 1993, the area held the second largest concentration of corncrakes in the country after the Shannon Callows and therefore would have unreservedly qualified for classification on any reasonable application of ornithological criteria. Thus there was evidence to justify classification of the Moy Valley as an SPA for a long period after the Birds Directive came into force. The loss of corncrakes in the Moy Valley was the result of changes in agricultural practices

which Ireland took no steps to remedy. The Commission submits that Ireland ought not to derive any advantage from its failure to classify and protect this site. Ireland has not demonstrated the infeasibility of re-establishing a corncrake presence in that area.

119 It is clear that the figures from BirdWatch Ireland, submitted by the Commission in its reply and showing that the Moy Valley area had numerous corncrakes in the 1980s until the mid-1990s, are not disputed by Ireland. It follows that that site was one of the most suitable areas for conservation of the corncrake and that, in line with the case-law cited in paragraph 37 of this judgment, Ireland ought to have classified it as an SPA.

120 According to the settled case-law referred to in paragraph 84 of this judgment, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved. It follows that Ireland ought at the very least to have adopted appropriate measures under the first sentence of Article 4(4) of the Birds Directive in order to prevent the deterioration of habitats in the Moy Valley and disturbances affecting the corncrake, in so far as they have significant effects in the light of the objectives of that article.

121 The case-file shows that in the Moy Valley, which should have been classified as an SPA, the loss of corncrake was the result of changes in agricultural practices which Ireland took no steps to remedy.

122 Nor has Ireland demonstrated that it would be impossible to re-establish the presence of the corncrake in that area. Accordingly, the Commission's action must be upheld on this point.

123 It follows that the action is also well-founded in respect of the Mullet Peninsula and the Moy Valley.

The second part of the first complaint

— Arguments of the parties

124 The Commission argues that Ireland has failed to fulfil its obligation under Article 4(1) and (2) of the Birds Directive because it classified certain sites as SPAs only partially. In its view, the SPA boundaries were in many cases drawn so as to exclude equivalent adjacent areas of ornithological interest as identified in IBA 2000. These criticisms cover a total of 37 sites.

125 After pointing out that SPA boundaries should be defined by ornithological considerations and not economic ones, the Commission notes that the Irish authorities, by contrast, have in many cases limited SPAs to sites in public ownership and have not classified sites seriously contested by economic interests.

126 The Commission adds that, during the proceedings, the Irish authorities stated that they intended to extend and re-designate a large number of sites by the end of June 2004, but do not appear to have followed up on that intention in practice.

127 Ireland states that the relevant survey work is in progress and that it is intended that fresh SPAs will be classified for the purpose of conservation of the species concerned. All reclassifications and new classifications will be carried out in accordance with the requirements of the Habitats Regulations. Nevertheless, it disputes the alleged failure to classify a sufficiently large area for the Sandymount Strand and Tolka Estuary SPA.

— Findings of the Court

128 In acknowledging that certain SPAs must be extended, Ireland admits that it has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive. Accordingly, the Commission's action must be upheld in respect of 36 of the 37 sites.

129 Next, the situation of the Sandymount Strand and Tolka Estuary SPA must be examined.

130 The Commission claims that the boundaries of the Sandymount Strand and Tolka Estuary SPA have not taken proper account of ornithological interests, contrary to Article 4(1) and (2) of the Birds Directive.

131 In its view, evidence indicates that the approach taken by the Irish authorities for the demarcation of the boundaries of the Sandymount Strand and Tolka Estuary SPA, an internationally important wetland for waterfowl, situated in Dublin Bay and regularly supporting over 20 000 wintering birds, leads to the exclusion of two areas earmarked for development in connection with major public works; that exclusion was decided upon on the basis of an isolated consideration of the ornithological value of those areas, whereas the boundaries of the SPAs should have been drawn up in the light of the natural boundaries of the wetland ecosystem.

132 According to the Commission, the first area of 4.5 hectares, the inclusion of which in the SPA had been proposed previously, was excluded from the initial extension project for the Sandymount Strand and Tolka Estuary SPA following representations by the Dublin Port Company, which wished to infill the area for a port extension.

133 Ireland, for its part, contends that that area should not have been included in the proposed extended area in the first instance and that its inclusion has no scientific basis. The adjustment of the proposed extended SPA was subjected to close examination and it was concluded that the inclusion of the area was not scientifically justified on the ground that only a small part is exposed briefly at low spring tides.

134 Ireland observes in particular that common adaptable wader species can use the area only when it is exposed at low tide. Those species find the bulk of their food elsewhere. Further, the area may not relate to significant habitats located nearby which provide better conditions for the species concerned. In Ireland's view, no real attempt has been made by the Commission to dispute the underlying scientific basis for this view.

135 As regards the first area, the Court finds, as a preliminary point, that the complaints expressed by the Commission in its reply regarding other sites in that area are inadmissible at the stage of proceedings before the Court on the ground that they were not the subject-matter of the action.

136 In accordance with the Court's settled case-law, the subject-matter of an action under Article 226 EC for failure to fulfil obligations is delimited by the pre-litigation procedure provided for by that provision, so that the application must be based on the same grounds and pleas as the reasoned opinion (see Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 35 and case-law cited).

137 Next, as evidenced by the case-file, the Commission produced an ornithological study carried out in November 2002 by Dublin Bay Watch, which, on the basis of an examination of the ornithological implications of the infilling project, called for the inclusion of those areas in the Sandymount Strand and Tolka Estuary SPA. That study, which has not been disputed by the Irish authorities, shows, as noted by the Advocate General in point 72 of her Opinion, that various species make above-average use of the land, which is exposed infrequently. Furthermore, at least parts of this land are exposed also on less extreme tides and can be used by birds. Lastly, the areas in question are used not only by wading birds but also by sandwich terns, for example, which do not rely on the land being exposed.

138 Accordingly, the first area in question is an integral part of the wetland ecosystem and should have been classified as an SPA. It follows that the action is well-founded in respect of the first area excluded from the initial proposal to extend the Sandymount Strand and Tolka Estuary SPA.

139 The second area comprised 2.2 hectares of inter-tidal mudflat at the entry to the estuary of the Tolka, destroyed, according to the Commission, in the construction of the Dublin Port Tunnel, the promoter of which is Dublin Corporation (now the Dublin City Council). The Commission argues that, although small, the excluded area had features similar to those of a complete ecosystem, namely mudflats, and had confirmed usage by birds that depend on the overall ecosystem, that is to say, the oystercatcher (*Haematopus ostralegus*) and the redshank. Such piecemeal exclusions of portions of an integrated wetland system undermine the objectives of the Birds Directive.

140 Ireland contends that only very small numbers of oystercatcher and redshank occur in the 2.2 hectare inter-tidal mudflat area, which is exposed as a feeding area only for very short periods of time at low tide. The area is therefore not regarded as significant for the purposes of inclusion in the relevant SPA. The criteria applied in reaching that decision were scientifically sound ornithological criteria. Ireland submits that the Commission's view that the loss of the 2.2 hectare area constitutes a significant deterioration of bird habitats and source of disturbance is not accepted and that the Commission has not identified any scientific or objectively verifiable evidence for its view.

141 In respect of the second area, it should be borne in mind that, according to the case-law referred to in paragraph 39 of this judgment, the classification of areas as SPAs is subject solely to the ornithological criteria determined by the Birds Directive.

142 The Commission is therefore correct in claiming, first, that SPA classification cannot be the result of an isolated study of the ornithological value of each of the areas in question but must be carried out in the light of the natural boundaries of the wetland ecosystem and, second, that the ornithological criteria which form the

foundation of the classification must have a scientific basis. The use of flawed, allegedly ornithological criteria might lead to an incorrect demarcation of the boundaries of SPAs.

143 In the present case, it is common ground that the area in question is separated from the rest of the classified estuary by a road which crosses the river and, being a mudflat, has the same characteristics as the Dublin Bay site as a whole.

144 It is furthermore clear from the environmental impact assessment published in July 1998, on which both parties relied during the proceedings, that that area is used as a feeding ground by some of the wild birds present in the Sandymount Strand and Tolka Estuary SPA.

145 The Court accordingly finds that the second area is used as a feeding ground by three of the nine bird species which are decisive for the classification of Dublin Bay as an area of ornithological importance. That area is used by those species within the average limits which could be expected, if not more. Consequently, it is an integral part of the entire wetland ecosystem and for that reason ought also to have been classified as an SPA.

146 It follows that the action is also well-founded in respect of the second area not included in the Sandymount Strand and Tolka Estuary SPA.

147 Consequently, the Court finds that the second part of the first complaint is well-founded.

148 In the light of all the foregoing considerations, the Court finds that the first complaint is well-founded, except for the point relating to the classification of SPAs to ensure conservation of the Greenland white-fronted goose, a species referred to in Annex I, and protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I.

*The second complaint: failure to establish the necessary legal protection regime in accordance with Article 4(1) and (2) of the Birds Directive*

Arguments of the parties

149 The Commission argues that, since 1981, Irish legislation has failed adequately to give effect to Article 4(1) and (2) of the Birds Directive and that, moreover, Ireland has not applied those provisions in practice by establishing a specific legal protection regime for SPAs such as to ensure survival and reproduction of the bird species concerned.

150 In the Commission's view, ensuring the survival and reproduction of bird species within SPAs may require not only preventive measures, but also active or positive measures, which, with one exception, have not been taken in Ireland. Secondly, there is a doubt as to whether the relevant Irish legislation actually provides a legal basis for taking such measures.

151 Ireland disputes the alleged failure to fulfil obligations. Regarding the obligation to establish an effective legal protection regime for SPAs, whilst accepting that the preventive approach is not sufficient to protect birds in all situations, it contends

that that view informed the creation of the voluntary Corncrake Grant Scheme. To that may be added a number of plans, at the draft stage, for bird management and conservation in a number of SPAs.

152 As regards the scope of the Irish legislation transposing Article 4(1) and (2) of the Birds Directive, Ireland denies that the sole purpose of the Habitats Regulations is to implement the Habitats Directive and contends that those regulations provide an adequate legal basis in national law for the creation and implementation of SPA management plans. Ireland states that the Habitats Regulations clearly apply a number of key protective and enforcement measures to SPAs, including Regulation 13, which is expressly listed in Regulation 34 as a provision applying to areas classified pursuant to the Birds Directive.

Findings of the Court

153 According to the case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in Annex I which are, nevertheless, regular visitors (Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21 and case-law cited).

154 As observed by the Advocate General in point 77 of her Opinion, the protection of SPAs may not be limited to avoiding harmful human effects but must also include positive measures to preserve or improve the state of the area, as the case may be.

155 It is common ground that Regulation 13 of the Habitats Regulations would have adequately transposed Article 4(1) and (2) of the Birds Directive if that provision had been applicable to SPAs. However, contrary to Ireland's position that Regulation 13 applies also to SPAs essentially by virtue of Regulation 34, the Commission takes the view that the Habitats Regulations are intended to implement only the Habitats Directive.

156 Regulation 34 of the Habitats Regulations provides that '[t]he provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive'.

157 According to the wording of the third paragraph of Article 249 EC, a directive, in binding all addressee Member States as to the result to be achieved, leaves it to the national authorities to decide the form and methods. It follows that Ireland, just like any other Member State, may choose the form and methods for implementing the Birds Directive (see, to that effect, Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55).

158 However, according to the case-law of the Court, the transposition of a directive into domestic law must guarantee the full application of the directive in a sufficiently clear and precise manner (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15).

159 The Court has also held, as mentioned in paragraph 64 of this judgment, that faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories.

160 It is therefore appropriate to examine whether Regulation 34 of the Habitats Regulations does not guarantee the application of Regulation 13 of those regulations to the areas classified as SPAs under Article 4(1) and (2) of the Birds Directive, as claimed by the Commission.

161 A literal reading of Regulation 34 shows that it does not, on the face of it, exclude from the scope of application of the Habitats Regulations the application of Regulation 13 to areas classified under Article 4(1) and (2) of the Birds Directive.

162 Consequently, it is not possible to accept the Commission's argument that, due to the lack of reference in the Habitats Regulations to a distinct objective of giving effect also to the Birds Directive and in the light of the limitations imposed by the European Communities Act, those regulations cannot provide a legal basis allowing the adoption of management plans for bird conservation in the SPAs.

163 For the same reason, it is also not possible to accept the Commission's argument that the Habitats Regulations do not allow for application to SPAs of the management measures provided for in Article 6(1) of the Habitats Directive, as the sole declared purpose of those regulations is to implement that directive. As observed by the Advocate General in point 82 of her Opinion, if measures similar to those provided for in Article 6(1) are to be applied to SPAs pursuant to Article 4(1) and (2) of the Birds Directive, the national legislature is not prevented from creating a single provision to transpose the rules of both directives.

164 The Court also cannot accept the Commission's argument relating to the limitations imposed by the European Communities Act. Ireland contends in its statement in

defence, without being contradicted on the point by the Commission, that the Habitats Regulations are not a statute but are, in their entirety and undoubtedly, of full force and effect unless and until they are successfully challenged before a court of competent jurisdiction.

165 Lastly, on the same ground as that referred to in paragraph 161 of this judgment, the Court cannot accept the Commission's argument that the application to SPAs of Regulation 13 of the Habitats Regulations, which relates to conservation measures to be taken by the Minister in relation to Special Areas of Conservation, is not automatic since, according to the wording of Regulation 34 of those regulations, some provisions of those regulations apply 'where appropriate' and 'with any necessary modifications' to areas classified under Article 4(1) and (2) of the Birds Directive.

166 Moreover, the Court has consistently held that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37 and case-law cited). In the present case, the Commission has not put forward in support of its action any decisions of national courts which interpreted the disputed national provision in a manner contrary to the Birds Directive.

167 In those circumstances, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (*Commission* v *Greece*, paragraph 35 and case-law cited), has demonstrated to the requisite legal standard that, at the date of expiry of the period laid down in the additional reasoned opinion notified on 11 July 2003, the Habitats Regulations had the scope attributed to them by the Commission.

168 The second complaint must accordingly be rejected.

*The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs*

Arguments of the parties

169 The Commission argues that, since 1981, Ireland has failed to ensure the application of the first sentence of Article 4(4) of the Birds Directive as regards sites which should have been classified as SPAs under that directive, but have not been. It considers that, given the extent of the inadequacy of the classification of SPAs by the Irish authorities, that omission has potentially important implications for the conservation of the bird species concerned.

170 In its view, although there is Irish legislation of relevance to the protection of habitats other than classified SPAs, that legislation lacks the ornithological specificity required by the first sentence of Article 4(4) of the Birds Directive. In particular, the Irish legislation fails to impose any specific duties in respect of the habitats of the wild bird species which should benefit from the protection conferred on SPAs in areas not covered by Ireland's existing SPA network. The Commission cites the specific example of the difficulties faced by the hen harrier and adds that unclassified areas requiring classification do not enjoy in Ireland the protection required by the first sentence of Article 4(4) of the Birds Directive, even in respect of the actions of public authorities.

171 Ireland replies, essentially, that important hen harrier survey work is nearing completion and that draft guidelines in relation to the development of wind energy are soon to be concluded.

Findings of the Court

172 As already noted in paragraph 84 of this judgment, the protection objectives of the Birds Directive, as expressed in the ninth recital in the preamble thereto, cannot be achieved if Member States are required to comply with their obligations under Article 4(4) thereof only where an area has been previously classified as an SPA.

173 As is also clear from the Court's case-law, the text of Article 7 of the Habitats Directive states that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a Member State under the Birds Directive, where the latter date is later. It is clear, therefore, that areas which have not been classified as SPAs but which should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive (Case C-374/98 *Commission* v *France*, paragraphs 46 and 47).

174 In the present case, however, Ireland has not even asserted that it ensured the application of the first sentence of Article 4(4) of the Birds Directive to areas requiring classification as SPAs under that directive.

175 Consequently, and without its being necessary to consider the specific examples provided by the Commission, the Court finds that the third complaint is well-founded.

*The fourth complaint: failure to transpose and apply the second sentence of Article 4(4) of the Birds Directive*

Arguments of the parties

176 The Commission complains that Ireland has failed to transpose and apply fully and correctly the second sentence of Article 4(4) of the Birds Directive relating to appropriate steps to be taken by the Member States to avoid pollution or deterioration of habitats outside SPAs.

177 In support of its complaint, the Commission states that the various domestic legal measures, in particular integrated pollution control licences, the Control of Farmyard Manure scheme, and provisions of planning legislation including environmental impact assessment requirements, which are deemed to transpose the second sentence of Article 4(4) of the Birds Directive, do not have any specifically ornithological content from that article. In the absence of any specific ornithological considerations, entities playing a role in the context of environmental measures cannot be expected to take account of ornithological interests. In the Commission's view, several of the domestic measures transposing the second sentence of Article 4(4) are partial and numerous lacunae remain. The shortcomings of those measures are borne out by the deterioration of habitats and, despite denials by Ireland, it cannot validly be disputed in the present case that human intervention has led to a deterioration of the habitats.

178 Ireland replies by stating that Article 4(4) of the Birds Directive is in practice transposed by a number of statutory schemes and measures. It adds that the second sentence of Article 4(4) of the Birds Directive is implemented by the Wildlife Act, which provides a sound legal basis for the protection of bird species in the wider countryside.

Findings of the Court

179 Although the second sentence of Article 4(4) of the Birds Directive does not require that certain results be achieved, the Member States must nevertheless make a serious attempt at protecting those habitats which lie outside the SPAs. It is thus clear, in the present case, that Ireland must endeavour to take suitable steps to avoid pollution or disturbances of the habitats (see, to that effect, Case C-166/97 *Commission* v *France*, paragraph 48).

180 First of all, it is appropriate to consider whether Ireland has transposed that provision fully and correctly by taking suitable steps to avoid pollution or deterioration of the habitats lying outside the SPAs.

181 It is clear, in the light of all the evidence submitted, assessed as a whole, that that is not so in the present case.

182 As regards the licences issued by the Environmental Protection Agency under the integrated pollution control scheme, it is not disputed, as pointed out by the Commission, that that scheme covers only a limited range of polluting activities and does not contain any specific reference to the ornithological considerations referred to in Article 4 of the Birds Directive. It would appear, moreover, that Ireland refers to the transposition of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), the objectives of which are different. Accordingly, the national rules relating to those licences cannot be regarded as being an adequate transposition of the second sentence of Article 4(4) of the Birds Directive.

183 With regard to the cross-compliance aspect of the single payment under the common agricultural policy, Ireland states that the various statutory management requirements (SMRs), the first key element of cross-compliance, referred to in Article 4 of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), the list of which is contained in Annex III to that regulation, are to be introduced progressively over three years, starting on 1 January 2005. Ireland adds that the list of those regulatory requirements includes a reference to the Birds Directive. However, for the same reasons as those referred to in paragraph 74 of this judgment, the progressive introduction in national law of those requirements may not be taken into account.

184 The same holds true for the second key element of cross-compliance of the single payment, relating to good agricultural and environmental condition referred to in Article 5 of Regulation No 1782/2003, the minimum requirements of which must be defined on the basis of the framework laid down in Annex IV to that regulation, with transposition measures for that article entering into force only as of 1 January 2005.

185 Regarding the steps taken under the Rural Environment Protection Scheme, designed to reward farmers for carrying out their farming activities in an environmentally friendly manner and to bring about environmental improvements on existing farms, the Commission acknowledges that they have advantages for wild birds in that they make it possible to avoid pollution and deterioration of habitats. It is common ground, however, that that scheme does not apply generally to all farmlands or to territories not classified as SPAs. Accordingly, those steps also cannot be regarded as transposing the second sentence of Article 4(4) of the Birds Directive.

186 The arguments concerning the Farm Waste Management Scheme and the planning legislation, including the provisions on environmental impact assessment, must also be rejected. In those texts, Ireland has not introduced any ornithological considerations in respect of the second sentence of Article 4(4) of the Birds Directive.

187 Lastly, with regard to the Wildlife Act, it is clear that the only provision of that act relevant in this context and referred to by Ireland during the proceedings is section 11(1). However, that provision is not sufficiently specific to be regarded as guaranteeing the transposition of the second sentence of Article 4(4) of the Birds Directive.

188 Secondly, it is appropriate to consider whether the Commission has established that Ireland has not made sufficient efforts in practice to avoid pollution or deterioration of habitats lying outside SPAs.

189 The Commission puts forward in this regard, by way of example, the habitats of the cuckoo (*Cuculus canorus*), skylark (*Alauda arvensis*), swallow (*Hirundo rustica*) and sand martin (*Riparia riparia*), widespread bird species contained in the 'orange list' of the *Birds of Conservation Concern in Ireland* inventory published in 1999 by BirdWatch Ireland and the Royal Society for the Protection of Birds. That inventory states that those species suffer greatly from the changes in agricultural practices. In addition, the Commission refers to the report *Ireland's Environment 2004*, drawn up by the Environmental Protection Agency, which attributes the general deterioration of habitats in Ireland to a number of developments.

190 It is also clear that the mere fact that a number of programmes and regulatory measures may have been implemented and taken, as contended by Ireland, does not

establish that Ireland has made sufficient efforts to avoid pollution or deterioration of habitats. As noted by the Advocate General in point 111 of her Opinion, serious endeavours, namely the taking of all reasonable measures to achieve the success being sought, require targeted action.

191 The Court finds in the present case that the measures taken by Ireland are partial, isolated measures, only some of which promote conservation of the bird populations concerned, but which do not constitute a coherent whole.

192 That finding is supported by the fact that Ireland has not contradicted the content of the inventory *Birds of Conservation Concern in Ireland*, published in 1999, or the report *Ireland's Environment 2004*, two ornithological studies referred to above and submitted by the Commission.

193 Accordingly, in the light of all the evidence adduced by the Commission, the Court finds that Ireland has not transposed or applied fully and correctly the second sentence of Article 4(4) of the Birds Directive. Consequently, the failure to fulfil obligations in regard to this complaint is well-founded.

*The fifth complaint: inadequate transposition and application of Article 6(2) to (4) of the Habitats Directive*

194 The fifth complaint concerns, in respect of the SPAs classified under the Birds Directive, the fact that Ireland has not adopted all the measures required to comply with Article 6(2) to (4) of the Habitats Directive. This complaint also concerns the inadequate transposition of Article 6(2) of that directive as regards the use of all the sites covered by that provision for recreational purposes.

Preliminary observations

195 Article 7 of the Habitats Directive provides that obligations arising under Article 6(2) to (4) of that directive are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) of that directive or similarly recognised under Article 4(2) thereof, as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later.

196 It follows that Article 6(2) to (4) of the Habitats Directive has applied to SPAs in Ireland since 10 June 1994, the date on which the period for transposition of that directive in Ireland expired, or since the date of their classification or recognition under the Birds Directive, where the latter date is later.

Inadequate transposition and application of Article 6(2) of the Habitats Directive

— Arguments of the parties

197 The Commission submits that Ireland has not transposed or applied correctly, as at 10 June 1994 or after that date, Article 6(2) of the Habitats Directive to all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) thereof.

198 It submits that, according to the wording of the Habitats Regulations, which, Ireland asserts, implement Article 6(2) of the Habitats Directive, the ability to control potentially damaging activities on the part of landowners is to a significant extent dependent on notices being served on landowners at the time an area is proposed to become a site subject to Article 6(2) of the Habitats Directive. Regulation 14 of those regulations provides for ministerial power to issue notices and impose conditions concerning the use of land. That power is subject to two limitations, however.

199 The first of those limitations is a limitation de jure in that Regulation 14 of the Habitats Regulations is worded in such a manner as to apply only to SPAs so classified after the entry into force of those regulations, so that it does not cover SPAs classified before that date. In the case of existing SPAs, there is no provision for issuing notices to landowners expressly informing them of the activities which require authorisation under the transposing legislation, so as to make the system of controls on damaging activities operational for these.

200 The second is a limitation de facto in that that regulation has not been applied to all SPAs.

201 According to the Commission, in the absence of any use of restrictive notices, Irish legislation does not contain any provision giving full effect to Article 6(2) of the Habitats Directive for State-owned land situated inside SPAs. It also takes the view that, in so far as those activities take place on State-owned land or State-controlled land, the national legislation does not provide for any explicit statutory obligation requiring the authorities responsible for regulating those activities to take enforcement action to ensure compliance with Article 6(2) of that directive.

202 The Commission refers, by way of example of an activity which infringes Article 6(2) of the Habitats Directive, to unauthorised mechanical cockle harvesting in the Bannow Bay SPA and also refers to the damaging development of the Glen Lough SPA.

203 Ireland rejects all of the Commission's allegations. It contends that, in addition to Regulation 14 of the Habitats Regulations, Regulation 13(3) of those regulations, which applies to both Special Areas of Conservation and SPAs, transposes Article 6(2) of the Habitats Directive. Ireland also refers, for the same purposes, to Regulations 17 and 18 of the Habitats Regulations and maintains its position that the Foreshore Acts ensure protection of SPAs.

— Findings of the Court

204 Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, in the areas classified pursuant to Article 4(1) or recognised pursuant to Article 4(2), the deterioration of habitats and disturbances having a significant effect on the species for which the SPAs were classified or recognised (see, to that effect, Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 26).

205 As regards Ireland's argument that Regulation 13(3) of the Habitats Regulations transposes Article 6(2) of the Habitats Directive, it is clear that the sole purpose of Regulation 13(3) of those regulations is to require the competent minister to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been

designated, with the result that that provision has effect only when that minister has direct responsibility over the SPAs concerned. Moreover, under the Habitats Regulations scheme, Regulation 13(3) thereof complements the provisions of Regulations 4 and 14, which provide for a notice-based scheme of landowner liability. In the present case, since it is common ground that notices were not issued for all the SPAs, Regulation 13(3) of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

206 With regard to the argument that Regulation 14 of the Habitats Regulations provides for the control of operations and activities listed in a notice issued by the competent minister pursuant to Regulation 4 and that listed activities may only be carried out with ministerial consent or pursuant to a management agreement provided for in Regulation 12 of those regulations, suffice it to hold that Regulation 14 is also dependent on the existence of a notice. Accordingly, and for the same reason as stated in the preceding paragraph of this judgment, the latter provision cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

207 As to the argument that Regulation 17 of the Habitat Regulations empowers the competent minister to seek injunctive relief to stop operations or activities that appear on assessment to be damaging to a European site, including an SPA, and that Regulation 18 of those regulations provides for similar ministerial powers in the event that an operation or activity damaging to an SPA is being carried out in an area outside the SPA, the Court finds that, as rightly pointed out by the Commission and the Advocate General in point 127 of her Opinion, those provisions do not make it possible to avoid the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which the areas concerned have been designated.

208 Although Ireland states, in its rejoinder, that the powers of the competent minister, as described in the preceding paragraph of this judgment, can be used to apply immediately for injunctive relief on an interim basis, it is clear that those provisions necessarily can come into play only after the activities in question have already commenced and thus only after any deterioration has already occurred. Moreover, the competent minister is not entitled to prohibit a harmful activity unilaterally and the abovementioned powers presuppose that an appropriate assessment of the environmental impact of that activity has been carried out before any judicial relief is sought. The reactive protection of SPAs may be delayed considerably by those procedural steps. Moreover, those provisions do not ensure protection of SPAs against the activities of individuals, as such protection requires that individuals be prevented in advance from engaging in potentially harmful activities.

209 Accordingly, Regulations 17 and 18 of those regulations also cannot be regarded as constituting an adequate transposition of Article 6(2) of the Habitats Directive.

210 Moreover, Ireland's argument that the Foreshores Acts ensure protection of SPAs cannot be accepted either. Those statutes ensure protection of coastal areas only and therefore do not apply to SPAs situated outside such areas.

211 Lastly, as regards the unauthorised mechanical harvesting of cockles in the Bannow Bay SPA, referred to by the Commission as an activity which infringes Article 6(2) of the Habitats Directive, the Court finds, as noted by the Advocate General in point 140 of her Opinion, that this is mere illustrative use which is not the subject-matter of the application. In any event, the Commission has not adduced any evidence such as to establish the failure to fulfil obligations on this point.

212 It follows that, as at 10 June 1994 or after that date, Ireland had not correctly transposed Article 6(2) of the Habitats Directive in respect of all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive.

213 Consequently, the Court finds that the complaint is well-founded on this point.

Inadequate transposition of Article 6(2) of the Habitats Directive in the field of recreational activities

— Arguments of the parties

214 The Commission takes the view that Ireland has not adequately transposed Article 6(2) of the Habitats Directive in respect of the use for recreational purposes of all the sites covered by that provision. It considers that the Irish legislation covers only the activities of landowners and that the legislation suffers from a number of shortcomings in terms of prevention of damage to habitats caused by users of the land for recreational purposes. The application of Regulations 14 and 17 of the Habitats Regulations has not resulted in the compilation of exhaustive lists of prohibited activities. Moreover, the mechanisms provided for in Regulation 17 of those regulations are reactive in nature and no other legislative provision referred to by Ireland appears to protect the SPAs against recreational activities engaged in by users.

215 Notwithstanding indications regarding proposals for appropriate legislative amendments, including the 2004 draft Maritime Safety Bill, Ireland denies that the current legislation is inadequate for implementing Article 6(2) of the Habitats Directive in the context of recreational use of land situated in the SPAs. Ireland explains that the

national authorities have powers to control recreational and other activities in European sites by persons other than the landowner and to impose penalties. In that context, Ireland refers to Regulation 4(3)(b) of the Habitats Regulations and to Regulations 14, 17 and 18 of those regulations, to the Wildlife Act and to the Criminal Justice (Public Order) Act 1994.

— Findings of the Court

216 With regard to Ireland's argument that Regulation 14 of the Habitats Regulations, which places restrictions on operations and activities, does not cover only landowners, occupiers or licence-holders, but also applies to all persons provided that the operation or activity is referred to in a notice issued pursuant to Regulation 4(2) of those regulations, suffice it to hold that Regulation 14(3) of those regulations does not allow for proceedings to be brought against third parties who were not aware of that notice. The latter may, in fact, rely on the defence of 'reasonable excuse' contained in Regulation 14(3). Accordingly, the transposition of Article 6(2) of the Habitats Directive is, at the very least, not sufficiently precise.

217 As to Ireland's argument that the procedure provided for in Regulations 17 and 18 of the Habitats Regulations is a separate and distinct procedure which may be implemented in respect of anyone and does not depend on the content of any particular 'notice', it is clear that there is no guarantee that it may be applied to persons who have not received the notice provided for in Regulation 4 of those regulations. Moreover, as has just been found in paragraphs 208 and 209 of this judgment, that procedure is a merely reactive measure; consequently, Regulations 17 and 18 of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

218 With respect to the argument that the Wildlife Act provides, in sections 22, 23 and 76, for a power to act where there is evident and wilful interference with the breeding place or the resting place of a protected wild animal, or where there is disturbance of protected birds as they nest, and under which the powers conferred by that statute include the power to seize equipment and vehicles used by the perpetrators, suffice it to hold that it is common ground that that statute does not cover all types of damage likely to be caused by recreational use.

219 Lastly, regarding the argument that trespass on private property was reclassified as a crime under Irish law by section 19A of the Criminal Justice (Public Order) Act, 1994, and that penalties on conviction include fines and the seizure of vehicles and equipment, the Court notes that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 26).

220 An examination of the criminal-law provisions on trespass on private property relied on by Ireland shows that those provisions are not specifically linked to the protection of natural habitats and of habitats of species against deterioration or against disturbances affecting species and that they are therefore not designed to avoid damage caused to habitats by the use of SPAs for recreational purposes. Consequently, they do not constitute a clear and precise implementation of the provisions of the Habitats Directive such as to satisfy in full the requirements of legal certainty.

221 The complaint is, accordingly, also well-founded on this point.

Inadequate transposition and application of Article 6(3) and (4) of the Habitats Directive

— Arguments of the parties

222 The Commission states that Ireland has not correctly transposed or applied Article 6(3) and (4) of the Habitats Directive.

223 In terms of transposition, the Commission argues that the national legislation does not contain any provisions designed to ensure that plans, as distinct from projects, are assessed in accordance with Article 6(3) and (4) of the Habitats Directive. The national legislation also fails to make proper provision for the application of those Community provisions to projects situated outside SPAs but having significant effects inside them.

224 As regards application, the Commission takes the view that Ireland fails to ensure systematically that plans and projects likely to have significant effects on SPAs, either by themselves or in combination with other plans and projects, undergo appropriate prior assessment.

225 Ireland maintains that no action or project under any plan can have any effect in law or substance without having been subjected to assessment. Although plans can stimulate certain activities, they do not override or obviate controls applying to sites under relevant regulatory regimes. They have no bearing on whether a project which can have an effect on a site is agreed or not. Before any plan or project can affect a site, it will have gone through a full assessment procedure either under the regulatory system provided by the Habitats Regulations, the planning system or under another regulatory system, in compliance with the provisions of the Habitats

Directive. Therefore, no plan or project can affect a site without having been subject to assessment.

— Findings of the Court

226 As regards the transposition of Article 6(3) and (4) of the Habitats Directive, it should be noted at the outset that the Court has already held that Article 6(3) of that directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (Case C-6/04 *Commission* v *United Kingdom*, paragraph 54 and case-law cited).

227 It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned.

228 On this point, Ireland maintains that the plans are made subject to an appropriate assessment of their implications on a site under Regulations 27 to 33 of the Habitats Regulations, which provide for various development proposals. However, Ireland has not demonstrated that such projects are plans within the meaning of Article 6(3) of the Habitats Directive.

229 Next, Ireland contends that the Planning and Development Act 2000 introduced requirements in relation to the consideration of the likely significant effects on the environment of certain plans including regional planning guidelines, development plans and local area plans. Since 1 January 2001, each of those plans is required to include information on the likely significant effects on the environment of its implementation. Those requirements were included in anticipation of the terms of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30). Despite the existence of such legislation, however, it cannot be said that Ireland has satisfied its obligations under Article 6(3) of the Habitats Directive. The obligation provided for in the Planning and Development Act concerns only information relating to likely significant effects on the environment, whereas Article 6(3) of the Habitats Directive requires a prior assessment of the implications of development plans.

230 Ireland adds that it implements the assessments pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and to Directive 2001/42, also transposed by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and by the Planning and Development Strategic Environmental Assessment Regulations 2004.

231 Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site.

Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.

232 Lastly, regarding the Commission's assertion that the Irish legislation does not make adequate provision for the application of Article 6(3) and (4) of the Habitats Directive to projects situated outside SPAs but having significant effects inside them, the Court finds that it is common ground that the environmental impact assessment report, which must be commissioned by the private persons concerned, who must bear the costs thereof, amounting to a minimum of EUR 15 000, is required only for plantations of over 50 hectares, whereas the average surface area of a plantation in Ireland is approximately 8 hectares.

233 It therefore follows that, since the Irish legislation does not make plans subject to an appropriate assessment of their effects on SPAs, Article 6(3) and (4) of the Habitats Directive has not been adequately transposed in the Irish domestic legal order.

234 Accordingly, the action is well-founded on this point.

235 As to the application of Article 6(3) and (4) of the Habitats Directive, the Commission relies on examples of aquaculture programmes and drainage work inside the Glen Lough SPA. It is, accordingly, appropriate to consider them in turn.

236 Firstly, regarding the aquaculture programmes, the Commission relies, essentially, on the *Review of the Aquaculture Licensing System in Ireland* carried out in 2000 by BirdWatch Ireland as the basis for its view that Ireland has systematically failed to

carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and (4) of the Habitats Directive. In that context, it emphasises the importance of a prior assessment for the purpose of weighing the implications of a project with the conservation objectives fixed for the SPA concerned.

237 The Court notes that that study covered 271 authorisations for aquaculture programmes issued by the Department of Communications, Marine and Natural Resources during the period from June 1998 to December 1999 and 46 applications yet to be decided on. Moreover, 72 licences and nine pending applications concerned aquaculture programmes situated inside or near an SPA. The authorisations issued concern, in 84% of the activities authorised in SPAs, oyster and clam farms.

238 It should also be borne in mind that, under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site is to be made subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 45).

239 The study carried out by BirdWatch Ireland refers to a number of potential negative effects of shellfish farming, including the loss of feeding areas and disturbances caused by increased human activity and states that, even when an aquaculture programme is inside an SPA, very little protection is provided for bird habitats. Ireland, for its part, does not allege that no aquaculture programmes have any effects on SPAs.

240 It follows that the authorisation procedure ought to have included an appropriate assessment of the implications of each specific project. It is clear that Ireland merely stated, without offering further explanation, that the Irish scheme for authorising mollusc farms, including the provisions on consultation, does in fact provide for detailed consideration of all aspects of an aquaculture development project before a decision is taken on authorisation.

241 Accordingly, the Court finds that Ireland fails to ensure systematically that aquaculture programmes likely to have a significant effect on SPAs, either individually or in combination with other projects, are made subject to an appropriate prior assessment.

242 This finding is supported by the fact that Ireland has not put forward any specific scientific studies showing that a prior, detailed ornithological study was carried out, in order to challenge the failure to fulfil obligations alleged by the Commission.

243 Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 61).

244 As to Ireland's argument that no environmental impact assessment had been required for shellfish farms because they are small in size and are of only limited impact on the environment, the Commission is correct in arguing that that is not an adequate reason not to assess the effects of such a plan or project. As just pointed out in paragraph 238 of this judgment, the first sentence of Article 6(3) of the Habitats Directive requires an appropriate assessment of any plan or project in combination with other plans and projects.

245 It is also clear from the Court's case-law that the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment (see, by analogy, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76).

246 Lastly, regarding Ireland's argument that maintenance authorisation for development projects carried out without prior authorisation is compatible with the Habitats Directive, the Court finds that the assessment of an already-completed development project cannot be regarded as being equivalent to the assessment of a plan or project within the meaning of the first sentence of Article 6(3) of the Habitats Directive.

247 Accordingly, the complaint must be regarded as being well-founded on this point.

248 Secondly, regarding the drainage work in the Glen Lough SPA, the Commission argues that in 1992 and 1997 Ireland carried out, contrary to Article 6(3) and (4) of the Habitats Directive, drainage work likely to have a significant effect on the Glen Lough SPA without having previously carried out an appropriate assessment of that

project or employed an adequate decision-making procedure, which led to habitat deterioration, contrary to Article 6(2) of that directive. Moreover, Ireland has failed to demonstrate that this deterioration has been remedied.

249 The Court notes, as a preliminary point, that at the time of the drainage works undertaken by the Office of Public Works in 1992, the Habitats Directive was not yet applicable. Consequently, those works do not form part of the subject-matter of the present proceedings.

250 It is, moreover, clear from the Court's case-law that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2) (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 35).

251 Accordingly, in so far as the complaint relating to the drainage works carried out in 1997 are concerned, it is appropriate to ascertain whether such activities may be contrary to Article 6(3) and (4) of the Habitats Directive.

252 Infringement of Article 6(3) and (4) of that directive presupposes that the drainage works in question are a project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects.

253 In this regard, it is common ground that those works are a project and that they are not directly connected with or necessary to the management of the site. It follows that, in accordance with the case-law referred to in paragraph 226 of this judgment, they had to be made subject to an assessment of their effects on the conservation objectives fixed for the Glen Lough SPA if it could not be ruled out, on the basis of objective information, that they would have a significant effect thereon, either individually or in combination with other plans or projects.

254 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such an assessment must be carried out if there is doubt as to the absence of significant effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 44).

255 The case-file shows that the Glen Lough SPA, which comprises approximately 80 hectares and was classified in 1995, is an important over-wintering site for migratory species of wild birds in the Irish midlands. In particular, it held internationally important numbers of whooper swan (*Cygnus cygnus*) and is especially valuable to birds because of its water.

256 In the present case, however, Ireland, after stating that the works in question were merely maintenance work on existing drains, as part of a system of earlier drainage which preceded the classification of Glen Lough as an SPA, and did not have a significant impact on the wild bird habitats in that SPA, recognises, in its statement in defence, that the drain maintenance of the Silver River carried out by the Office of Public Works in 1997 seems to have reduced the hydrological response times and hence the usage of the site by whooper swans.

257 Accordingly, the Court finds that Ireland, in failing to assess the impact of the drains maintenance works on the conservation objectives of the Glen Lough SPA before those works were carried out, infringed the first sentence of Article 6(3) of the Habitats Directive.

258 Next, it follows from the second sentence of Article 6(3) of the Habitats Directive that, in a situation such as that in the present case, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of those works for the site concerned in the light of the site's conservation objectives, could have authorised such an activity only if they had made certain that it would not adversely affect the integrity of that site, which would have been the case if there had remained no reasonable scientific doubt as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 67).

259 As noted by the Advocate General in point 182 of her Opinion, in the absence solely of an assessment of the impact on the site of the drain maintenance works carried out in 1997, authorisation would have been unlawful under the second sentence of Article 6(3) of the Habitats Directive. Ireland's submission shows, as just noted in paragraph 256 of this judgment, that authorisation was not possible also on account of the adverse effects that the works in question were likely to have on the Glen Lough SPA. Since conservation of the whooper swans' wintering area is the principal conservation objective of the SPA, its integrity was adversely affected within the meaning of the second sentence of Article 6(3) of the Habitats Directive.

260 It also follows that, in spite of a negative assessment of the implications for the site, an authorisation under Article 6(4) of the Habitats Directive would have been possible only if there had been no alternative solutions and if the project had had to be carried out for imperative reasons of overriding public interest, and on the

condition that the Member State took all necessary compensatory measures to ensure that the overall coherence of Natura 2000 was protected.

261 In that regard, and even if there was a public interest in the drainage, as noted by the Advocate General in point 183 of her Opinion, such an interest can justify a deterioration of the SPA within the meaning of Article 6(4) of the Habitats Directive only if there are no alternative solutions.

262 However, Ireland itself states that the National Parks and Wildlife Service, after having installed a dyke in 1998 along the Silver River where it runs through the SPA and holds back the lake water while allowing that river to fulfil its arterial drainage role for the lands upstream, in early 2005 entered into a contract to have the dyke repaired and a sluice and weir installed as well as the overflow pipe. According to Ireland, this will enable the close regulation of the lake level and the hydrological regime will be designed to optimise the usage of the lake by whooper swans. Ireland has not, however, put forward any arguments showing that such alternatives could not have been implemented before the drain maintenance works were carried out in 1997.

263 It follows that, contrary to Article 6(3) and (4) of the Habitats Directive, Ireland carried out a drain maintenance project in 1997 which was likely to have a significant effect on the Glen Lough SPA without having carried out beforehand an appropriate assessment of its implications on the site or employed an adequate decision-making procedure, which resulted in habitat deterioration, contrary to Article 6(2) of that directive.

264 Accordingly, the complaint is also well-founded on this point.

265 In those circumstances, the fifth complaint is well-founded.

*The sixth complaint: failure to transpose Article 10 of the Birds Directive*

Arguments of the parties

266 The Commission submits that the use of the verb 'shall' in Article 10 of the Birds Directive imposes an obligation on Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive. The national regulatory provisions, however, do not reflect that obligation. In its view, the position under Irish law is ambiguous, to say the least.

267 The Commission submits that the wording of the Wildlife Act makes the promotion of research an optional activity for the competent minister.

268 Conversely, Ireland denies that it has failed to comply with its obligation to encourage research. It contends that its legislation is not flawed, and that section 11(3) of the Wildlife Act constitutes a satisfactory transposition into national law of Article 10 of the Birds Directive and fully reflects, and arguably exceeds, the degree of obligation imposed by that Community provision.

Findings of the Court

269 As a preliminary point, section 11(3) of the Wildlife Act, read literally, clearly provides for the possibility for the competent minister to carry out or cause to be carried out research which he considers desirable for the performance of his functions under that statute. It does not, however, lay down any obligation for the competent minister to encourage such activities.

270 As correctly pointed out by the Commission, however, Article 10 of the Birds Directive creates an obligation for Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive.

271 It follows that Ireland cannot be deemed to have transposed Article 10 of the Birds Directive into its domestic legal order.

272 This finding cannot be affected by Ireland's argument that the competent minister's role is further extended by section 11(1) of the Wildlife Act. That provision merely states that it is his function to secure the conservation of wildlife and to promote the conservation of biological diversity.

273 Furthermore, the Court cannot accept Ireland's argument that the use of the word 'may', for the purpose of interpreting the national legislation, does not necessarily mean that the competent minister may, at his discretion, decide to carry out, or not to carry out, research.

274 The national case-law referred to by Ireland does not show that such an interpretation of Irish law is systematic, or refer specifically to the national provision in question.

275 Consequently, the sixth complaint is well-founded.

276 In the light of all the foregoing considerations, the Court finds that, by failing:

— to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable territories in number and size for the species mentioned in Annex I, with the exception of those intended to ensure conservation of the Greenland white-fronted goose, as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing, the redshank, the snipe and the curlew;

— to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as SPAs under that directive;

— to transpose and apply the provisions of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of all SPAs classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of recreational use of all sites intended to be subject to that article;

— to take all the measures necessary to comply with Article 6(3) and (4) of the Habitats Directive in respect of plans;

— to take all the measures necessary to comply with Article 6(3) of the Habitats Directive in respect of authorisation of aquaculture projects;

— to take all the measures necessary to comply with Article 6(2) to (4) of the Habitats Directive in respect of the drain maintenance works in the Glen Lough SPA; and

— to take all the measures necessary to comply with Article 10 of the Birds Directive,

Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of the Birds Directive and Article 6(2) to (4) of the Habitats Directive.

## Costs

277 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has, in essence, been unsuccessful, Ireland must be ordered to pay the costs.

278 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. The Hellenic Republic and the Kingdom of Spain must accordingly bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

**1. Declares that, by failing:**

— **to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July**

**1997, all the most suitable territories in number and size for the species mentioned in Annex I to that directive, with the exception of those intended to ensure conservation of the Greenland white-fronted goose (*Anser albifrons flavirostris*), as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*) and the curlew (*Numenius arquata*);**

— **to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, are applied to areas requiring classification as special protection areas under that directive;**

— **to transpose and apply the provisions of the second sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, fully and correctly;**

— **to take all the measures necessary to comply with Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in respect of all special protection areas classified under Article 4(1) of Directive 79/409, as amended by Directive 97/49, or recognised under Article 4(2) of that directive;**

— **to take all the measures necessary to comply with Article 6(2) of Directive 92/43 in respect of recreational use of all sites intended to be subject to that article;**

— **to take all the measures necessary to comply with Article 6(3) and (4) of Directive 92/43 in respect of plans;**

— **to take all the measures necessary to comply with Article 6(3) of Directive 92/43 in respect of authorisation of aquaculture programmes;**

— **to take all the measures necessary to comply with of Article 6(2) to (4) of Directive 92/43 in respect of the drain maintenance works in the Glen Lough special protection area; and**

— **to take all the measures necessary to comply with Article 10 of Directive 79/409, as amended by Directive 97/49,**

**Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of Directive 79/409, as amended by Directive 97/49, and Article 6(2) to (4) of Directive 92/43.**

2. **Dismisses the remainder of the action.**

3. **Orders Ireland to pay the costs.**

4. **Orders the Hellenic Republic and the Kingdom of Spain to bear their own costs.**

[Signatures]

# JUDGMENT OF THE COURT (Second Chamber)

14 June 2007 *

In Case C-342/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2005,

**Commission of the European Communities**, represented by M. van Beek and I. Koskinen, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Republic of Finland**, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk, L. Bay Larsen (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2006,

gives the following

## Judgment

1 By its application, the Commission of the European Communities seeks a declaration that, by authorising wolf hunting in breach of the grounds of derogation laid down in Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive'), the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of that directive.

## Legislative background

*The Habitats Directive*

2 Under Article 12(1) of the Habitats Directive:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

...'.

3 Annex IV to the Habitats Directive is entitled 'Animal and Plant Species of Community Interest in Need of Strict Protection'. Annex IV(a), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Annex IV(a)'), mentions the following species: 'Canis lupus (except the ... Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)'.

4 Article 16(1) of the Habitats Directive states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

...'

5 The conservation status of species is defined in Article 1(i) of the Habitats Directive:

'(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

— population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

— the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'.

*Finnish law*

6 It is clear from the documents before the Court that Articles 12 and 16 of the Habitats Directive have been transposed in substantially identical terms in the Finnish legislation on hunting.

7 However, there are specific regulations as regards authorisation to kill wolves. Wolf hunting is authorised on a case-by-case basis by the competent game management district. On the other hand, the upper regional limits, that is to say the maximum number of wolves which may be hunted in each district during the hunting season from 1 November until 31 March, are set by the Ministry of Agriculture and Forestry. The limits are set so that the wolf population is not threatened in those districts. All information on mortality is taken into account, particularly mortality resulting from road accidents and human activities.

8 In order to authorise hunting the game management districts must consider whether the conditions set out in Article 16(1) of the Habitats Directive, which has been transposed into national law, are satisfied. Furthermore, where an upper regional limit has been reached it may be exceeded only if the conditions laid down in Article 16(1) are complied with and a special ministerial authorisation is granted.

9 Moreover, although the police may kill animals in exceptional circumstances, they may only do so if the conditions set out in paragraph 8 of this judgment are respected.

## The pre-litigation procedure

10 The Commission initiated the procedure for failure to fulfil obligations by sending the Republic of Finland a letter of formal notice on 10 April 2001. After that Member State had responded, by a letter of 6 July 2001, the Commission issued a reasoned opinion on 26 June 2002. In that opinion the Commission stated that since (i) the conservation status of the wolf was not favourable in Finland, (ii) alternative approaches could be employed and (iii) hunting permits were issued without any relationship to the particular wolves causing serious damage being established, wolf hunting as authorised did not satisfy the conditions laid down in Article 16(1) of the Habitats Directive. The Republic of Finland responded to the reasoned opinion by a letter of 28 August 2002.

11 However, taking the view that the failure to fulfil obligations complained of persisted, the Commission brought the present action on 14 September 2005.

## The action

*Arguments of the parties*

12 The Commission states, first of all, that in Finland the wolf is an endangered species and, consequently, its conservation status cannot be regarded as favourable in that Member State.

13 Next, the Commission submits that the practice in Finland consisting in authorising hunting as a preventive measure is contrary to Article 16(1) of the Habitats

Directive. Where it is thought highly likely that a wolf will cause serious damage, the latter may generally be avoided by means other than preventive killing. The use of repellents, scents, electric or other fences, the confinement of cattle or dogs at night or even compensation for damage sustained could be considered. Where hunting permits are issued on preventive grounds, it is highly unlikely that the wolves killed are those which cause the serious damage. In any event, those permits are issued by the Finnish authorities without any relationship with the particular wolves causing such damage being duly established. In those circumstances hunting is not a very effective means to prevent such damage.

14 Finally, the Commission states that the annual regional quotas set in advance by the Ministry of Agriculture and Forestry for a specific period are not justified, since derogations from the system of strict protection must be assessed regardless of the period concerned and be considered separately with respect to each hunting permit, in accordance with Article 16(1) of the Habitats Directive. Furthermore, the practice of the Finnish authorities leads to a situation in which wolves may be legally killed even though the maximum limit set by the Ministry of Agriculture and Forestry has been exceeded substantially. Thus, in the 2003-04 season in particular, although the maximum limit had been fixed at eight wolves, in addition eleven derogatory permits were issued and two permits were issued by the police. Ultimately, twelve wolves were killed during that season.

15 The Commission concludes that since the conservation status of the wolf in Finland is not favourable, alternative approaches may be employed and the hunting permits are issued without any relationship to the particular wolves causing serious damage being properly established, wolf hunting is authorised in Finland to an extent which infringes the conditions laid down in Article 16(1) of the Habitats Directive.

16 The Finnish Government argues that wolf hunting requires a permit, which may be obtained by written request to the local game management district stating the reasons for the request and the territory and number of animals concerned. The local game management district, having the appropriate information relating to its area, examines whether hunting impedes the maintenance of the species at a favourable conservation level, whether it is possible to find another satisfactory solution, and whether the conditions for derogation laid down in Article 16(1) of the Habitats Directive have been satisfied.

17 Furthermore, decisions to issue hunting permits are also taken with regard to an upper regional limit of specimens that may be hunted in each game management district, which is set by the Ministry of Agriculture and Forestry and corresponds to the number of specimens which may biologically be removed without the populations being endangered. It is not, therefore, a quota which must be attained or exhausted.

18 The Finnish Government submits that its practice does not prevent the maintenance in Finland of a favourable conservation status of the wolf population. That population has increased considerably in recent years. The same is true for the geographic population area. Moreover, the dynamics data on the species concerned indicates that it is likely to maintain itself on a long-term basis as a viable component of its natural habitats.

19 As regards the condition that there is 'no satisfactory alternative', the Finnish Government contends that many different means are used as far as possible, either alone or in combination, in order to prevent or reduce the damage caused by wolves. In any event, the game management districts consider all satisfactory alternatives before issuing a hunting permit. In that connection, the Finnish Government stresses the fact that the alternatives to which the Commission refers in the present case are not appropriate to each individual instance.

20 According to the Finnish Government, and contrary to the Commission's submissions, Article 16(1) of the Habitats Directive does not prohibit derogations from the system of strict protection in order to prevent serious damage. Further, it is not the case that the decisions by which the competent national authorities issue wolf hunting permits do not identify the wolves which cause serious damage. The decisions precisely determine the geographical areas covered by the permits where wolves causing such damage are present. However, since wolves live in packs the hunting permit cannot always identify the specimen(s) causing the damage. Nevertheless, where the particular wolves in question belonging to the pack are known, they are the subject of the hunting permit issued. Furthermore, where the animal concerned moves about alone, the hunting permit may also refer to it individually.

*Findings of the Court*

21 As the Advocate General rightly observes in point 16 of her Opinion, in this case the Commission does not challenge either Finnish legislation or a specific case of killing wolves, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.

22 A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law (see Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 47).

23 It is clear from established case-law that in an action for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement. It is the Commission which must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21, and *Commission* v *Germany*, paragraph 48).

24 Thus, in the context of this action, it is incumbent upon the Commission to prove that the practice followed in Finland adversely affects the system, laid down by Article 12(1) of the Habitats Directive, providing strict protection for the wolf as a species listed in Annex IV(a), on the ground that derogations from that system are not granted in compliance with the conditions laid down in Article 16(1) of the directive (see, to that effect, *Commission* v *United Kingdom*, paragraph 22).

25 Since the latter provision provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 16(1) of the Habitats Directive (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 34).

26 In this case it is common ground that:

— the Finnish authorities authorise wolf hunting each year, to a limited extent, by way of derogation;

— according to the report on the threat to species in Finland in 2000, published in 2001 by the Ministry of the Environment and the Finnish Environment Centre (Pertti Rassi, Aulikki Alanen, Tiina Kanerva ja Ilpo Mannerkoski: (toim.): Suomen lajien uhanalaisuus 2000. Uhanalaisten lajien II seurantaryhmä. Ympäristöministeriö & Suomen ympäristökeskus, Helsinki 2001), the wolf is classified as an endangered species in Finland;

— in that report, it is stated that the number of wolves capable of reproducing is less than 50, a figure which is the limit below which an acute danger of extinction exists;

— according to point 7.2 of the Management Plan for the Wolf Population, published in 2005 by the Ministry of Agriculture and Forestry ('the management plan'), it can be estimated that Finland requires 20 breeding pairs in order to ensure the maintenance in the long term of a wolf population as a viable component of its natural habitats;

— as regards 2001, 2002, 2003 and 2004, the number of breeding pairs was estimated, according to point 2.1.5 of the management plan, at 11, 12, 13 and 16 respectively.

27 It appears therefore, having regard to the criterion laid down in the first indent of Article 1(i) of the Habitats Directive, that at the end of the period set in the reasoned opinion the conservation status of the wolf in Finland was not favourable.

28 Article 16(1) of the directive makes the favourable conservation status of the populations of the species concerned in their natural range a necessary precondition in order for the derogations for which it provides to be granted (see Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 115).

29 None the less, the grant of such derogations remains possible by way of exception where it is duly established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status. Following the example of the views formulated by the Commission, in particular in paragraphs 47 to 51 of Section III of its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range. Such a derogation would therefore be neutral for the species concerned.

30 It is clear from two decisions to issue wolf hunting permits, which were taken by the Finnish authorities before the Commission sent the letter of formal notice to the Republic of Finland and were produced before the Court by the Commission, that in both those cases the authorities permitted the hunting of a fixed number of wolves in a well defined geographical area, but without relying on an assessment of the conservation status of the species, without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative and without specifically identifying the wolves causing serious damage which could be killed.

31 Such decisions, which are not based on an assessment of the effect of the killing of the wolves that they authorise on the maintenance at a favourable conservation

status of the population of that species in its natural range, and which do not contain a clear and sufficient statement of reasons as to the absence of a satisfactory alternative, are contrary to Article 16(1) of the Habitats Directive.

32 However, as is clear from paragraph 21 of this judgment, by this action the Commission does not seek to complain of specific cases, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.

33 In that connection, the Court has held that, although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature (see, in particular, *Commission* v *Germany*, paragraph 50).

34 Furthermore, as is clear from settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 29).

35 In this case, the Commission has not produced any of the decisions relating to the issuing of wolf hunting permits that the Finnish authorities have taken after the decisions noted in paragraph 30 of this judgment, with the exception of two decisions in 2006, to which it refers in order to emphasise the progress made in the matter by the Finnish authorities in the meantime.

36 Furthermore, the Commission, which in these proceedings has never pleaded a lack of sincere cooperation by the Finnish authorities as regards the communication of decisions relating to the issuing of hunting permits, has not provided the Court with any decision of that kind dating from the period corresponding to the end of the pre-litigation procedure and capable of providing the Court with the evidence necessary to ascertain whether the complaints are well founded.

37 Moreover, it must be recalled, as stated in paragraph 26 of this judgment, that the number of breeding pairs rose from 11 to 16 in the period from 2001 to 2004. Nor is it disputed that during the same period the total number of wolves present on Finnish territory rose from between 110 and 130 specimens to between 185 and 200 specimens.

38 Although that data is not in itself conclusive, it is in any event capable of showing that, in spite of the wolf hunting authorised by way of derogation in Finland, the conservation status of the species concerned substantially and consistently improved in that Member State during the pre-litigation phase and a significant part of the period before the present action was brought.

39 Therefore, the Commission has not adduced sufficient evidence as to the existence of an administrative practice by the Finnish authorities of issuing wolf hunting permits without relying on an assessment of the conservation status of the species or without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative.

40 As regards the complaint by the Commission relating to the fact that hunting permits are issued on a preventive basis or, in any event, without any relationship

with the particular wolves causing serious damage being duly established, it must be observed, as the Advocate General has also noted in point 29 of her Opinion, that Article 16(1) of the Habitats Directive does not require serious damage to be sustained before derogating measures can be adopted.

41 However, it is the case that the Finnish Government admits that, as the wolf is an animal which generally lives in a pack, hunting permits cannot always target the specimen(s) which cause serious damage.

42 Although it cannot be automatically ruled out that authorising the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis.

43 In that regard, as stated in point 5.4.5 of the management plan, certain parties are of the opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available.

44 In those circumstances, the Commission's complaint relating to the fact that hunting permits are issued on a preventive basis must be upheld.

45 As to the fact that decisions to issue wolf hunting permits are also subject to a maximum regional limit of specimens which may be killed in each game management district, this cannot be regarded as contrary to Article 16(1) of the Habitats Directive. That limit, which is set according to the number of specimens which may be killed without endangering the species in question, is, as the Advocate General has observed in point 33 of her Opinion, only the framework within which the game management districts may issue hunting permits where, in addition, the conditions in Article 16(1) of the Habitats Directive are fulfilled.

46 Having regard, in particular to what is stated in paragraph 8 of this judgment, the fact that during the 2003-04 season the limit in question was in fact exceeded cannot in itself be sufficient to prove that the Finnish authorities have issued hunting permits to an extent which may harm the maintenance at a favourable conservation status of wolf populations in their natural range.

47 Accordingly, by authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of the Habitats Directive, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive; the remainder of the Commission's application must be dismissed.

## Costs

48 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads.

49 Since both parties have failed in one or several of their claims, they must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the Republic of Finland to bear their own costs.**

[Signatures]

# JUDGMENT OF THE COURT (Fourth Chamber)

10 May 2007 *

In Case C-508/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 December 2004,

**Commission of the European Communities,** represented by M. van Beek and B. Schima, acting as Agents, and by M. Lang, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

**Republic of Austria,** represented by E. Riedl and H. Dossi, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

## Judgment

1 By its application, the Commission of the European Communities requested the Court to declare that the Republic of Austria has failed to fulfil its obligations under Articles 1, 6(1) to (4), 7, 11, 12, 13, 15, 16(1) and 22(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

## Legal context

*Community legislation*

2 Article 1 of the Directive contains a number of definitions, including the following:

'(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as "favourable" when:

— its natural range and areas it covers within that range are stable or increasing, and

— the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

— the conservation status of its typical species is favourable as defined in (i);

...

(g) *species of Community interest* means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

(h) *priority species* means species referred to in (g)(i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

— population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

— the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

...

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

3 Article 6(1) of the Directive states that, 'for special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'.

4 Article 6(2) of the Directive provides that 'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of [the] Directive'.

5 Article 16(1) of the Directive states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the [breeding] operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

6 Article 22(b) of the Directive states in particular that the Member States are to 'ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction'.

*The provisions of Laws and regulations of the various Austrian provinces the compatibility of which with the Directive's provisions is contested*

Province of Lower Austria

7 The following provisions are at issue: Paragraph 95 of the Law of Lower Austria on Hunting (Niederösterreichisches Jagdgesetz 1974, LGBl. (Niederösterreich) No 76/74; 'the Nö JagdG'); Paragraphs 9(5), 17(5), 20(4), 21 and 22 of the Law of Lower Austria on Nature Protection (Niederösterreichisches Naturschutzgesetz 2000, LGBl. (Niederösterreich) No 87/2000; 'the Nö NSchG').

8 Paragraph 95 of the Nö JagdG provides:

'1. All non-selective hunting methods are prohibited; in particular it is prohibited:

...

(3) to hunt at night, that is to say during the period from 90 minutes after sundown until 90 minutes before sunrise; the hunting of wild boar, predatory game, capercaillie, black grouse, wild goose, wild duck and snipe is excluded from this prohibition;

(4) to use, when capturing or killing game, devices for illuminating targets (with the exception of mobile lamps ...), artificial night-time sighting aids, such as infra-red apparatus, electronic sight units, sighting devices for night shooting comprising an electronic image magnifier or image converter, such as residual light amplifiers;

...

(8) to use blind or mutilated animals as live decoys, or anaesthetic bait; to use tape recorders, or electric or electronic devices capable of killing or stunning; to use mirrors or other dazzling devices, explosives, or nets that operate non-selectively; to gas or smoke animals out;

(9) to hunt game birds with snares, limes, hooks, nets or traps;

(10) to hunt from aircraft, moving motor vehicles, or boats that can be operated at a speed of more than five kilometres per hour.

...'

9 Paragraph 9 of the Nö NSchG provides:

'...

2. ... the following definitions shall apply:

...

(6) "conservation status of a natural habitat" means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species;

(7) "priority species" means wild fauna and flora for the conservation of which the Community has particular responsibility and which are indicated by an asterisk (*) in Annex II to the Habitats Directive;

(8) "conservation status of a species" means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations;

(9) "conservation objectives" means the maintenance or restoration at a favourable conservation status of the natural habitats listed in Annex I to the Habitats Directive

and the species of fauna and flora listed in Annex II to that directive which a site of Community importance hosts, and of the species of birds listed in Annex I to the Birds Directive or referred to in Article 4(2) of that directive and their habitats which a European bird protection area hosts.

3. Sites referred to in subparagraph 1 shall, by regulation of the Provincial Government, be declared special areas of conservation called "European areas of conservation". In particular, existing nature conservation areas and landscape conservation areas may also be declared European areas of conservation.

4. The regulation adopted in accordance with subparagraph 3 shall lay down the boundaries of the area of conservation, the subject-matter of protection in each case, in particular priority natural habitat types and priority species, the conservation objectives and, if need be, the obligations and prohibitions necessary in order to achieve a favourable conservation status. In particular, measures which may lead to destruction of, or substantial detriment to, the area of conservation or its components are to be prohibited. More stringent protective provisions under this Law shall not be affected.

5. European areas of conservation shall, if need be, be the subject of appropriate maintenance, development and conservation measures of a governmental or contractual nature which reflect the ecological requirements of the natural habitat types under Annex I and the species under Annex II to the Habitats Directive, and of the species of birds in Annex I to the Birds Directive, which those areas host (management plan). In so far as those measures have implications for land-use planning, they shall be submitted to the Land-Use Planning Advisory Board, with the exception of measures for the administration of European areas of conservation.

6. The Provincial Government shall monitor and document the conservation status of the natural habitats and wild fauna and flora. In so doing, particular regard shall be had to priority natural habitat types and priority species.'

10 Paragraph 17 of the Nö NSchG provides:

'...

(5) The planting and promotion of non-native plants and plants inappropriate to the location and the release and promotion in the wild of non-native fauna require authorisation from the Provincial Government. Authorisation shall be refused if native populations appropriate to the location, the natural (genetic) characteristics of native species of fauna and flora or the beauty and characteristics of a landscape area will suffer lasting harm.'

11 Paragraph 20 of the Nö NSchG states:

'...

(4) The Provincial Government may by decision grant derogations ..., in particular for scientific or pedagogical purposes, when there is no reason to fear a material risk to protected flora growing in the wild and protected fauna living in the wild ... The authorisation shall lay down at least:

1. the species which are subject to the derogation,

2. the means, arrangements or methods authorised for capture or killing and

3. the controls which will be carried out.'

12 Paragraph 21 of the Nö NSchG provides:

'1. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with commercial use of land shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

2. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with an up-to-date and sustainable agricultural or silvicultural use of land within the framework of an agricultural or silvicultural operation shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

3. Agricultural or silvicultural use shall be considered to be up-to-date and sustainable where the activities in an agricultural or silvicultural operation serve to produce or obtain plant or animal products and are organised in accordance with processes which are customary in a particular area and at a particular time or on the

basis of traditional experience, and the use, adapted to the natural conditions, durably ensures performance in a functioning system, without the productive base being exhausted and nature and landscape being unduly burdened.'

13 Paragraph 22 of the Nö NSchG states:

'1. Instead of, or in addition to, the governmental safeguarding of nature protection interests, agreements under private law may also be concluded by the Province of Lower Austria in order to achieve nature protection objectives, in particular in order to conserve, maintain, safeguard and develop sites which are valuable from the point of view of nature protection or are important to the landscape. Such agreements must above all be concerned with the conservation and maintenance, subject to appropriate conditions, of fairly small natural or semi-natural expanses of stagnant surface water, of wet meadowland and of dry and nutrient-poor sites, and also of coppices located in open farmland, and hedges, that are valuable from the point of view of nature protection. Other support measures include:

— payment for measures to create, conserve or improve other areas and objects valuable for nature protection;

— the promotion of a method of use or management that is appropriate particularly to the interests of nature protection, in areas that are ecologically important or important in landscape terms;

— the promotion of measures to improve important rural ecology functions (for example, biotope network, extensification, switch to natural methods for pursuing agricultural and silvicultural activity).

...'

Province of Upper Austria

14 The provision at issue is Paragraph 15(2) of the Law of Upper Austria on Nature and Countryside Protection (Oberösterreichisches Natur- und Landschaftsschutzgesetz 2001, LGBl. (Oberösterreich) No 129/2001; 'the Oö NSchG').

15 That provision states:

'For countryside conservation areas ..., protected countryside zones ..., European areas of conservation ... or nature reserves ..., the Provincial Government may prepare countryside maintenance plans defining those measures which in accordance with subparagraph 1 are necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land. In the absence of an agreement under private law or statutory provisions to the contrary, the costs of implementing such countryside maintenance plans must be borne by the Province as the holder of private rights. The landowner (person with the power of disposal) must permit such measures.'

Province of Salzburg

16 The following provisions are at issue: Paragraphs 3a, 5(8) to (10), 22a, 22b, 29 and 34 of the Law of Salzburg on Nature Protection (Salzburger Naturschutzgesetz 1999, LGBl. (Salzburg) No 73/1999; 'the Sbg NSchG'); Paragraph 104(4) of the Law of Salzburg on Hunting (Salzburger Jagdgesetz 1993, LGBl. (Salzburg) No 100/1993; 'the Sbg JagdG').

17 Paragraph 3a of the Sbg NSchG provides:

'1. When applying this Law and regulations adopted on the basis of this Law, the guiding principle is that the public interest in nature protection may be accorded precedence over all other interests.

2. Measures which, demonstrably, directly serve particularly important public interests are to be approved or taken into account, subject to the interests of nature protection ... being largely safeguarded, if:

(1) in the specific case, the other public interests have precedence over the interests of nature protection and

(2) it is demonstrated that there is no appropriate alternative to the measure in question that would have a lesser adverse effect on the interests of nature protection.

3. Where it can be anticipated that measures under subparagraph 2 will have a significant adverse effect on priority natural habitat types ... or priority species ... in European areas of conservation within the meaning of Paragraph 5(10)(a) and (c), only considerations connected with the following matters of public interest can be included in the weighing of interests:

(1) human life and health,

(2) public safety,

(3) beneficial consequences of primary importance for the environment.

Other public interests can be included in the weighing of interests only if an opinion from the ... Commission has first been obtained. The decision must have regard to that opinion.

4. Where, following a weighing of interests under subparagraph 2 or 3, the interests of nature protection do not have precedence, the adverse effect anticipated to result from the interference is, except in a case covered by subparagraph 6, to be compensated for by appropriate substitute measures. The compensation shall be prescribed by decision. Where the interference concerns particular habitats and populations of fauna and flora, above all the creation of replacement habitats comes into question as a substitute measure. These replacement habitats shall, where possible, be created in the immediate vicinity of the place of the interference. If no

replacement habitats can be created, the applicant shall be required, by decision, to pay a sum of money of an amount corresponding approximately to the costs of an appropriate substitute measure. Where replacement habitats can be created only to an insufficient extent, an appropriately reduced sum of money shall be required to be paid.

5. Where subparagraph 4 applies, the Provincial Government shall, in the case of European areas of conservation, safeguard the coherence of the European ecological network "Natura 2000". The measures adopted for that purpose shall be communicated to the ... Commission.

6. Substitute measures shall not be prescribed in respect of measures which:

(1) are necessary and unavoidable because of a risk to human life or health or in order to avert serious damage to the national economy, and

(2) have no effects on European areas of conservation.'

18 Paragraph 5 of the Sbg NSchG provides:

'For the purposes of this Law:

...

(8) "Interference with a protected site or object" means temporary or permanent measures which, individually or together with other measures, can have not merely insignificant effects, on the protected site or object or with regard to the protective purpose, or can be expected to have such effects through the multiple repetition or accumulation of such measures. Interference also takes place where the measures themselves originate from outside the protected site or object.

(9) "Conservation objectives of a European area of conservation" means the maintenance or restoration at a favourable conservation status:

(a) of the natural habitats specified in Annex I to the Habitats Directive or of the species of fauna and flora specified in Annex II to that directive;

(b) of the species of birds in Annex I to the Birds Directive, of regularly occurring migratory species (Article 4(2) of that directive), and of their habitats, paying particular attention to wetlands of international importance.

(10) "European areas of conservation" means:

(a) sites of Community importance which are entered on the list envisaged in Article 4(2) of the Habitats Directive;

(b) sites which, until the list referred to in (a) exists, have been included in a list pursuant to Article 4(1) of the Habitats Directive;

(c) bird protection areas under Article 4(1) and (2) of the Birds Directive.

...'

19 Paragraph 22a of the Sbg NSchG provides:

'...

2. For European areas of conservation, the Provincial Government shall enact by regulation protective provisions which in any event contain the protective purpose and the necessary requirements and prohibitions. The regulation shall also define the boundaries of the area of conservation. The protective purpose shall indicate the conservation objectives (Paragraph 5(9)) of the area of conservation in question. ...

3. The regulation governing a European area of conservation may prohibit or require measures, and allow certain interference generally or by dispensation granted by the Provincial Government. It shall be ensured by prohibitions, requirements and provisos to dispensations that those natural habitats and those

species of fauna and flora in respect of which, in accordance with the protective purpose, a favourable conservation status is to be maintained or restored are, respectively, not impaired and not significantly disturbed.

4. Before a dispensation is granted, the Provincial Government shall examine whether the interference may have a significant effect on the components of the European area of conservation that are essential for the conservation objectives (Paragraph 5(9)) (assessment of implications). The dispensation shall be granted only if no significant effect is to be anticipated.

5. The adoption of a regulation in accordance with subparagraphs 2 and 3 is not required if adequate protection and achievement of the conservation objective are already ensured for the area by other measures. More stringent protective provisions shall remain unaffected.

6. If necessary, countryside maintenance plans and also detailed plans ... shall be drawn up and implemented for European areas of conservation, having regard to Article 4(1) and (2) of the Birds Directive and Article 6(1) of the Habitats Directive. The conservation status of European areas of conservation shall be regularly monitored by the Provincial Government and, in so doing, particular regard is to be had to priority natural habitat types and priority species.'

20 Paragraph 22b of the Sbg NSchG states:

'1. Until adequate protective provisions have been enacted ..., measures in enjoyment of land may be carried out only in the way, and to the extent, that they were lawfully undertaken ...

2. All measures going beyond what is referred to in subparagraph 1 which may have a significant effect on natural habitats or species of fauna or flora in respect of which, in accordance with the Habitats Directive or the Birds Directive, a favourable conservation status is to be maintained or restored may be undertaken only with authorisation from the Provincial Government.

3. Authorisation is to be granted where the measure can cause no deterioration of the habitats covered by subparagraph 2 or significant disturbance of the species covered by subparagraph 2 and, in addition, it does not run counter to the objective of maintaining or creating a favourable conservation status for those habitats or species.

4. More stringent protective provisions shall remain unaffected.'

21 Paragraph 29 of the Sbg NSchG provides:

'1. Wild plants growing in the open whose population is threatened generally or in specific areas and in whose conservation there is a public interest on grounds of nature protection, and plants which are necessary for maintaining a balanced ecosystem, in particular for safeguarding the population of other plant species and of animals, may be protected entirely or partially by regulation of the Provincial Government. The protection can be limited both in time and in area.

2. The protection of plants in their entirety extends to all their parts, above and below ground. It encompasses a prohibition on damaging them, destroying them,

removing them from their location or treating the location of such plants in such a way that their further existence is jeopardised or precluded, and on keeping or transporting plants taken in the wild or accepting or furnishing such plants against or without payment. The prohibition on keeping or transporting plants or accepting or furnishing them against or without payment also relates to any derivative of the plant and any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of the plant.'

22 Paragraph 34 of the Sbg NSchG provides:

'1. The competent nature protection authority may, on application, authorise derogations from the prohibitions under [inter alia] Paragraph 29(2) and (3) ... Authorisation may ... only be granted for measures which serve one of the following purposes:

(1) public health including the production of medicinal products;

(2) the production of beverages;

(3) public safety;

(4) air safety;

(5) the protection of wild flora and fauna or the conservation of their habitats;

(6) research or teaching;

(7) the building up of populations or resettlement elsewhere;

(8) the prevention of serious damage to crops and forests, to animals for production or domestic animals, to fishing grounds or to waters;

(9) the construction of installations;

(10) other grounds of overriding public interest.

2. Points 9 and 10 of subparagraph 1 are inapplicable to birds. Points 2 and 9 of subparagraph 1 do not apply to plant species named in Annex IV to the Habitats Directive.

3. Authorisations under subparagraph 1 may be granted only if the purpose of the measure cannot be satisfactorily achieved by other means and the relevant population of the animal or plant species in question also does not suffer deterioration in the area of the interference.

4. Applications for authorisation under subparagraph 1 must state grounds and contain the following details:

...

6. Authorisation cannot be granted to the following persons:

...

7. The authorisation must contain all the details laid down in subparagraph 4 and state that it does not replace the agreement under private law of the person having the power of disposal over the land in question. In the case of authorisations for scientific purposes, the authority shall in addition require that the documentation is to be held in safekeeping, in agreement with a recognised scientific institution.

...'

23 Paragraph 104 of the Sbg JagdG provides:

'...

4. The authority may authorise further derogations from the prohibitions ... where that does not jeopardise the population of the species of game concerned and there is no satisfactory alternative for achieving the purpose pursued. Such derogations may be granted only for the following purposes:

(a) to protect other wild animals and plants and to conserve their natural habitats;

(b) to avoid serious damage to crops, livestock, forests, fishing waters and, in the case of furred game, to other forms of property;

(c) in the interests of public health and public safety or, in the case of furred game, also for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purposes of research and teaching;

(e) to increase the population of those species or reintroduce them, and for the breeding required to that end;

(f) for trade in a small number of animals (or parts of animals or products obtained from those animals) of those species of feathered game which ... are allowed to be captured or killed.'

Province of Tyrol

24 The following provisions are at issue: Paragraphs 1(1), 2(2), 5 to 9, 22 to 24 and 28(3) of the Law of Tyrol on Nature Protection (Tiroler Naturschutzgesetz 1997, LGBl. (Tirol) No 33/1997; 'the Tiroler NSchG'); Paragraph 1(1) and (2)(a) and (b), Paragraph 3, the first sentence of Paragraph 6(1) and Paragraph 6(2) of the Regulation of Tyrol on Nature Protection (Tiroler Naturschutzverordnung 1997, LGBl. (Tirol) No 95/1997; 'the Tiroler NSchVO').

25 Paragraph 1(1) of the Tiroler NSchG provides:

'This Law has the objective of conserving and maintaining nature, a foundation of human life, in such a way that:

(a) its diversity, special features and beauty,

(b) its recreational value,

(c) the richness of species in the indigenous animal and plant world and its natural habitats, and

(d) its balance, as unimpaired and efficient as possible,

are preserved and sustainably safeguarded or restored. The conservation and maintenance of nature extend to all its manifestations, in particular to the landscape, and indeed irrespective of whether the landscape is in its original state or has been fashioned by man. Environmentally friendly agriculture and silviculture have particular importance in this regard. Demands can be made on nature only to the extent that its value remains preserved for subsequent generations.'

26 Paragraph 2(2) of the Tiroler NSchG provides:

'Measures that are customary in agriculture and silviculture require no authorisation under this Law.

That does not apply to measures in alluvial forests ..., in wetlands ..., in nature reserves and special protection areas ...'

27 Paragraph 5 of the Tiroler NSchG provides:

'The following are prohibited throughout the territory of the Province:

(a) the conduct of sporting competitions with motor vehicles powered by an internal combustion engine, except on areas for which an authorisation ... exists;

(b) the use of helicopters to transport persons for tourism purposes, except between airports;

(c) the use of watercraft which are powered by a combustion engine on natural watercourses, except to implement schemes for which an authorisation under nature protection law exists and to the extent necessary for those schemes;

(d) any lasting impairment of glaciers and their drainage basins, except in the case of the operation, maintenance and repair of existing installations and their alteration ...'

28 Paragraph 22 of the Tiroler NSchG provides:

'1. The Provincial Government shall by regulation declare to be protected plant species those species of wild plants whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of plants, prohibit any person from:

...'

29 Paragraph 23 of the Tiroler NSchG states:

'1. The Provincial Government shall by regulation declare to be protected animal species those species of non-huntable wild animals whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of animals, prohibit any person from:

(a) disturbing, pursuing, capturing, holding, keeping whether alive or dead, transporting, offering for sale, selling, acquiring or killing animals of protected species;

(b) removing from their natural surroundings, damaging or destroying, keeping, transporting, offering for sale, selling or acquiring developing forms (such as eggs, larvae and chrysalises) of animals of protected species;

(c) keeping, transporting, offering for sale, selling or acquiring parts of animals of protected species (such as feathers, skins);

(d) removing or destroying breeding places or nests of animals of protected species;

(e) treating the habitat ... of animals of protected species ... in such a way that their continued existence in that habitat becomes impossible.

Prohibitions under (a) to (d) above may be limited to a specific number of animals and their developing forms, to specific developing forms and to specific periods and areas; prohibitions under (e) above may be limited to specific periods and areas.

3. Any person who claims that animals of protected species which he, for the purposes of his occupation, transports, holds, uses or offers for sale have been obtained by him from rearing in Tyrol or have been brought by him into Tyrol from another province or from abroad must, upon request, prove that to the authority.

4. An authorisation under nature protection legislation is required for the release into the wild of animals which are not subject to the provisions of hunting or fisheries law and are not of a native species. Such an authorisation may be granted only if neither a major alteration to existing plant life and wildlife nor prejudice to the interests of nature protection in accordance with Paragraph 1(1) is to be anticipated.

5. In regulations under subparagraph 1, the Provincial Government may enact provisions on the capture and gathering of wild animals of protected species,

including their developing forms, in order to ensure that those activities are carried out properly. In this context, certain methods of capture and the use of certain means of capture may be prohibited.'

30 Paragraph 24 of the Tiroler NSchG provides:

'It is prohibited deliberately to disturb or to pursue wild non-huntable animals of unprotected species, to capture them without justified reason and to remove, damage or destroy their breeding places, nets or developing forms without justified reason.'

**Pre-litigation procedure**

31 After analysing the various Laws and regulations relating to the transposition of the Directive of which the Republic of Austria had produced copies, on 13 April 2000 the Commission sent that Member State a letter of formal notice complaining that it had not transposed a number of the Directive's provisions completely or correctly.

32 By letter of 27 July 2000, the Republic of Austria submitted observations in this connection to the Commission. It informed the Commission in particular that measures were being taken to amend a number of domestic provisions. However, it put forward arguments divergent from those of the Commission as regards other aspects of the Directive's transposition.

33 By letter of 17 October 2003, the Commission delivered a reasoned opinion in which it concluded that, by not transposing a number of the Directive's provisions completely or correctly, the Republic of Austria had failed to fulfil its obligations under the Directive.

34 By letter of 23 December 2003, the Republic of Austria replied to the reasoned opinion along similar lines to its reply to the letter of formal notice.

35 In those circumstances, the Commission decided to bring the present action.

**Procedure before the Court**

36 In its application the Commission put forward 27 grounds of infringement against the defendant.

37 In its defence, the defendant accepted that 17 of those grounds were well founded and adhered to its position as to the remainder.

38 In its reply, the Commission withdrew two grounds of infringement.

39 Following a request, made by the Court under Article 54a of the Rules of Procedure, to submit additional information concerning the domestic legal instruments covered by the action the Commission also withdrew its action in so far as it concerned the grounds of infringement relating to Articles 6(3) and (4), 7, 11 and 15 of the Directive.

40 As a result, the action in fact concerns 14 grounds of infringement, which relate to the transposition of Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.

41 The Republic of Austria does not dispute that Austrian law, as it stood on expiry of the period laid down in the reasoned opinion, was not consistent with the Directive's requirements with regard to a number of points, which are covered by seven grounds of infringement.

## The action

### *Uncontested grounds of infringement*

Arguments of the Commission

— Breach of Article 12 of the Directive in the Provinces of Styria and Tyrol

42 The Commission observes that Paragraph 13d(1) of the Law of Styria on Nature Protection (Steiermärkisches Naturschutzgesetz; 'the Stmk NSchG') provides that

the Government of the Province of Styria is to transpose Article 12 of the Directive by adopting a regulation for that purpose. However, Paragraph 4 of the Regulation of Styria on Nature Protection (Steiermärkische Naturschutzverordnung; 'the Stmk NSchVO'), which sets out the list of animals protected throughout the year, does not fully transpose Article 12 of the Directive, because it does not concern all the species protected by virtue of Annex IV(a) to the Directive.

43 The Commission states that, under Paragraph 23(l)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected species those mentioned in Annex IV(a) to the Directive. However, the provisions of the Tiroler NSchVO do not set out all the species referred to.

— Breach of Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol

44 The Commission submits that Annex 1 to the Regulation of the Province of Carinthia on the Protection of Plant Species (Kärntner Pflanzenartenschutzverordnung), which concerns Paragraph 1 of that regulation, does not adequately protect all the plant species listed in Annex IV(b) to the Directive.

45 The Commission asserts that, in accordance with Paragraph 13c(1) of the Stmk NSchG, the Government of the Province of Styria must adopt a regulation transposing Article 13 of the Directive. However, no such regulation has been adopted. Nor do Paragraphs 1 and 2 of the Stmk NschVO, which lay down the plant species that are wholly or partially protected, fully transpose the Directive, given that they do not set out all the protected species referred to in Annex IV(b) to the Directive.

46 The Commission states that, under Paragraph 22(l)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected plant species those listed in Annex IV(b) to the Directive. However, the Tiroler NSchVO does not establish a regime protecting all the species included in Annex IV (b).

— Breach of Article 16(1) of the Directive in the Provinces of Styria and Tyrol

47 The Commission observes that Paragraph 62(2) of the Law of Styria on Hunting (Steiermärkisches Jagdgesetz) fails to take account of the fact that derogations are permitted only if it is ensured that the populations of the protected species are maintained at a 'favourable conservation status'.

48 The Commission submits that, for priority natural habitat types, the prohibition laid down in Paragraph 3 of the Tiroler NSchVO fails to take account of the requirement of a 'favourable conservation status'. The same applies to the plant species referred to in Paragraph 1(2)(b) of the Tiroler NSchVO and the animal species referred to in Paragraph 6(2)(e) of that regulation.

49 The Austrian Government states that a number of measures transposing the Directive are in the process of being drawn up within the competent bodies of the provinces concerned. Those provinces are thereby seeking to make all the domestic enactments at issue consistent with the Directive.

Findings of the Court

50 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes in primary or secondary legislation (see, inter alia, Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8, and Case C-23/05 *Commission* v *Luxembourg* [2005] ECR I-9535, paragraph 9).

51 Since the reasoned opinion was notified to the Republic of Austria on 17 October 2003, and given the period laid down in the opinion, the date by which the defendant had to ensure that provisions of domestic law were consistent with the Directive's requirements was 17 December 2003.

52 It is apparent from the information provided regarding the aforementioned grounds of infringement that the Austrian Government does not dispute that the measures necessary to transpose the Directive in respect of all the points concerned had not been adopted within the period set in the reasoned opinion.

53 It must therefore be held that the action is well founded so far as concerns the grounds of infringement relating to the transposition of Article 12 of the Directive in the Provinces of Styria and Tyrol, Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol and Article 16(1) of the Directive in the Provinces of Styria and Tyrol.

*Contested grounds of infringement*

Breach of Article 1 of the Directive in the Province of Salzburg

— Arguments of the parties

54 The Commission states that Paragraph 5 of the Sbg NSchG lays down a set of definitions which do not transpose correctly the definitions set out in Article 1(e), (g), (i) and (l) of the Directive of the terms 'conservation status of a natural habitat', 'species of Community interest', 'conservation status of a species' and 'special area of conservation'.

55 The Commission adds that, while it is true that Paragraph 5(9) of the Sbg NSchG refers to the concepts of maintenance and restoration of a favourable conservation status, it does not define them. Furthermore, neither Paragraph 3(a) of the Sbg NSchG, which merely provides for a weighing of interests, nor Paragraphs 22a, 22b and 29 of that Law, which relate to a number of complementary protective measures, amount to a correct transposition of Article 1 of the Directive.

56 The Austrian Government submits that the transposition of Article 1 of the Directive into the law of the Province of Salzburg is consistent with Community law. All the elements of that provision are reproduced in the applicable Law, as a result of the use of the concept of 'interference' in conjunction with the conservation objectives. The following legal terms in the Directive and national provisions are involved:

— 'conservation status of a natural habitat': Article 1(e) of the Directive; Paragraphs 5(8) and (9) and 22a(3) and (4) of the Sbg NSchG;

— 'species of Community interest': Article 1(g) of the Directive; 'conservation status of a species': Article 1(i) of the Directive; Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG;

— 'special area of conservation': Article 1(l) of the Directive; Paragraphs 5(9) and (10) and 22a of the Sbg NSchG.

— Findings of the Court

57 It should be remembered at the outset that, as is apparent from the 4th and 11th recitals in the preamble to the Directive, the habitats and species covered by the Directive form part of the Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States.

58 With regard to the field under consideration, the Court has pointed out that faithful transposition is particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 25, and Case C-98/03 *Commission* v *Germany* [2006] ECR I-53, paragraph 59).

59 The Court has held with regard to the definitions set out in Article 1 of the Directive that the terms concerned must be transposed into the Member States' national law (see Case C-72/02 *Commission* v *Portugal* [2003] ECR I-6597, paragraph 17).

60 So far as concerns, first, the terms defined in Article 1(e) and (i) of the Directive ('conservation status of a natural habitat' and 'conservation status of a species'), it is to be noted that, while the words 'favourable conservation status' are used in Paragraph 5(9) of the Sbg NSchG, the wording of the contested provisions of national law does not, however, encompass all the features set out in Article 1(e) and (i) of the Directive.

61 Such a legislative technique does not ensure that all the elements of the definitions in question are actually taken into account when the Directive is implemented, although those elements are decisive for the meaning and scope of the protection afforded to the habitats and species covered.

62 Consequently, Paragraph 5(8) and (9) and Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG cannot be regarded as amounting to an adequate legislative transposition of Article 1(e) and (i) of the Directive.

63 So far as concerns, second, Article 1(g) of the Directive, this provision equally contains a large number of parameters, intended to define the term 'species of Community interest'.

64 Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG, on the other hand, concern solely a weighing of interests, supplementary measures of delegated legislation that relate to European areas of conservation, detailed rules governing the grant of dispensations from the prohibitions laid down by the Law, and the specific protection of wild plants. The concept of species of Community interest is not mentioned there.

65 Those provisions accordingly cannot be regarded as transposing Article 1(g) of the Directive.

66 So far as concerns, third, Article 1(l) of the Directive, it is to be noted that Paragraph 5(10) of the Nbg NSchG, which must be read in conjunction with Paragraph 5(9) which lays down as objective the maintenance or restoration of a favourable conservation status, uses the words 'European area of conservation' instead of 'special area of conservation'. The areas referred to by Paragraph 5(10) include the sites which have been entered by the Commission on the list of sites of Community importance, pursuant to Article 4(2) of the Directive, and the sites proposed by the Province of Salzburg for entry on that list, in accordance with Article 4(1) of the Directive.

67 In addition, Paragraph 22a(2) to (4) of the Sbg NSchG indicates with precision the measures to be taken in order to achieve the protective objectives relating to 'European areas of conservation'.

68 It follows from the foregoing that Paragraphs 5(9) and (10) and 22a of the Sbg NSchG provide with sufficient legal precision a definition of the sites which are included in the term 'special area of conservation' within the meaning of Article 1(l) of the Directive.

69 That provision has therefore been transposed correctly in the Province of Salzburg.

70 Accordingly, the present complaint is well founded only with regard to the failure to transpose Article 1(e), (g) and (i) of the Directive.

Breach of Article 6(1) of the Directive in the Province of Lower Austria

— Arguments of the parties

71 The Commission states that Paragraph 9(5) of the Nö NSchG confines itself to laying down an obligation to take, 'if need be', appropriate maintenance, development and conservation measures. However, it is apparent from Article 6(1) of the Directive that the 'necessary conservation measures' must be adopted in all cases, and not 'if need be'. In Article 6(1) the words 'if need be' concern only management plans and cannot be understood as a general restriction on the obligation to adopt the necessary statutory, administrative or contractual measures.

72 The Austrian Government contends that the obligation laid down in Article 6(1) of the Directive is not to adopt conservation measures in all cases, but only the 'necessary' conservation measures. In any event, where such measures are required in addition to the obligations and prohibitions to be laid down pursuant to Paragraph 9(4) of the Nö NSchG, they are indeed taken by the competent authorities of the Province in order to achieve a favourable conservation status.

— Findings of the Court

73 It should be noted first of all that the Directive lays down complex and technical rules in the field of environmental law and that, accordingly, the Member States are under a particular duty to ensure that their legislation intended to transpose the Directive is clear and precise (see *Commission* v *United Kingdom*, paragraph 26).

74 Regarding the complaint set out by the Commission, both Article 6(1) of the Directive and Paragraph 9(5) of the Nö NSchG use the words 'if need be'. However, in the provision of domestic law, those words refer generally to all conservation measures, which means that under that provision the implementation of such measures is not mandatory.

75 In Article 6(1) of the Directive, on the other hand, the same words relate only to particular cases, that is to say to certain means or technical choices for achieving conservation which are defined as 'appropriate management plans specifically designed for the sites or integrated into other development plans'.

76 Thus, the Directive requires the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States and restricts any latitude of the national authorities when laying down rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures.

77 It follows that Paragraph 9(5) of the Nö NSchG cannot be regarded as adequately transposing the obligation to take, in all cases, the conservation measures necessary for special areas of conservation.

78 The argument put forward by the Austrian Government that, in any event, this provision of domestic law is interpreted in a manner consistent with the Directive where conservation measures are necessary cannot be upheld.

79 Such interpretation of provisions of domestic law in a manner consistent with a directive cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, to this effect, Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 21).

80 Moreover, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14; Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraph 30; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865, paragraph 25).

81 It must therefore be found that the legislation of the Province of Lower Austria is not consistent with Article 6(1) of the Directive.

82 The action is thus well founded in this regard.

Breach of Article 6(1) of the Directive in the Province of Upper Austria

— Arguments of the parties

83 The Commission states that Paragraph 15(2) of the Oö NSchG provides for the possibility of countryside management plans being drawn up. An option of that kind is not, however, sufficient in view of the obligation laid down in Article 6(1) of the Directive.

84 The Commission further observes that, under that provision, the Provincial Government may draw up for the protected areas countryside maintenance plans including measures which are 'necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land'. The subordinate clause concerning 'economic use' is intended as a restriction on the obligation to draw up countryside management plans.

85 The Austrian Government submits that Article 6(1) of the Directive confers on the Member States the power to determine the nature of the protective measures to be taken.

86 It also pleads that Paragraph 15(2) of the Oö NSchG is consistent with the Directive since the term 'economic use' can only be understood as use complying with the protective rules applicable to the protected areas. Use contrary to the protective objectives which are laid down in Article 6(1) of the Directive cannot therefore be authorised by the competent legislative or administrative authorities.

— Findings of the Court

87 It should be noted at the outset that, by means of the words used in Article 6(1) of the Directive, the Community legislature sought to impose on the Member States the obligation to take the necessary conservation measures that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II to the Directive respectively.

88 It is clear, however, that Paragraph 15(2) of the Oö NSchG, according to which 'European areas of conservation' and 'nature reserves' 'may' be the subject of countryside maintenance plans, confers discretion on the Provincial Government with regard to whether the taking of 'necessary conservation measures' is required.

89 As has been stated in paragraph 76 of the present judgment, consideration of that kind does not fall within a discretionary power of the Member States. On this basis alone, Paragraph 15(2) of the Oö NSchG does not transpose Article 6(1) of the Directive correctly.

90 In addition, Paragraph 15(2) of the Oö NSchG does not specify the scope of the term 'authorised economic use' and it is conceivable that operations of that kind may prevent necessary conservation measures from being taken. That provision is therefore incompatible with Article 6(1) of the Directive in this respect too.

91 It follows from the foregoing that the legislation of the Province of Upper Austria is not consistent with Article 6(1) of the Directive.

92 The Commission's action is therefore well founded in this regard.

Breach of Article 6(2) of the Directive in the Province of Tyrol

— Arguments of the parties

93 The Commission submits that it cannot be inferred either from Paragraphs 1 and 2 or from Paragraph 5 or 14 of the Tiroler NSchG that Article 6(2) of the Directive has been transposed in a manner consistent with Community law. Paragraphs 22, 23 and 24 of the Tiroler NSchG concern the protection of plant, animal and bird species and measures relating to unprotected species, but they do not lay down a prohibition to prevent the deterioration of special areas of conservation.

94 The Austrian Government contends that the obligation laid down in Article 6(2) of the Directive is taken into consideration in the abovementioned provisions of the Tiroler NSchG.

95 While the Austrian Government accepts that these provisions do not contain a specific prohibition to prevent the deterioration of special areas of conservation, it considers, however, that transposition of that obligation does not necessarily require the wording of Article 6(2) of the Directive to be reproduced verbatim. The provincial legislature took care to have due regard to this requirement for protection, and it is thus ensured that natural habitats and the habitats of species do not deteriorate and that the species for which the areas have been designated are not disturbed.

96 The Austrian Government adds that, in any event, the legislative amendments introduced by Paragraph 14 of the Tiroler NSchG have made that Law consistent with the Directive.

— Findings of the Court

97 It must be stated at the outset that Paragraph 14 of the Tiroler NSchG was not inserted until after the period laid down in the reasoned opinion had expired. In accordance with the Court's case-law set out in paragraph 50 of the present judgment, this legislative amendment is therefore irrelevant for the purposes of assessing the present ground of infringement.

98 With regard to the first obligation laid down in Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species, it must be stated, in light of the proposition advanced by the Austrian Government concerning the manner in which Article 6(2) of the Directive is transposed, that the law of the Province of Tyrol as in force at the end of the period laid down in the reasoned opinion did not contain a provision endowed with the necessary legal precision requiring the competent authorities to avoid the deterioration of those habitats (see, to this effect, *Commission* v *United Kingdom*, paragraph 37).

99 In those circumstances, the proposition that the general legal context resulting from the legislation in force in the Province of Tyrol meets the aforementioned requirements cannot be upheld.

100 As to the second obligation resulting from Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid disturbance of the species for which the special areas of conservation have been designated, Paragraphs 22 to 24 of the Tiroler NSchG likewise do not transpose this obligation, since they concern not species whose conservation makes designation of those areas necessary, that is to say species referred to in Annex II to the Directive, but species referred to in Annex IV(a) thereto, whose protection falls under Article 12 of the Directive.

101 Protection of the species for which special areas of conservation have been designated must be complete (see Case C-75/01 *Commission* v *Luxembourg* [2003] ECR I-1585, paragraph 43).

102 Consequently, the legislation of the Province of Tyrol does not comply with Article 6(2) of the Directive.

103 The Commission's action is therefore well founded in this regard.

Breach of Article 16(1) of the Directive in the Provinces of Lower Austria and Salzburg

— Complaint relating to the legislation of the Province of Lower Austria

Arguments of the parties

104 The Commission submits that Paragraphs 20, 21 and 22 of the Nö NSchG do not refer to the criterion of 'maintenance at a favourable conservation status' and that

the conditions and criteria to be met in order to be able to derogate from the system of protection laid down by the Directive are not listed exhaustively, contrary to Article 16(1) thereof.

105 The Commission adds that the prohibitions set out in Paragraph 95 of the Nö JagdG concern solely animal species living in the wild and therefore that they do not apply to other species.

106 The Austrian Government contends that, by virtue of the legislative technique chosen, the protection required by the Directive is ensured by Paragraph 20(4) of the Nö NSchG. The competent authorities must, first, act in a manner consistent with the Directive and, second, observe the prohibitions laid down in hunting legislation. In practice, derogations are granted only very restrictively, that is to say solely where no significant risk to protected species of wild plants and animals is to be feared.

107 The Austrian Government also maintains that Paragraph 20(4) of the Nö NSchG ensures that the principle of legal certainty is complied with, because it requires the competent authorities to specify expressly the means, devices and methods of capture or killing that are authorised.

108 The Austrian Government explains finally that the derogations provided for in Paragraph 21(1) and (2) of the Nö NSchG can never apply in the case of deliberate harm to protected flora, fauna or habitats.

Findings of the Court

109 Articles 12 to 14 and 15(a) and (b) of the Directive form a coherent body of provisions which require the Member States to establish strict regimes of protection for the animal and plant species concerned (see, to this effect, *Commission* v *United Kingdom*, paragraph 112).

110 Also, Article 16 of the Directive, which defines in a precise manner the criteria on the basis of which the Member States may provide for derogations from the prohibitions set out in Articles 12 to 15, is a provision constituting an exception to the system of protection which the Directive imposes. Consequently, Article 16 must be interpreted restrictively (see *Commission* v *United Kingdom*, paragraph 111).

111 It should be added in this regard that under Article 16(1) of the Directive any measure adopted at national level which derogates from the prohibitions laid down by the Directive must be conditional on there being no satisfactory alternative.

112 It follows that national provisions under which the grant of derogations from the prohibitions established by Articles 12 to 14 and 15(a) and (b) of the Directive is subject not to all the criteria and conditions set out in Article 16 of the Directive but, incompletely, to certain elements of them, cannot constitute a regime consistent with Article 16.

113 Furthermore, as has been pointed out in paragraph 80 of the present judgment, an administrative practice consistent with a directive's provisions is not sufficient to transpose Community law correctly.

114 So far as concerns Paragraph 20(4) of the Nö NSchG, it is to be noted, first, that while it provides that derogations may be granted when there is no reason to fear a risk to flora and fauna in the wild, it does not thereby preclude such derogations where the populations of the species concerned do not have a favourable conservation status.

115 However, Article 16(1) of the Directive makes the favourable conservation status of those populations in their natural range a necessary precondition in order for the derogations for which it provides to be granted.

116 Accordingly, the ambiguity which characterises the wording of Paragraph 20(4) of the Nö NSchG is incompatible with the requirement for a precise and clear transposition of Article 16(1) of the Directive (see, by analogy, Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9).

117 Second, regarding grounds of derogation, Paragraph 20(4) of the Nö NSchG mentions, by way of example, derogations for scientific or pedagogical purposes.

118 While it is true that such derogations are capable of being tied to Article 16(1)(d) of the Directive, the wording of the domestic provision in question does not preclude that derogations may be authorised on grounds other than those which are nevertheless listed exhaustively in Article 16(1)(a) to (d) of the Directive.

119 Third, nor does Paragraph 20(4) of the Nö NSchG reproduce the conditions for a derogation which are included in Article 16(1)(e) of the Directive, namely the requirement that any derogation be under strictly supervised conditions and of a selective and limited nature.

120 So far as concerns, next, Paragraph 21 of the Nö NSchG, it need merely be pointed out that Article 16(1) of the Directive does not provide for a ground of derogation in favour of a commercial operation of an agricultural or silvicultural nature.

121 Finally, so far as concerns the arguments put forward by the Austrian Government which are derived from the provisions of hunting legislation, it is to be pointed out that application of Paragraph 20(4) of the Nö NSchG is liable to infringe Articles 12 to 15 of the Directive outside the field of hunting. Furthermore, even if the competent authorities comply with the domestic nature protection provisions that relate to engaging in hunting, a body of rules of that kind is not capable of establishing a legal framework consistent with the Community provision which lists exhaustively the permitted grounds of derogation: Paragraph 95 of the Nö JagdG does not contain such a list of grounds, but merely prohibits a number of hunting methods for certain animal species.

122 It follows from the foregoing considerations that the legislation of the Province of Lower Austria is not consistent with Article 16(1) of the Directive.

123 The Commission's action is therefore well founded in this regard.

— Complaint relating to the legislation of the Province of Salzburg

Arguments of the parties

124 The Commission observes that Paragraph 34 of the Sbg NSchG and Paragraph 104(4) of the Sbg JagdG do not reproduce the criterion of 'maintenance at a favourable conservation status' set out in Article 16(1) of the Directive. Nor can the grounds of derogation laid down in points 2 and 9 of Paragraph 34(1) of the Sbg NSchG concerning the production of beverages and the construction of installations be tied to any of the grounds included in Article 16(1) of the Directive.

125 The Austrian Government contends that, inasmuch as Article 16(1) of the Directive provides for the possibility of derogation from the prohibitions prescribed by the Directive, it would be contrary to the logic of the system of protection thereby established to lay down an obligation to restore a favourable conservation status within the framework of a provision relating to the authorising of derogations. Furthermore, Paragraph 34(3) of the Sbg NSchG is stricter than Article 16(1) of the Directive since any derogating measure must avoid deterioration in respect of the populations of plant or animal species that are present in the area concerned.

Findings of the Court

126 The words 'maintenance ... at a favourable conservation status' in Article 16(1) of the Directive relate to a situation which is defined in Article 1(i) of the Directive and which involves, first, general factors referred to in the first subparagraph of Article 1(i) and second, a number of cumulative criteria. As is apparent from paragraph 59

of the present judgment, the Member States have the task of transposing those concepts into national law with sufficient legal precision.

127 Paragraph 104(4) of the Sbg JagdG, on the other hand, provides that derogations may be authorised 'where that does not jeopardise the population of the species of game concerned'. This provision deviates from the system of protection prescribed by the Directive since it allows derogations from the general prohibitions without making them dependent on a requirement to maintain the populations of the species concerned at a favourable conservation status.

128 As regards Paragraph 34(1) of the Sbg NSchG, the grounds of justification relating to, respectively, the production of beverages and the construction of installations do not fall within any of the grounds exhaustively listed in Article 16(1) of the Directive.

129 The failure to fulfil obligations that has been alleged must therefore be held to be proved.

Breach of Article 22(b) of the Directive in the Province of Lower Austria

— Arguments of the parties

130 The Commission observes that Paragraph 17(5) of the Nö NSchG makes the grant of authorisation to introduce non-native species dependent on a criterion not

envisaged by the Directive, namely that any harm must not be 'lasting'. In addition, that provision does not prohibit all prejudice to natural habitats within their natural range and to the wild native fauna and flora that is due to the deliberate introduction of non-native species.

131 The Austrian Government submits that, when Paragraph 17(5) of the Nö NSchG is interpreted consistently with the Directive, authorisation to introduce into the wild a species that is not native or not suited to local conditions will always be refused if that adversely affects native fauna and flora.

— Findings of the Court

132 Paragraph 17(5) of the Nö NSchG permits the deliberate introduction of non-native animal or plant species provided that natural habitats and native wild fauna and flora will not suffer lasting harm.

133 Such a regime does not transpose correctly the system of protection laid down by the Directive. That system requires any derogating measure to comply with the conditions prescribed in Article 22(b) of the Directive, in particular the condition under which authorisation may be granted only in so far as this does not prejudice natural habitats.

134 The words 'not ... prejudice' constitute an unambiguous protective requirement which goes further than that laid down in Paragraph 17(5) of the Nö NSchG.

135 This alleged failure to fulfil obligations must accordingly be held to be proved.

136 It follows from the foregoing considerations that the Republic of Austria has failed to fulfil its obligations under Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.

**Costs**

137 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been essentially unsuccessful in its pleas remaining at issue in the proceedings, the Republic of Austria should be ordered to pay the costs.

138 As regards the grounds of infringement set out in the application which were withdrawn by the Commission at a subsequent stage in the proceedings, it must be stated that the Commission ceased pursuing the complaints concerned as a result of amendments to the domestic legal instruments at issue. The withdrawal is

accordingly attributable to the defendant, given that the provisions of domestic law were brought into line with the requirements of Community law only belatedly. In accordance with Article 69(5) of the Rules of Procedure, the Republic of Austria should therefore be ordered to bear all the costs of the present proceedings.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that the Republic of Austria has failed to fulfil its obligations under Article 1(e), (g) and (i), Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**

2. **Dismisses the remainder of the action;**

3. **Orders the Republic of Austria to pay the costs.**

[Signatures]

ARRÊT DE LA COUR (cinquième chambre)

16 mars 2006 (*)

«Manquement d'État – Directive 92/43/CEE – Conservation des habitats naturels ainsi que de la faune et de la flore sauvages – Protection des espèces»

Dans l'affaire C-518/04,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 21 décembre 2004,

Commission des Communautés européennes, représentée par MM. M. van Beek et M. Konstantinidis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République hellénique, représentée par M^me^ E. Skandalou, en qualité d'agent, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (cinquième chambre),

composée de M. J. Makarczyk, président de chambre, MM. R. Schintgen et J. Klučka (rapporteur), juges,

avocat général: M. A. Tizzano,

greffier: M^me^ C. Strömholm, administrateur,

vu la procédure écrite et à la suite de l'audience du 26 janvier 2006,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en ne prenant pas les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos afin d'éviter toute perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la

conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7, ci-après la «directive»).

## Le cadre juridique

2 L'article 12, paragraphe 1, de la directive dispose:

«Les États membres prennent les mesures nécessaires pour instaurer un système de protection stricte des espèces animales figurant à l'annexe IV point a), dans leur aire de répartition naturelle, interdisant:

[...]

b) la perturbation intentionnelle de ces espèces notamment durant la période de reproduction, de dépendance, d'hibernation et de migration;

[...]

d) la détérioration ou la destruction des sites de reproduction ou des aires de repos.»

3 La vipère Vipera schweizeri figure à l'annexe IV, sous a), de ladite directive en tant qu'espèce animale d'intérêt communautaire qui nécessite une protection stricte.

## La procédure précontentieuse

4 Estimant que la République hellénique avait manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive, la Commission a engagé la procédure en manquement prévue à l'article 226 CE.

5 Après avoir mis la République hellénique en demeure de présenter ses observations, la Commission a, le 19 décembre 2003, émis un avis motivé invitant cet État membre à prendre les mesures nécessaires pour s'y conformer dans un délai de deux mois à compter de la notification de cet avis.

6 N'ayant reçu aucun élément d'information lui permettant de conclure que la République hellénique s'était conformée à ses obligations résultant de la directive, la Commission a décidé d'introduire le présent recours.

## Sur le recours

### Argumentation des parties

7 La Commission considère que la réglementation grecque n'assure pas une protection stricte de la vipère Vipera schweizeri en ce qu'elle se limiterait à introduire des principes généraux et des orientations ainsi qu'à fixer des règles isolées, sans instaurer un régime spécifique, préventif et juridiquement contraignant. À cet égard, elle invoque l'arrêt du 30 janvier 2002, Commission/Grèce (C-103/00, Rec. p. I-1147, points 29 et 30) ainsi que les conclusions de l'avocat général Léger (point 43) rendues dans la même affaire.

8 Le gouvernement hellénique ne conteste pas la nécessité de prendre des mesures aux fins de protéger l'espèce en question mais estime que le cadre législatif en vigueur, les différents programmes et activités

de gestion en cours ainsi qu'un projet d'arrêté interministériel sont suffisants pour assurer cette protection, notamment en prévoyant, préalablement à l'autorisation de certains projets, travaux et activités, l'évaluation de leur incidence sur l'environnement ainsi qu'en envisageant des actions spécifiques de protection.

9 Ledit gouvernement fait également valoir que le bon état de l'environnement et, en particulier, la stabilité dans le temps de la population des vipères concernées attestent de la qualité des mesures qui ont été adoptées.

10 La Commission rétorque que ces circonstances ne sauraient dispenser la République hellénique d'adopter un cadre juridique propre à instaurer une protection stricte de l'espèce Vipera schweizeri. La Commission se réfère, à cet égard, aux points 30 et 31 de l'arrêt Commission/Grèce, précité.

11 À l'audience, elle a fait également valoir que les mesures adoptées de manière isolée par la République hellénique ne permettent pas de garantir la protection de ladite espèce, dans la mesure où des mines seraient exploitées dans la zone regroupant les sites de reproduction et les aires de repos de cette même espèce et seraient à l'origine de perturbations intentionnelles de celle-ci. De même, des caprins et des bovins seraient laissés en pâture de manière excessive dans ladite zone, ce qui serait susceptible de nuire à la protection de l'espèce Vipera schweizeri.

Appréciation de la Cour

12 À titre liminaire, il convient de rappeler que, selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai imparti dans l'avis motivé et que les changements intervenus par la suite ne sauraient être pris en compte par la Cour (voir, notamment, arrêts Commission/Grèce, précité, point 23, et du 19 juin 2003, Commission/France, C-161/02, Rec. p. I-6567, point 6).

13 Dès lors, il n'y a pas lieu d'examiner si le projet d'arrêté interministériel, dont le gouvernement hellénique a fait mention au cours de la procédure écrite et orale et qui, selon lui, a pour objet de codifier ou compléter des mesures de protection déjà en vigueur, satisfait, en ce qui concerne la vipère Vipera schweizeri, aux exigences de protection énoncées à l'article 12, paragraphe 1, sous b) et d), de la directive.

14 S'agissant des autres mesures visant, selon le gouvernement hellénique, à protéger cette espèce, il importe de rappeler que l'article 12, paragraphe 1, sous b) et d), de la directive impose l'adoption des mesures nécessaires pour instaurer un système de protection stricte des espèces animales figurant à l'annexe IV, sous a), de la directive dans leur aire de répartition naturelle, interdisant, d'une part, la perturbation intentionnelle desdites espèces, notamment durant la période de reproduction, et, d'autre part, la détérioration ou la destruction des sites de reproduction ou des aires de repos.

15 À cet égard, il convient de relever, en premier lieu, que l'île de Milos est une région essentielle pour la reproduction et la survie de l'espèce protégée Vipera schweizeri figurant à ladite annexe IV, sous a). En effet, d'une part, il est constant que la partie occidentale de Milos regroupe, à elle seule, plus de la moitié de la population mondiale de cette espèce. D'autre part, un des trois sites proposés par les autorités helléniques comme sites d'importance communautaire pour le réseau Natura 2000 aux fins de la protection de la vipère Vipera schweizeri est situé à Milos.

16 En deuxième lieu, un système de protection stricte, au sens de l'article 12, paragraphe 1, sous b) et d), de la directive, suppose l'adoption de mesures cohérentes et coordonnées, à caractère préventif, ainsi

que l'a relevé l'avocat général Léger dans ses conclusions dans l'affaire Commission/Grèce, précitée (points 43 et 44).

17 En troisième lieu, la loi-cadre grecque n° 1650/1986, relative à la protection de l'environnement, exige elle-même, d'une part, l'élaboration d'un plan de gestion, ou «étude environnementale spéciale», en vue de l'adoption ultérieure d'un décret présidentiel relatif à la protection efficace des espèces ainsi que de leurs habitats qui fixera les conditions, restrictions et interdictions nécessaires à cette protection, et, d'autre part, la création d'un organisme de gestion. À titre transitoire, cette loi-cadre prévoit que, jusqu'à l'adoption de ce décret, lesdites conditions, restrictions et interdictions peuvent être fixées par arrêté ministériel. Or, il est constant que, à l'expiration du délai fixé par l'avis motivé, toutes les mesures nécessaires n'avaient pas été prises en ce sens.

18 À cet égard, le gouvernement hellénique a reconnu, au cours de la procédure écrite, que les lignes directrices fixées par le cadre juridique actuellement en vigueur méritent, pour certaines, d'être précisées et a ajouté, à l'audience, que le projet d'arrêté interministériel ayant pour objet de codifier mais également de compléter les mesures prises en application de la loi-cadre n° 1650/1986 et d'assurer ainsi une protection plus spécifique et plus stricte de la partie occidentale de Milos était encore en cours d'adoption.

19 En quatrième lieu, s'agissant des autres éléments dudit cadre juridique, le gouvernement hellénique s'est contenté, lors de la procédure écrite et orale, d'énumérer une série d'actes législatifs, réglementaires et administratifs, sans indiquer ni reproduire aucune disposition spécifique en vigueur au moment de l'expiration du délai fixé par l'avis motivé susceptible de remplir les exigences imposées par l'article 12, paragraphe 1, sous b) et d), de la directive.

20 En conséquence, il y a lieu de constater que la République hellénique n'a pas adopté, dans le délai prescrit, un cadre juridique de nature à assurer, sur l'île de Milos, une protection stricte de la vipère Vipera schweizeri contre toute perturbation intentionnelle, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que contre toute détérioration ou destruction de ses sites de reproduction ou aires de repos (voir, en ce sens, arrêt Commission/Grèce, précité, points 27 à 30).

21 Des circonstances telles que le bon état de l'environnement ou la stabilité de la population de l'espèce Vipera schweizeri, sur l'île de Milos, ne sauraient, par elles-mêmes, remettre en cause cette constatation (voir, en ce sens, arrêt Commission/Grèce, précité, point 31). Le recours de la Commission doit donc être accueilli.

22 Au vu de ce qui précède, il convient de constater que, en ne prenant pas, dans le délai prescrit, les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos interdisant la perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos de ladite espèce, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive.

## Sur les dépens

23 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de

la République hellénique et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (cinquième chambre) déclare et arrête:

1) En ne prenant pas, dans le délai prescrit, les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos interdisant la perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos de ladite espèce, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages.

2) La République hellénique est condamnée aux dépens.

Signatures

---

* Langue de procédure: le grec.

# JUDGMENT OF THE COURT (Second Chamber)

10 January 2006 *

In Case C-98/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 February 2003,

**Commission of the European Communities,** represented by U. Wölker, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany,** represented by M. Lumma and C. Schulze-Bahr, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: A. Tizzano,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2005,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2005,

gives the following

## Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that:

— by failing, in respect of certain projects carried out outside special areas of conservation ('SACs') within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild

fauna and flora (OJ 1992 L 206, p. 7; 'the Directive'), to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting an SAC;

— by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;

— by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;

— by failing to ensure compliance with the criteria for derogation set out in Article 16 of the directive in the case of certain activities compatible with the conservation of the area;

— by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;

— by failing to notify fishery catch legislation and/or to ensure that such legislation contains adequate bans on fishing,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.

## Legal background

*Community law*

2 The aim of the Directive, in accordance with Article 2(1), is 'to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.

3 Article 4 of the Directive lays down a procedure for designating sites as SACs, where species and habitats protected by the Directive are present.

4 As provided in the 10th recital in the preamble to the Directive, 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.' That recital is expressed in Article 6(3) of the Directive which refers to subparagraph 4. Those subparagraphs provide:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in

combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

5 According to Article 12(1) of the Directive:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 Article 13 of the Directive provides that:

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV(b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

7 Article 16(1) of the Directive is worded as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

*National law*

8 The Federal Republic of Germany has, inter alia, transposed the Directive by the Federal Law on Nature protection of 21 September 1998 (Gesetz über Naturschutz und Landschaftspflege, BGBl. 1998 I, p. 2995) ('the BNatSchG 1998').

9 That law was subsequently repealed and replaced by the Federal Law on nature protection and countryside conservation of 25 March 2002 (Gestz über Naturschutz und der Landschaftspflege, BGBl. 2002 I, p. 1193) ('the BNatSchG 2002').

10 Paragraph 34(1) of the BNatSchG 2002 transposed into German law the duty laid down in the first sentence of Article 6(3) of the Directive to subject projects to an assessment of their implications for protected sites, for the purposes of the Directive.

11 Paragraph 10(1)(11) of the BNatSchG 2002 defines the concept of 'projects within the meaning of the law' as follows:

'(a) projects and measures planned within a site of Community importance or a European site for the protection of birds, in so far as they are subject to a decision by an authority or to notification to an authority or that they are carried out by an authority, and

(b) acts affecting nature and the countryside, within the meaning of Paragraph 18, in so far as they are subject to a decision by an authority or to notification to an authority or are carried out by an authority, and

(c) installations subject to an authorisation under the Federal law on protection against pollution and the use of water, which are subject to an authorisation or to approval under the Law on water use,

in so far as, separately or in conjunction with other projects or plans, they are likely to have a significant effect on a site of importance to the Community or a European site for the protection of birds ...'

12 Paragraph 18 of the BNatSchG 2002 provides:

'1. Acts affecting nature and the countryside, within the meaning of this Law, are changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum which may alter to a considerable extent the capacity and functioning of the ecosystem or the countryside.

2. The use of soil for the purpose of agriculture, forestry and fishing shall not constitute an intervention where it takes account of the objectives and the principles of nature protection and countryside conservation. The use of soil for the purposes of agriculture, forestry and fishing does not, in principle, undermine the objectives and principles set out above, provided that it complies with the conditions in Paragraph 5(4) to (6) and the rules of professional practice under the Law on agriculture forestry and fishing and Paragraph 17(2) of the Federal Law on soil protection.'

13 Paragraph 36 of BNatSchG 2002 entitled 'Material nuisances' provides:

'If it is foreseeable that installations, subject to an authorisation under the Federal Law on protection against pollution, will cause emissions which, together with other installations or measures, will significantly affect, in the area of impact of that installation, the elements fundamentally necessary for the conservation of a site of Community importance or a European site for the protection of birds, and if the damage cannot be made good in accordance with Paragraph 19(2), the authorisation shall not be issued unless the conditions in the combined provisions of Paragraph 34 (3) and (4) are fulfilled. Paragraph 34(1) and (5) are applicable *mutatis mutandis.* Decisions shall be taken with the agreement of the authorities responsible for nature protection and conservation areas.'

14 The first sentence of Paragraph 39(2) of the BNatSchG 2002, entitled 'Relationship with other legislative provisions', provides:

'The laws on the protection of plants, the protection of animals, protection against epizootic diseases and the laws on forests, hunting and fishing shall not be affected either by the provisions of this section or by the laws adopted pursuant thereto.'

15 Paragraph 42(1) and (2) of the BNatSchG 2002 are designed to transpose the prohibitions in Articles 12 and 13 of the Directive.

16 Paragraph 43 of the BNatSchG 2002, entitled 'Derogations', provides, in subparagraph 4, that 'the prohibitions laid down in Paragraph 42(1) and (2) shall not apply to acts intending to use land for the purposes of agriculture, forestry or fishing and carried out in accordance with good professional practice and the requirements laid down in Paragraph 5(4) to (6); acts intending to process the products obtained in the course of those activities; acts designed to implement an act authorised under Paragraph 19, or an assessment of the effect on the environment within the framework of the Law on the assessment of environmental impact; acts to implement a measure authorised under Paragraph 30; provided that animals and their nesting and incubation sites, habitats and resting places, and plant species which are specifically protected, are not intentionally damaged as a result.'

17 The Directive was also transposed in the Federal Republic of Germany by way of a number of sectoral laws, including the Law on plant protection of 14 May 1998 (Planzenschutzgesetz, BGBl. 1998 I, p. 971, 'the PflSchG'), which provides in Paragraph 6(1):

'Pesticides must be used in accordance with good professional practice. Use shall be prohibited if it is foreseeable that it will produce harmful effects on humans or animals or the water table, or that it will produce other serious harmful effects, in particular, on the balance of nature. The competent authority shall order the measures necessary in order to satisfy the requirements mentioned in the first two sentences of this subparagraph.'

**Pre-litigation procedure**

18 On 10 April 2000, the Commission sent a letter of formal notice to the Federal Republic of Germany inviting on it to submit its observations on the implementation of Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.

19 After examining the reply sent to it by the Federal Republic of Germany on 11 August 2000, the Commission issued a reasoned opinion on 25 July 2001, calling on that Member State to take the measures necessary to comply with that opinion within two months of the date of its notification.

20 In that reasoned opinion the Commission found, referring in particular to the BNatSchG 1998, that the Federal Republic of Germany had failed to take the measures necessary in order to transpose the abovementioned provisions of the Directive.

21 After the expiry of the period prescribed in the reasoned opinion, the Federal Republic of Germany, by letter of 21 November 2001, challenged the complaints raised by the Commission.

22 Subsequently the BNatSchG 2002 entered into force.

23 In those circumstances, the Commission decided to bring the present proceedings.

## Admissibility of the action

24 The German Government argues, as a preliminary issue, that the Commission's action is inadmissible for failing to take sufficient account of the new provisions introduced by the BNatSchG 2002 or other specific national provisions. The latter ensure that the contested provisions are applied in accordance with the Directive.

25 In that connection, it must be observed that the issue of whether or not the Commission has taken account of certain legislative changes in the assessment of the compatibility of German law with the Directive relates to the substance of the proceedings and, therefore, to the merits of the case and not to its admissibility.

26 The fact that, in its originating application the Commission bases its pleas on certain provisions of the BNatSchG 2002, mentioning the earlier provisions of the BNatSchG 1998 between brackets, while the reasoned opinion referred only to those earlier provisions, is not capable of rendering the action inadmissible.

27 Although it is true that the subject-matter of an action brought under Article 226 EC is delimited by the pre-litigation procedure and that, accordingly, the originating application cannot be based on provisions other than those stated in that procedure, that requirement cannot, however, go so far as to make it necessary for the national provisions mentioned in the reasoned opinion and those in the application to be completely identical. Where a change in the legislation occurred between those two procedural stages, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the

new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application (Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraphs 38 and 39).

28 In this case, the provisions of the BNatSchG 2002 to which the Commission refers in its originating application are almost identical to the provisions in the BNatSchG 1998 that it criticises in its reasoned opinion.

29 It follows that the action is admissible.

**The merits**

30 In support of its application the Commission raises six complaints.

*The first complaint*

Arguments of the parties

31 The Commission complains that the Federal Republic of Germany has failed to fully transpose Article 6(3) and (4) of the Directive into its national law in so far as the definition of 'project', in Paragraph 10(1)(11)(b) and (c) of the BNatSchG 2002, which applies to projects undertaken outside the SACs, is too restrictive and

excludes the duty to carry out an assessment of the implications of certain acts and other activities which are potentially harmful to protected sites.

32 As regards projects within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, the Commission submits that since they include only acts affecting nature and the countryside, within the meaning of Paragraph 18, certain projects likely to have a significant effect on protected sites are not subject to a prior assessment of the implications for the site in accordance with Article 6(3) and (4) of the Directive. Paragraph 18(1) covers only changes of form or use of surface areas, but fails to take account of any other activities or measures which do not concern the surface area of a protected site or those which do not result in any change, even where they are likely to have a significant effect on such a site. In fact, the term 'project', within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, which refers to acts carried out outside the SACs, is narrower than that in Paragraph 10(1)(11)(a), which concerns projects carried out within an SAC. In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site.

33 Moreover, Paragraph 18(2) of BNatSchG 2002 excludes from the term 'project' within the meaning of Paragraph 10(1)(11)(b) the use of soil for the purposes of agriculture, forestry and fishing, where that project takes account of the objectives and principles of nature protection and countryside conservation.

34 Furthermore, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the Commission criticises the fact that the definition of 'project' is limited, on one hand, to installations subject to authorisation under the Federal Law on protection against pollution (Bundes-Immissionsschutzgestez, 'the BImSchG') and, on the other hand, to the use of water which is subject to authorisation or approval under the Law on water use (Wasserhaushaltsgesetz, 'the WHG'). Therefore, the installations

and uses of water not subject to authorisation or approval are excluded from the duty to carry out an assessment of the implications for the site laid down in Article 6 (3) of the Directive, regardless of whether or not they may have a significant impact on the protected sites.

35 The German Government submits, first of all, that the Commission interprets the term 'project' too widely, since it does not permit any limit on the duty to carry out an assessment of the implications that the activities referred to by German law may have on the sites. That term should be interpreted in the light of the specific definition in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

36 Next, the German Government contends that the term 'act', within the meaning of Paragraph 18(1) of the BNatSchG 2002, requires a case by case assessment in the light of the objectives of the Directive. Therefore, in practice, Paragraph 18(1) does not limit the term 'project' with the meaning of the Directive. Paragraph 18(1) does not require a change of form or use of the surface area, but that there be an act where an activity has an effect on the surface area which impacts on the protected site.

37 As regards the derogation laid down in Paragraph 18(2) of the BNatSchG 2002, the German Government submits that it is a mandatory requirement of that provision that the objectives and principles of nature protection and countryside conservation have been taken into consideration, so that the use of soil for the purposes of agriculture, forestry and fishing does not constitute a project which must be subject to an assessment of its implications.

38 Finally, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the German Government states that the installations which are not subject to authorisation or approval under the BImSchG must themselves comply with requirements which take account of the Directive. The BImSchG requires, inter alia, verification that serious environmental damage which is preventable by the state of current technology is in fact prevented, and that the damage that cannot be avoided by current technology is reduced to the minimum. As regards the use of water which does not require an authorisation under the WHG, the German Government contends, in particular, that such use concerns very small quantities of water, which is compatible with Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1). If uses which do not have any significant impact on the status of a body of water are not taken into consideration under Directive 2000/60 they cannot have any significant impact on neighbouring SACs.

Findings of the Court

39 According to the first sentence of Article 6(3) of the Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The Court has already held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 54).

41 Therefore, the condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, as do Paragraph 10(1)(11)(b) of the BNatSchG 2002, read in conjunction with Paragraph 18, and Paragraph 10(1)(11)(c), in respect of certain categories of projects, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites.

42 It should be noted, in particular, that Article 10(1)(11)(b) and (c) of the BNatSchG 2002 exclude from the assessment obligation (i) projects consisting of acts affecting nature and the countryside other than changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum, and (ii) projects relating to installations or to use of water, on account of the fact that they are not subject to authorisation. It does not appear that those criteria excluding the duty to carry out an assessment are capable of ensuring that those projects are never likely have a significant effect on the protected sites.

43 As regards, in particular, installations not subject to authorisation under the BImSchG, the fact that that text requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3) of the Directive. The duty of verification laid down by the BImSchG is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage.

44 As regards the use of water not requiring an authorisation under the WHG, the fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites.

45 In the light of the foregoing, it must be held that the Federal Republic of Germany has failed to correctly transpose into its national law Article 6(3) of the Directive as regards certain projects undertaken outside the SACs.

*The second complaint*

Arguments of the parties

46 The Commission submits that Paragraph 36 of the BNatSchG 2002 does not correctly transpose Article 6(3) and (4) of the Directive, in so far as the authorisation for installations causing emissions is refused only where it is foreseeable that they directly affect an SAC situated in an area where those installations are operated.

47 It follows that material nuisances caused outside such an area are, however, not taken into account, contrary to those provisions of the Directive.

48 The German Government states that monitoring of material nuisance caused by air pollutants or noise from the area affected by the installation must be carried out on an individual basis taking account of local data and the various pollutants emitted by the installation. Further, in practice, an authorisation for a project involving material nuisance is issued only if it does not have any harmful effects on the areas protected by the Directive.

Findings of the Court

49 Since, under Paragraph 36 of the BNatSchG 2002, the authorisation of installations causing emissions is refused only where they appear likely to affect a protected site situated in the area of impact particularly of those installations, installations whose emissions affect a protected site situated outside such an area may be authorised without taking account of the effects of those emissions on such a site.

50 In that connection, it must be held that the system established by German law, so far as it covers emissions within an area of impact, as defined in technical circulars in accordance with general criteria on installations, do not appear to be capable of ensuring compliance with Article 6(3) and (4) of the Directive.

51 In the absence of established scientific criteria, which have not been mentioned by the German Government, which would a priori rule out emissions affecting a protected site situated outside the area of impact of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3) of the Directive.

52 Accordingly, it must be held that Article 6(3) of the Directive has not been properly transposed.

*The third complaint*

53 The Commission complains that the Federal Republic of Germany has failed to properly transpose the obligation in Article 12(1)(d) of the Directive to take the requisite measures to establish a system of strict protection for certain animals by prohibiting the deterioration or destruction of breeding sites or resting places. The Commission argues that that provision requires Member States to prohibit not only deliberate acts but also non-deliberate ones. It submits that Paragraph 43(4) of the BNatSchG 2002 fails to comply with Article 12(1)(d) of the Directive, in so far as it authorises a number of derogations from the rules protecting the sites 'provided that animals, including their nesting or incubation sites, habitat or resting places ... are not intentionally affected'.

54 The German Government observes that the transposition of Article 12(1)(d) of the Directive is limited over the whole territory of the Federal Republic of Germany to deliberate acts, which, it argues, is in accordance with that provision since it does not require inclusion of non-deliberate destruction or deterioration of those sites in the system of protection that it establishes. An interpretation which also prohibits non-deliberate acts is, in any event, contrary to the principle of proportionality.

55 The Court has already held that the acts referred to in Article 12(1)(d) of the Directive include non-deliberate acts (see *Commission* v *United Kingdom*, paragraphs 73 to 79). By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in

Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.

56 In those circumstances the complaint alleging that Article 12(1)(d) of the Directive has not been properly transposed must be accepted.

*The fourth complaint*

57 The Commission complains that the Federal Republic of Germany inserted in Paragraph 43(4) of the BNatSchG 2002 two derogations to the prohibitions laid down in Paragraph 42(1), which do not sufficiently take account of the conditions to which the derogations authorised by Article 16 of the Directive are subject. More specifically, the Commission refers to derogations in German law to the systems for the protection of species to which implementing measures for an act authorised in accordance with Paragraph 19 of the BNatSchG 2002 and implementing measures authorised under Paragraph 30 of that law are entitled.

58 The German Government replies that the acts and measures which are the subject of the two derogations laid down in Paragraph 43(4) of the BNatSchG 2002 are subject to administrative decisions and that in order to adopt such decisions the competent authorities are, in any event, bound to observe the conditions laid down in Article 16 of the Directive.

59 It is clear from the 4th and 11th recitals in the preamble to the Directive that the threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Accordingly, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see *Commission* v *United Kingdom*, paragraph 25)

60 It follows that, in the context of the Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see *Commission* v *United Kingdom*, paragraph 26).

61 Accordingly, even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive. In that connection, it is sufficient to state that Paragraph 43(4) of the BNatSchG 2002 provides as the sole condition for authorisation for those derogations that animals, including their nesting or incubation sites, habitat or resting places and plant species which are particularly protected must not be subject to deliberate harm.

62 Therefore, the complaint alleging that Article 16 of the Directive has not been properly transposed into German law must be accepted.

*The fifth complaint*

63 The Commission refers to Paragraph 6(1) of the PflSchG, which prohibits the use of pesticides if it is foreseeable that they will produce effects harmful to human or animal health or the water table, or has other seriously harmful effects, in particular, on the balance of nature, the latter also covering plant and animal species within the meaning of Paragraph 2(6) of the PflSchG. The Commission argues that, by that prohibition, the Federal Republic of Germany has failed to transpose Articles 12, 13 and 16 of the Directive in a sufficiently clear and precise manner.

64 The German Government contests the merits of that complaint, arguing that the provision referred to by the Commission contains a general prohibition which facilitates compliance with the prohibitions laid down in Articles 12 and 13 of the Directive. It also refers to the fact that, according to Paragraph 6(1) of the PflSchG, pesticides must be used in accordance with good professional practice, and that the competent authority may order the measures necessary to fulfil the requirements also mentioned in that provision.

65 In that connection, as was pointed out in paragraph 60 of this judgment, the Member States are, in the context of the Directive, under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise.

66 According to settled case-law, Articles 12, 13 and 16 of the Directive form a coherent body of provisions (see, *Commission* v *United Kingdom*, paragraph 112). Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species.

67 Paragraph 6(1) of the PflSchG, by listing the situations in which the use of pesticides is prohibited, does not express in a clear, specific and strict manner the measures laid down in Articles 12 and 13 of the Directive which prohibit protected species from being adversely affected.

68 In particular, it does not appear that the prohibition on using pesticides, where it is foreseeable that it will produce seriously harmful effects on the balance of nature, is as clear, precise and strict as the prohibition on the deterioration of breeding sites or resting places of protected animals laid down in Article 12(1)(d) of the Directive or the prohibition of the deliberate destruction in the wild of protected plants laid down in Article 13(1)(a) of the Directive.

69 Accordingly, the fifth complaint must be accepted in so far as it concerns Articles 12 and 13 of the Directive.

*The sixth complaint*

Arguments of the parties

70 The Commission complains that the Federal Republic of Germany has infringed Articles 12 and 16 of the Directive by failing to notify it of the fishery catch legislation or by failing to ensure that those provisions contain adequate bans on fishing.

71 The Commission argues that the legislation in three Länder is not in accordance with the Directive. Thus, in Bavaria, the fish known by the scientific name *coregonus oxyrhynchus* does not feature among the species protected all year round. In Brandenberg, that species and the mollusc *unio crassus* are not protected. In Bremen, the legislation does not include in the list of fishing bans the three species which must be protected in that Land, namely, the two species previously mentioned and the fish *acipenser sturio*. Furthermore, that legislation expressly authorises fishing of specimens of *acipenser sturio* which are at least 100 cm long and specimens of the species *coregonus oxyrhynchus* which are at least 30 cm long. Moreover, no information is available on any fishing bans in the Länder of Berlin, Hamburg, Mecklenburg-West Pomerania, Lower Saxony, North Rhine-Westphalia, Saarland, Saxony and Saxe-Anhalt. It cannot, therefore, be held that the legislation in those Länder contains the fishing bans necessary to satisfy the provisions of Articles 12 and 16 of the Directive.

72 The German Government contends that, although Federal law authorises the Länder to lay down more specific provisions on the right to fish, those provisions

must nevertheless be interpreted in accordance with the Directive. Where the provisions of the Länder on fishing contravene the protection of the species of fish and shellfish legally required by Community law, they are void on account of an infringement of Federal law. To that effect, the BNatSchG 2002 is a law which overrides the legislation of the Länder. The fishing ban laid down in Paragraph 42 (1)(1) of the BNatSchG 2002, which also concerns the species mentioned in Annex IV of the Directive is therefore applicable. Therefore, it is not necessary to notify the provisions of the Länder on that matter.

73 The German Government states that it will ensure that the provisions of the Länder on fishing will be amended forthwith, in so far as they do not comply with the conditions of the Directive and Federal law, as is the case, for example, of the legislation of the Land Bremen, which is complained of by the Commission.

Findings of the Court

74 It is common ground in this case that *coregonus oxyrhynchus*, *unio crassus* and *acipenser sturio*, which feature in Annex IV(a) to the Directive, are species found in Germany.

75 Those species must therefore be subject, in accordance with Article 12(1)(a) of the Directive, to a system of strict protection prohibiting all forms of deliberate capture or killing of members of those species in the wild.

76 It is clear from the file that, when the period set down in the reasoned opinion expired, Bremen's legislation authorised, inter alia, the capture of fish all year round so long as no fishing bans were issued. *Coregonus oxyrhynchus* is not the subject of a fishing ban. In Brandenburg neither that species nor *unio crassus* are the subject of a fishing ban. As to Bremen's legislation, the German Government has acknowledged that it is not in accordance with the Directive.

77 Although it is true, as the German Government observes, that Paragraph 42(1) of the BNatSchG 2002 prohibits, inter alia, the capture and killing of the animal species covered by a system of strict protection, such as those mentioned in paragraph 74 of this judgment, the fact remains that, under the first sentence of Paragraph 39(2) of that law on the protection of animals, hunting and fishing are not affected by the provisions of that section. That section includes Paragraph 42 of the BNatSchG 2002.

78 In those circumstances, it must be stated that the legislative framework existing in Germany, in which regional provisions which infringe Community law coexist with a Federal law which complies with it, does not ensure effectively, and in a clear and precise manner, in respect of the three animal species at issue in this case, the strict protection required by Article 12(1)(a) of the Directive, with respect to the prohibition of all forms of deliberate capture and killing of specimens of those species in the wild.

79 In this case, it is established that German law is not in accordance with Article 12(1)(a) of the Directive and does not fulfil the conditions for derogation laid down in Article 16 of the Directive.

80 As regards the rules on fishing in the other Länder, which have not been communicated to the Commission, it cannot be held that they do not satisfy the provisions of Articles 12 and 16 of the Directive, since no information is available on any fishing bans in those Länder, particularly since, as was stated in Paragraph 77 of this judgment, Paragraph 42(1)(1) of the BNatSchG 2002 prohibits the capture and killing of specimens of the species *coregonus oxyrhynchus*, *union crassus* and *acipenser sturio*.

81 In that connection, it must be observed that Article 23(3) of the Directive provides that Member States are to communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive. However, the Commission has not based its action on that provision.

82 It follows that the sixth complaint must be accepted within the limits set out in the preceding paragraphs of this judgment.

83 Accordingly, the Court finds that:

— by failing, in respect of certain projects carried out outside the SAC within the meaning of Article 4(1) of the Directive, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of the Directive whether or not such projects are capable of significantly affecting such an SAC;

— by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;

— by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;

— by failing to ensure compliance with the criteria for derogation set out in Article 16 of the Directive in the case of certain activities compatible with the conservation of the area;

— by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;

— by failing to ensure that legislation on fishing contains adequate bans on catches,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of the Directive.

## Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby rules:

1. — **By failing, in respect of certain projects carried out outside special areas of conservation within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting a special area of conservation;**

— **by authorising emissions in a special area of conservation, irrespective of whether they are likely to have a significant effect on that area;**

— **by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;**

— **by failing to ensure compliance with the criteria for derogation set out in Article 16 of Directive 92/43 in the case of certain activities compatible with the conservation of the area;**

— **by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;**

— **by failing to ensure that legislation on fishing contains adequate bans on catches,**

**the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of Directive 92/43.**

2. **Orders the Federal Republic of Germany to pay the costs.**

[Signatures]

# JUDGMENT OF THE COURT (Second Chamber)

20 October 2005 *

In Case C-6/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 January 2004,

**Commission of the European Communities,** represented by M. van Beek and L. Flynn, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland,** represented by C. Jackson, acting as Agent, and K. Smith, Barrister,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis and J. Klučka (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 May 2005,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2005,

gives the following

## Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that, by failing to transpose correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

## Legal context

*Community legislation*

2 According to Article 2(1) of the Habitats Directive, the aim of the directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 In accordance with Article 3(1) of the Habitats Directive, the Member States designate special areas of conservation ('SACs') with a view to maintaining or restoring, at a favourable conservation status, natural habitat types and habitats of species of Community interest. Those areas are to form part of a European ecological network under the title Natura 2000.

4 Article 6 of the Habitats Directive relates to the measures necessary in order to protect SACs. Surveillance of the conservation status of natural habitats and species of Community interest is governed by Article 11 of the directive. Articles 12 and 13 concern measures for protecting animal and plant species. Article 14 relates to the taking of specimens of species of wild fauna and flora. Article 15 prohibits certain indiscriminate means of capture or killing of some species of wild fauna. Article 16 sets out the circumstances in which the Member States may derogate, for specified purposes, from certain provisions of the directive.

5 Under Article 23(1) of the Habitats Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification and were forthwith to inform the Commission thereof. The directive was notified to the Member States on 10 June 1992.

*National legislation*

6 The principal instruments transposing the Habitats Directive in the United Kingdom that are relevant in the present case are the following:

— the Conservation (Natural Habitats, &c.) Regulations 1994 ('the 1994 Regulations'), which apply in England, Wales and Scotland;

— the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 ('the 1995 Regulations'), which apply in Northern Ireland;

— the Nature Protection Ordinance 1991 as amended by the Nature Protection Ordinance (Amendment) Regulations 1995 ('the 1991 Ordinance'), which applies in Gibraltar;

— the Conservation of Seals Act 1970 ('the Conservation of Seals Act').

7 Regulation 3(2) of the 1994 Regulations provides that the Secretary of State, the Minister of Agriculture, Fisheries and Food and the nature conservation bodies are to exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.

8 Regulation 3(4) of the 1994 Regulations provides that, without prejudice to the provision referred to in the preceding paragraph, every competent authority in the exercise of any of its functions is to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

**Pre-litigation procedure**

9 On 6 November 2000, the Commission sent to the United Kingdom a letter of formal notice in which it contended that certain provisions of the Habitats Directive had not been correctly transposed into that Member State's domestic law.

10 The United Kingdom authorities replied to the letter of formal notice by letter of 27 February 2001. They accepted that on two points, relating to offshore oil and gas activities and to the extension of the application of the Habitats Directive beyond territorial waters, the letter of formal notice was well founded, but contested most of the other complaints raised in it.

11 Since it was not persuaded by the explanations provided by the United Kingdom, on 18 July 2001 the Commission issued a reasoned opinion in which it repeated its complaints and called on the United Kingdom to take the necessary measures to comply with the reasoned opinion within two months of its receipt.

12 By letter of 27 November 2001 ('the letter of 27 November 2001') the United Kingdom informed the Commission, in response to the reasoned opinion, of its intention to amend its legislation in order to establish greater legal certainty and clarity on a number of points at issue in the reasoned opinion, while maintaining that in general the measures in force complied with the Habitats Directive.

13 Finally, by letter of 2 December 2003, the United Kingdom authorities informed the Commission of progress made in the process of implementing changes in national legislation to transpose the Habitats Directive better.

14 It was in those circumstances that the Commission decided to bring the present action.

## The action

### *The method of transposing the Habitats Directive*

#### Arguments of the parties

15 The Commission alleges that the United Kingdom has not transposed the Habitats Directive appropriately into its legal order. In particular, the Commission submits that the United Kingdom has wrongly adopted a general clause for the purpose of filling any gaps in the specific provisions designed to transpose it.

16 The United Kingdom maintains that it has correctly transposed the Habitats Directive by adopting, for its transposition, legislation which contains not only specific requirements but also general duties and administrative procedures. Those general duties must be read together with the specific requirements of that legislation, which they supplement, thereby ensuring that the directive is in fact implemented appropriately.

17 The United Kingdom authorities rely in particular on regulation 3(2) and (4) of the 1994 Regulations, the equivalent provisions of which are, for Northern Ireland, regulation 3(2) and (4) of the 1995 Regulations and, for Gibraltar, section 17A of the 1991 Ordinance. Those provisions require ministers, nature conservation bodies and all competent public authorities to exercise their functions so as to secure compliance with the requirements of the Habitats Directive.

18 The Commission submits, on the other hand, that the general clauses pleaded by the United Kingdom are not sufficiently precise to ensure transposition into national law of the specific obligations imposed by the directive.

19 In order to determine the scope of their rights and obligations, individuals must refer to the Habitats Directive each time, a situation which does not meet the requirements of legal certainty or the conditions with regard to specificity, precision and clarity required under the settled case-law of the Court.

20 The Commission adds that if the Court were to follow the logic of the United Kingdom's reasoning, the whole directive could presumably have been transposed by such a general clause. This would be at odds with the requirement of specificity repeatedly noted in the case-law on the transposition of directives.

Findings of the Court

21 Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15, and Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26).

22 In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States (see Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 77).

23 The United Kingdom's argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that directive cannot be upheld.

24 First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive in question by the national authorities.

25 Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see by analogy, in respect of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 39, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53).

26 It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.

27 However, it is apparent on examination of the legislation relied upon by the United Kingdom that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty (see, by analogy, Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, paragraph 15) and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down (see, by analogy, the judgment of 10 March 2005 in Case C-531/03 *Commission* v *Germany*, not published in the ECR, paragraph 19).

28 It follows that the general duties laid down by the United Kingdom legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently, there remains no need to consider the United Kingdom's arguments based on the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission.

*The complaints raised by the Commission*

The complaint alleging incomplete transposition of Article 6(2) of the Habitats Directive

29 In the light of information that the United Kingdom provided, the Commission, in its reply and at the hearing, abandoned its complaint alleging breach of Article 6(2) of the Habitats Directive with regard to England, Wales, Scotland and Northern Ireland, while maintaining it with regard to Gibraltar.

30 The Commission submits that, by merely protecting designated sites from any operation with potential to cause disturbance without also ensuring that deterioration due to neglect or inactivity is avoided, the United Kingdom has failed to implement Article 6(2) of the directive fully in Gibraltar.

31 The United Kingdom, without genuinely contesting the Commission's line of argument, contends that only non-natural deterioration is to be avoided.

32 In addition, it argues that the 1991 Ordinance set in place a complete and stringent enforcement regime. That regime adequately implements the Habitats Directive, particularly when it is read in conjunction with the general rule laid down in section 17A of the ordinance.

33 As to those submissions, it should first be noted that Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species.

34 As the Advocate General has observed in point 19 of her Opinion, it is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.

35 Second, at the end of the period laid down in the reasoned opinion, Article 6(2) of the Habitats Directive had not been formally reproduced in the legislation applicable in Gibraltar. Section 17G of the 1991 Ordinance, allowing the competent authorities to enter into site management agreements with the owners or occupiers of sites, appears to be the only provision applicable in Gibraltar for avoiding any deterioration.

36 It is clear that this provision confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration, contrary to the requirements of Article 6(2) of the Habitats Directive.

37 Accordingly, inasmuch as domestic law contains no express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species, it involves an element of legal uncertainty as to the obligations with which those authorities must comply.

38 It follows from the foregoing that, in any event, Article 6(2) of the Habitats Directive has not been transposed clearly, precisely and completely in Gibraltar.

39 In those circumstances, the complaint alleging incomplete transposition of Article 6 (2) of the Habitats Directive must be held to be well founded as regards Gibraltar.

The complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive

40 The Commission submits that United Kingdom legislation does not properly transpose these provisions in three specific areas: water abstraction plans and projects, land use plans and, in respect of Gibraltar, the review of existing planning rights.

— Water abstraction plans and projects

41 In the Commission's submission, no provision of domestic law requires water abstraction licences granted under Chapter II of Part II of the Water Resources Act

1991 to comply with the obligation, imposed by Article 6(3) of the Habitats Directive, to take account of the significant effects which water abstraction may have on sites forming part of a SAC. No such provisions exist in Northern Ireland or Gibraltar either. Thus, water abstraction activities, which may have a significant adverse effect on a SAC, are not fully covered or correctly controlled by the United Kingdom's implementing legislation.

42 The Commission adds that in its letter of 27 November 2001 the United Kingdom had indicated that the relevant provisions of the 1994 Regulations would be amended in order to clarify the rules relating to water abstraction activities.

43 The United Kingdom contends, on the other hand, that it has set up, in conjunction with the general clauses, a system which enables potentially damaging operations to be determined in advance for each site.

44 As to those submissions, Article 6(3) of the Habitats Directive provides that any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

45 In the present case, it is not disputed that, at the end of the period laid down in the reasoned opinion, no legal provision expressly required water abstraction plans and projects to be subject to such an assessment.

46 Furthermore, the system established by the United Kingdom legislation, inasmuch as it essentially provides that all water abstraction plans and projects which fall within the conditions laid down in Article 6(3) of the Habitats Directive are deemed in advance to be potentially damaging for the site concerned, does not appear to be capable of ensuring compliance with the requirements of that provision.

47 As the Advocate General has observed in point 33 of her Opinion, while this kind of advance assessment of potential risks can be based on concrete facts with regard to the site, that is not the case with regard to the projects themselves, contrary to the requirements of Article 6(3) of the Habitats Directive, under which an appropriate assessment of the project's implications for the site in question should be carried out. Consequently, in merely defining potentially damaging operations for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered.

48 Nor is it possible to uphold the United Kingdom's argument that, as regards Scotland, the Water Environment and Water Services Act 2003 has laid down, as part of the transposition of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), a framework for a comprehensive new system of water abstraction which introduces controls consistent with Article 6(2) and (3) of the Habitats Directive.

49 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23, and Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8).

50 Having regard to the foregoing, it must be found that the United Kingdom has not transposed Article 6(3) and (4) of the Habitats Directive correctly as regards water abstraction plans and projects.

— Land use plans

51 The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.

52 According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.

53 The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.

54 As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).

55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.

56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

— Review of existing planning rights in Gibraltar

57 The Commission submits that, so far as concerns Gibraltar, the competent authorities do not comply with the requirements of Article 6(3) of the Habitats Directive in that they are not obliged to review whether existing planning permits affect sites protected under the directive.

58 As the Advocate General rightly observes in point 55 of her Opinion, while it is true that such an obligation to carry out a subsequent review may be based on Article 6 (2) of the Habitats Directive, the fact remains that Article 6(3) of the directive contains no provision obliging the Member States to carry out a review of that kind.

59 On the contrary, it follows from the very wording of the latter provision that the procedure laid down must be applied before a Member State agrees to the carrying out of plans or projects likely to affect the site concerned.

60 It follows that this part of the complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive cannot be upheld.

The complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive

61 The Commission alleges that the United Kingdom has failed to transpose into domestic law the surveillance obligations set out in these provisions. It maintains that, until those obligations have been clearly assigned to the competent authorities, it will be unable to establish whether the required surveillance is actually being carried out.

62 In support of this complaint, the Commission relies on the letter of 27 November 2001, in which the United Kingdom stated, first, that a surveillance obligation was implicitly imposed on the competent authorities and, secondly, that the 1994 Regulations, the 1995 Regulations and the 1991 Ordinance would be amended to provide greater legal certainty through provisions more specific than those of that legislation.

63 In the United Kingdom's submission, Articles 11 and 14(2) of the Habitats Directive simply provide that the Member States are to undertake surveillance, without imposing any specific requirement as to how it is to take place, or as to how such surveillance is to be provided for in national law. It further contends that the list of surveillance activities carried out in accordance with domestic legislation demonstrates that surveillance is being carried out effectively in the United Kingdom in accordance with Articles 11 and 14(2) of the directive.

64 The Commission replies that it never asserted that no surveillance of the conservation status of natural habitats and species was undertaken in the United Kingdom. It contends, on the other hand, that the surveillance obligation is neither clearly implemented in that Member State nor clearly assigned to a particular authority of the latter.

65 With regard to those submissions, first, as has already been stated in paragraph 26 of this judgment, the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner.

66 However, at the end of the period laid down in the reasoned opinion, no provision of domestic law imposed an obligation on the national authorities requiring the surveillance of natural habitats and species.

67 Second, the United Kingdom's argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld. As the Court has already held, the fact, should it be established, that a practice is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that directive into the domestic law of the Member State concerned (see, to this effect, Case C-361/88 *Commission* v *Germany*, cited above, paragraph 24).

68 Accordingly, inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis.

69 It follows that Articles 11 and 14(2) of the Habitats Directive have not been transposed completely, clearly and precisely in the United Kingdom.

70 Consequently, the complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive must be held to be well founded.

The complaint alleging incorrect transposition of Article 12(1)(d) of the Habitats Directive

71 The Commission submits that the United Kingdom has not transposed correctly the obligation to take the requisite measures to establish a system of strict protection for certain animal species by prohibiting deterioration or destruction of their breeding sites or resting places. National legislation uses the verb 'to damage' instead of the word 'deterioration' used in Article 12(1)(d) of the Habitats Directive.

72 First, in the Commission's submission the use of the verb 'to damage' means that the effects of deterioration resulting from neglect or inactivity on the part of the competent authorities are not covered. However, in its reply, the Commission went back on this argument, accepting that the provision does not require breeding sites

and resting places of the species concerned to be protected from deterioration due to neglect or inactivity on the part of the competent authorities. Accordingly, there is no longer any need to rule on this point.

73 Second, the Commission contends that by creating offences only for acts having the effect of harming or damaging the breeding sites or resting places of the species in question, without prohibiting their deterioration, the measures transposing the Habitats Directive introduce a condition, not provided for in Article 12(1)(d) thereof, linked to whether the harmful act is intentional.

74 The United Kingdom does not dispute that Article 12(1)(d) of the Habitats Directive requires activities which would lead to the deterioration or destruction of the sites concerned to be prohibited. On the other hand, it contests the Commission's interpretation of the national legislation, according to which transposition of the directive in the United Kingdom, with the exception of Gibraltar, is limited to deliberate or intentional acts.

75 As to those submissions, it is settled case-law that in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove the allegation that the obligation has not been fulfilled and it may not rely on any presumption (see, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34).

76 Accordingly, inasmuch as the United Kingdom contends that its domestic law in force is consistent with Article 12(1)(d) of the Habitats Directive, it is for the Commission, in order to prove that that provision has not been transposed completely, to put before the Court the evidence or arguments necessary in order for it to determine that there has been such a failure to fulfil obligations.

77 However, it does not appear from the documents before the Court that the Commission has put forward evidence or arguments capable of proving that the transposition of that provision is limited to deliberate or intentional acts. On the contrary, it appears that the criminal offence provided for by United Kingdom domestic law, which punishes acts consisting in damaging or destroying a site, is a strict liability offence not in any way requiring the damage or destruction to be deliberate or intentional.

78 In those circumstances, since the Commission has not proved that the United Kingdom, other than in respect of Gibraltar, has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive, this part of the complaint cannot be upheld.

79 As regards Gibraltar, suffice it to state that the United Kingdom acknowledges that, by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d). Accordingly this part of the complaint must be held to be well founded.

80 Third, the Commission states that the United Kingdom legislation as currently drafted would protect breeding sites and resting places only against activities having a direct effect on them, and does not take account of indirect impairment in accordance with the requirements of Article 12(1)(d) of the Habitats Directive.

81 This argument cannot be upheld. The Commission has adduced no evidence capable of proving that the United Kingdom has failed to fulfil its obligations in this regard.

82 It follows from the foregoing that the complaint alleging that Article 12(1)(d) of the Habitats Directive has been transposed incorrectly must be partially upheld.

The complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive

83 The Commission submits that the national measures intended to transpose the prohibition on the keeping, transport, sale or exchange of specimens of animal and plant species fail to comply with the temporal limitation laid down in those articles.

84 It need only be stated that the United Kingdom acknowledged, during the written procedure and at the hearing, that the derogations in force in its domestic law are broader than those envisaged by the Habitats Directive and that, consequently, the provisions in question have not been correctly transposed in that Member State.

85 Accordingly, the complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive must be held to be well founded.

The complaint alleging incorrect transposition of Article 12(4) of the Habitats Directive

86 The Commission submits that the United Kingdom's implementing measures contain no provision requiring the establishment of a monitoring system such as

that required in Article 12(4), in respect of the incidental capture and killing of certain animal species. In the absence of further information the Commission is unable to establish whether such monitoring is in fact carried out.

87 It need only be stated that the United Kingdom, first, has acknowledged that national legislation contains no provision designed to establish such a monitoring system and, second, accepted in its letter of 27 November 2001 that national legislation had to be amended so that such monitoring is expressly established.

88 In any event, it does not appear that such a measure was adopted within the period laid down in the reasoned opinion.

89 Accordingly, the complaint alleging that Article 12(4) of the Habitats Directive has been transposed incorrectly must be held to be well founded.

The complaint alleging incorrect transposition of Article 15 of the Habitats Directive

90 The Commission complains that the United Kingdom has failed to comply with its obligations under Article 15 of the Habitats Directive. First, it criticises that Member State for having prohibited only the methods expressly listed in Annex VI(a) and (b) to the directive, without imposing a general prohibition on the use of indiscriminate means. Second, the Commission submits that sections 1 and 10 of the Conservation of Seals Act prohibit the use of only two methods of killing seals, whilst providing for exemptions, in the form of licences granted by the Secretary of State, which appear to go beyond the derogations allowed by the directive.

— No general prohibition on all indiscriminate means

91 The Commission pleads that United Kingdom legislation contains no general prohibition on the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the relevant species of wild fauna. The national legislation does not therefore preclude the emergence of as yet unknown means of indiscriminate capture and killing.

92 The United Kingdom contends that Article 15 of the directive has been transposed by regulation 41 of the 1994 Regulations, regulation 36(2) of the 1995 regulations and section 17V(2) of the 1991 Ordinance. It states that those provisions establish lists of every indiscriminate means of capture and killing of the protected species that is currently recorded in that Member State and that the lists are kept under review in order to be updated if necessary.

93 As to those submissions, Article 15 of the Habitats Directive provides that, in respect of the capture or killing of species of wild fauna listed in Annex V(a) thereto and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States are to prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species.

94 That provision, as is apparent from its very wording, imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned.

95 In the present case, it is not in dispute that, at the end of the period laid down in the reasoned opinion, domestic law did not impose a general prohibition of that kind.

96 Furthermore, as the Advocate General has observed in point 89 of her Opinion, the possibility of updating a list of prohibited methods is less effective than a general prohibition. Delay in updating the aforementioned lists would necessarily lead to lacunae in protection which are specifically intended to be prevented by means of the general prohibition in Article 15 of the Habitats Directive. This interpretation is all the more justified because domestic law contains no statutory duty to review the lists.

97 In those circumstances, it is not in any way guaranteed that all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the protected species are prohibited in the United Kingdom.

98 Therefore, it must be held that the United Kingdom has not transposed Article 15 of the Habitats Directive correctly as regards the prohibition on all indiscriminate means of capture or killing of the species of wild fauna concerned.

— Conservation of Seals Act

99 A preliminary point to note is that in its reply the Commission withdrew its complaint relating to the Conservation of Seals Act, on the basis of the fact that the United Kingdom had undertaken in its defence to adopt amending legislation in that regard. However, in its rejoinder the United Kingdom considered it necessary to alert the Commission that it would await the outcome of the present proceedings before amending its legislation. It was in those circumstances that at the hearing the Commission wished to maintain this complaint, and the United Kingdom did not contest this.

100 The Commission submits that, by prohibiting only two methods of killing seals and allowing licences to be granted on conditions which go beyond the derogations provided for by the Habitats Directive, the Conservation of Seals Act does not comply with Article 15 of the directive.

101 According to the United Kingdom, such an interpretation of the Conservation of Seals Act is incorrect. The Act simply supplements regulation 41 of the 1994 Regulations, which transposes Article 15 of the Habitats Directive, and it therefore provides additional protection for the various seal species.

102 As to those submissions, first, as has been held in paragraph 98 of this judgment, regulation 41 of the 1994 Regulations does not transpose Article 15 of the Habitats Directive correctly. Therefore, the United Kingdom's argument that the Conservation of Seals Act supplements regulation 41 of the 1994 Regulations cannot be upheld.

103 Second, even if the Conservation of Seals Act were to supplement the 1994 Regulations, it could be interpreted as meaning that only the two methods expressly mentioned by it are prohibited.

104 In those circumstances, the Conservation of Seals Act involves an element of legal uncertainty as to the methods of killing seals which are prohibited in the United Kingdom and it therefore does not ensure that Article 15 of the Habitats Directive is transposed correctly.

105 It follows from the foregoing that the complaint relating to incorrect transposition of Article 15 of the Habitats Directive must be upheld.

The complaint alleging incorrect transposition of Article 16 of the Habitats Directive

106 First, the Commission submits that the body of national provisions establishing derogations from Articles 12, 13, 14 and 15(a) and (b) of the Habitats Directive, which are set out in particular in regulation 40 of the 1994 Regulations, regulation 35 of the 1995 Regulations and section 17U of the 1991 Ordinance, does not comply with the two conditions specified in Article 16 of the directive. The Commission observes that, as provided in Article 16, a derogation may be granted only if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

107 It need only be stated (i) that the United Kingdom has accepted that any derogation granted pursuant to Article 16 of the directive must necessarily fulfil the two aforementioned conditions and (ii) that although that Member State has admitted that those conditions are not reproduced in the national legislation, no amendment designed to remedy that breach of obligations had been made at the end of the period laid down in the reasoned opinion.

108 This part of the complaint must therefore be upheld.

109 Second, the Commission submits that the specific derogations set out in regulations 40(3)(c) and 43(4) of the 1994 Regulations and in the equivalent provisions of the 1995 Regulations and the 1991 Ordinance go beyond the scope of Article 16 of the Habitats Directive. It states that the prohibitions laid down in order to transpose Articles 12, 13 and 16 of the directive are not applicable where the act in question is the result of a lawful operation.

110 The United Kingdom contends that since it transposed the requirements of Articles 12 and 13 of the Habitats Directive by making their infringement a criminal offence, it is necessary to exclude the application of such an offence in cases where persons act without criminal intent.

111 As to those submissions, Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively.

112 Furthermore, as the Advocate General has observed in point 113 of her Opinion, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.

113 The derogation at issue in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof.

114 Having regard to the foregoing, the action must be held well founded in this regard.

Failure to apply the Habitats Directive beyond the territorial waters of the United Kingdom

115 The Commission alleges that the United Kingdom has limited the application of the provisions which transpose the Habitats Directive into national law to just national territory and United Kingdom territorial waters. It contends that within their exclusive economic zones the Member States have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the directive therefore applies beyond territorial waters. In particular, the Commission complains that the United Kingdom has not complied in its exclusive economic zone with its obligation to designate SACs under Article 4 of the directive or the obligation to provide species protection laid down in Article 12 of the directive.

116 The United Kingdom, without contesting the validity of this complaint, states, first, that in 2001 it adopted appropriate legislation so far as concerns the petroleum industry, namely the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, and second, that it has prepared suitable legislation to extend the application of the Habitats Directive's requirements to the marine area beyond its territorial waters.

117 As the Advocate General has rightly observed in points 132 and 133 of her Opinion, it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the directive must be implemented in that exclusive economic zone.

118 Furthermore, it is common ground that the legislation to which the United Kingdom refers in its letter of 27 November 2001, which extends the application of the measures designed to transpose the requirements of the Habitats Directive beyond United Kingdom territorial waters, had not yet been adopted at the end of the period laid down in the reasoned opinion.

119 Consequently, the only national legislation in force at the end of that period was the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. It is clear that those regulations concern only the petroleum industry and are therefore not capable by themselves of transposing the Habitats Directive beyond United Kingdom territorial waters.

120 The Commission's action must accordingly be held well founded in this regard.

121 In light of all the foregoing considerations, it must be held that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of the Habitats Directive, and in particular of:

— Article 6(2), as regards Gibraltar,

— Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,

— Article 11,

— Article 12(1)(d), as regards Gibraltar,

— Article 12(2),

— Article 12(4),

— Article 13(1),

— Article 14(2),

— Article 15,

— Article 16,

— the whole of the Habitats Directive beyond its territorial waters,

the United Kingdom has failed to fulfil its obligations under that directive.

## Costs

122 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been essentially unsuccessful, the United Kingdom must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and in particular of:**

   — **Article 6(2), as regards Gibraltar,**

   — **Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,**

   — **Article 11,**

   — **Article 12(1)(d), as regards Gibraltar,**

   — **Article 12(2),**

   — **Article 12(4),**

   — **Article 13(1),**

— **Article 14(2),**

— **Article 15,**

— **Article 16,**

— **the whole of Directive 92/43 beyond its territorial waters,**

**the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;**

2. **Dismisses the action as to the remainder;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]

## JUDGMENT OF THE COURT

**(Grand Chamber)**

**of 26 April 2005**

**in Case C-494/01: Commission of the European Communities v Ireland** [1]

***(Failure of a Member State to fulfil obligations — Environment — Waste management — Directive 75/442/EEC, as amended by Directive 91/156/EC — Articles 4, 5, 8, 9, 10, 12, 13 and 14)***

(2005/C 143/02)

*(Language of the case: English)*

In Case C-494/01, action under Article 226 EC for failure to fulfil obligations, brought on 20 December 2001, Commission of the European Communities (Agents: R. Wainwright and X. Lewis) v Ireland (Agent: D. O'Hagan, assisted by P. Charleton SC and A. Collins BL) — the Court (Grand Chamber), composed of V. Skouris, President, P. Jann (Rapporteur), C.W.A. Timmermans and A. Rosas, Presidents of Chambers, J. P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, M. Ilešič, J. Malenovský, U. Lõhmus and E. Levits, Judges; L.A. Geelhoed, Advocate General; L. Hewlett, Principal Administrator, for the Registrar, gave a judgment on 26 April 2005, in which it:

1. *Declares that, by failing to take all the measures necessary to ensure a correct implementation of the provisions of Articles 4, 5, 8, 9, 10, 12, 13 and 14 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, Ireland has failed to comply with its obligations under those provisions;*

2. *Declares that, by failing to respond to a request for information dated 20 September 1999 in relation to waste operations at Fermoy, County Cork, Ireland has failed to fulfil the obligations which it has pursuant to Article 10 EC;*

3. *Orders Ireland to pay the costs.*

[1] OJ C 56 of 02.03.2002.

## JUDGMENT OF THE COURT

**(First Chamber)**

**of 17 March 2005**

**in Case C-294/02: Commission of the European Communities v AMI Semiconductor Belgium BVBA and Others** [1]

***(Arbitration clause — Designation of the Court of First Instance — Jurisdiction of the Court of Justice — Parties in liquidation — Capacity to be parties to legal proceedings — Regulation (EC) No 1346/2000 — Insolvency proceedings — Recovery of advances — Reimbursement under a clause of the contract — Joint and several liability — Recovery of sums paid but not due)***

(2005/C 143/03)

*(Language of the case: German)*

In Case C-294/02, Commission of the European Communities (Agent: M G. Wilms, assisted by R. Karpenstein) v AMI Semiconductor Belgium BVBA, formerly Alcatel Microelectronics NV, established in Oudenaarde (Belgium), (Rechtsanwälte: M. Hallweger and R. Lutz), A-Consult EDV-Beratungsgesellschaft mbH (in liquidation), established in Vienna (Austria), (Rechtsanwalt: E. Roehlich), Intracom SA Hellenic Telecommunications & Electronic Industry, established in Athens (Greece), (avocats: M. Lienemeyer, U. Zinsmeister and D. Waelbroeck), ISION Sales + Services GmbH & Co. KG (in liquidation), established in Hamburg (Germany), (Rechtsanwälte: H. Fialski and T. Delhey), Euram-Kamino GmbH, established in Hallbergmoos (Germany), (Rechtsanwälte: M. Hallweger and R. Lutz), HSH Nordbank AG, formerly Landesbank Kiel Girozentrale, established in Kiel (Germany), (Rechtsanwälte: B. Treibmann and E. Meincke), and InterTeam GmbH (in liquidation), established in Itzehoe (Germany), (Rechtsanwälte: M. Hallweger and R. Lutz) — application under Article 238 EC brought on 12 August 2002 — the Court (First Chamber), composed of P. Jann, President of the Chamber, R. Silva de Lapuerta, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges; J. Kokott, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, gave a judgment on 17 March 2005, in which it:

1. *Dismisses the application;*

2. *Dismisses the counterclaim by Intracom SA Hellenic Telecommunications & Electronic Industry;*

3. *Orders the Commission of the European Communities to pay the costs.*

---

([1]) OJ C 289 of 23.11.2002.

---

**JUDGMENT OF THE COURT**

**(First Chamber)**

**of 14 April 2005**

**in Case C-341/02: Commission of the European Communities v Federal Republic of Germany** ([1])

***(Failure of a Member State to fulfil obligations — Directive 96/71/EC — Posting of workers in the framework of the provision of services — Undertakings in the construction industry — Minimum wages — Comparison between the minimum wage established by the provisions of the Member State to the territory of which a worker is posted and the remuneration actually paid by his employer established in another Member State — Failure to take into account, as constituent elements of the minimum wage, all of the allowances and supplements paid by the employer established in another Member State)***

(2005/C 143/04)

*(Language of the case: German)*

In Case C-341/02, Commission of the European Communities (Agents: J. Sack and H. Kreppel) v Federal Republic of Germany (Agents: W.-D. Plessing and A. Tiemann) — action for failure to fulfil obligations under Article 226 EC, brought on 25 September 2002, — the Court (First Chamber), composed of P. Jann, President of the Chamber, A. Rosas (Rapporteur), K. Lenaerts, S. von Bahr and K. Schiemann, Judges; D. Ruiz-Jarabo Colomer, Advocate General; M.-F. Contet, Principal Administrator, for the Registrar, gave a judgment on 14 April 2005, in which it:

1. *Declares that, by failing to recognise as constituent elements of the minimum wage allowances and supplements which do not alter the relationship between the service provided by a worker and the consideration which that worker receives in return, and which are paid by employers established in other Member States to their employees in the construction industry who are posted to Germany, with the exception of the general bonus granted to workers in the construction industry, the Federal Republic of Germany has failed to fulfil its obligations under Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services;*

2. *Dismisses the remainder of the action;*

3. *Orders each party to bear its own costs.*

---

([1]) OJ C 305 of 07.12.2002.

---

**JUDGMENT OF THE COURT**

**(Grand Chamber)**

**of 26 April 2005**

**in Case C-376/02 Reference for a preliminary ruling from the Hoge Raad der Nederlanden Stichting 'Goed Wonen' v Staatssecretaris van Financiën** ([1])

***(Turnover tax — Common system of value added tax — Article 17 of Sixth Directive 77/388/EEC — Deduction of input tax — Amendment of national legislation — Retroactive effect — Principles of the protection of legitimate expectations and legal certainty)***

(2005/C 143/05)

*(Language of the case: Dutch)*

In Case C-376/02: reference for a preliminary ruling under Article 234 EC from the Hoge Raad der Nederlanden (Netherlands), made by decision of 18 October 2002, received at the Court on 21 October 2002, in the proceedings pending before that court between **Stichting 'Goed Wonen'** and **Staatssecretaris van Financiën** — the Court (Grand Chamber), composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas (Rapporteur), R. Silva de Lapuerta and A. Borg Barthet, Presidents of Chambers, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, P. Kūris, E. Juhász, G. Arestis and M. Ilešič, Judges; A. Tizzano, Advocate General, M.-F. Contet, Principal Administrator, for the Registrar, gave a judgment on 26 April 2005, the operative part of which is as follows:

# JUDGMENT OF THE COURT (Second Chamber)

14 April 2005 *

In Case C-441/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 October 2003,

**Commission of the European Communities,** represented by M. van Beek, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Kingdom of the Netherlands,** represented by H.G. Sevenster and N.A.J. Bel, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), R. Schintgen, P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2005,

gives the following

## Judgment

1 By its application the Commission of the European Communities seeks from the Court a declaration that, by failing to bring into force within the prescribed periods the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and of Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), in conjunction with Articles 2(2), 1

(a), (e) and (i), 6(2) to (4), 7, 11, 14 and 15 thereof, or, at the very least, by failing to notify those national provisions to it and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

2 As a result of information communicated by the Netherlands Government in its defence the Commission has however found that Article 14 of Directive 92/43 had been properly transposed into domestic law, so that it withdrew, in its reply, the complaint relating to the incorrect transposition of that article.

## Legal background

### *Community legislation*

3 Directive 79/409 relates, as provided in Article 1(1) thereof, to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States. It covers the protection, management and control of these species and lays down rules for their exploitation.

4 In accordance with Article 4(1) and (2) of Directive 79/409, the species mentioned in Annex I thereto are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, taking account of the particular situation of a certain number of species. As regards the conservation of those species, Member States are to classify

in particular the most suitable territories in number and size as special protection areas. Member States are also obliged to take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection as regards their breeding, moulting and wintering areas and the staging posts along their migration routes. To this end, Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

5 Under Article 2(1) thereof, the aim of Directive 92/43 is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies. According to Article 2(2), measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

6 Article 6(2) to (4) of Directive 92/43 provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the

integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Article 11 of Directive 92/43 is worded as follows:

'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.'

8 Article 15 of Directive 92/43 provides:

'In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking,

capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

...'.

*National legislation*

9 As the Commission stated in its application, the Kingdom of the Netherlands has adopted the following measures in order to transpose Directive 92/43:

— Nature Conservancy Law (Natuurbeschermingswet);

— Decree providing for exceptions to and derogations from the Nature Conservancy Law (Besluit ontheffingen en vrijstellingen Natuurbeschermingswet);

— Action Plan for Nature (Natuurbeleidsplan) including the European Network of protected areas (ecologische hoofdstructuur EHS);

— Structural Plan for Green Spaces (Structuurschema Groene Ruimte);

— Town and Country Planning Law (Wet op de ruimtelijke ordening);

— Decree on protected native animal species (Besluit beschermde inheemse diersoorten);

— Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 12 April 1995;

— list of endangered and vulnerable species within the meaning of Articles 1 and 3 of the Berne Convention on the Conservation of wildlife and natural habitats, drawn up by the Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 27 January 1995;

— Law on endangered exotic animal and plant species (Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation on management contracts and nature development (Regeling beheersovereenkomsten en natuurontwikkeling);

— Regulation to stimulate forest development of farm land (Regeling stimulering bosuitbreiding op landbouwgronden);

— Regulation providing for derogations from the Law on endangered exotic animal and plant species (Regeling ontheffingen Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation designating endangered exotic animal and plant species (Regeling aanwijzing bedreigde uitheemse dier- en plantensoorten);

— Environment Management Law (Wet milieubeheer), and

— Flora and Fauna Law (Flora- en faunawet).

**Pre-litigation procedure**

10 By letter of formal notice of 24 October 2000 the Commission called on the Kingdom of the Netherlands to submit its observations concerning the transposition of Directives 79/409 and 92/43 into its national law. The Kingdom of the Netherlands replied by letter of 8 March 2001.

11 On 26 July 2001 the Commission sent a reasoned opinion to the Kingdom of the Netherlands in which it complained that the latter had incorrectly transposed a certain number of provisions of Directives 79/409 and 92/43, and invited the Kingdom of the Netherlands to comply with the reasoned opinion within two months from the date of its notification.

12 By letter of 11 October 2001, the Kingdom of the Netherlands sent to the Commission a draft law amending the Nature Conservancy Law. On 28 January 2002 a more detailed reply on that matter was sent to the Commission by the Netherlands authorities.

13 Taking the view that the Kingdom of the Netherlands had not fully transposed, within the prescribed periods, Directives 79/409 and 92/43, the Commission decided to bring the present proceedings.

## The action

*Arguments of the parties*

14 The Commission puts forward the following seven complaints against the Kingdom of the Netherlands:

— the national legislation does not fully transpose Article 6(1) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— the national legislation has only partially transposed the requirements of Article 6(2) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands are in accordance with the requirements of Article 6(3) of Directive 92/43;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands adequately transpose Article 6(4) of Directive 92/43, in the situations covered by that provision; Article 13(4) of the Nature Conservancy Law is also incompatible with that provision;

— contrary to the requirements of Article 11 of Directive 92/43 a complete system for surveillance of sites has not been set up in the Netherlands;

— the prohibition of indiscriminate means set out in Article 15 of Directive 92/43 is not fully implemented in the provisions of the Decree providing for exceptions to and derogations from the Nature Conservancy Law;

— the measures necessary to fulfil the obligation to protect the habitat of the species of birds referred to in Article 4(1) and (2) of Directive 79/409 have not been adopted in the Netherlands.

15 As regards the third complaint, relating to the failure to transpose Article 6(3) of Directive 92/43 into Netherlands law, the Commission submits that the assessment which must be carried out on the basis of that provision must also cover the elements set out in Article 6(4). For the purposes of such an assessment there should

be an examination not only of whether a plan or project is likely adversely to affect the integrity of the site concerned, but also of whether alternative solutions exist, whether imperative reasons of overriding public interest require the operation to be carried out or whether compensatory measures must be taken. Furthermore, it is necessary to take account of the fact that a particular site may host a priority natural habitat type and/or a priority species.

16 In that connection, the Netherlands Government, while acknowledging that Article 6(3) of Directive 92/43 has not been fully transposed, rejects the Commission's interpretation of the definition of 'appropriate assessment' contained in that provision. It takes the view that, given the characteristics of the assessment process for plans or projects set out in that article, Article 6(4) and the elements in it are applicable only if it is clear from the assessment carried out under Article 6(3) that the plan or project may in fact adversely affect the integrity of the site. The Netherlands Government argues that it is only in such cases that it is necessary to go on to examine the elements mentioned in Article 6(4). If the assessment carried out under Article 6(3) showed that a plan or project does not affect the integrity of the site, there would then be no reason to add to the assessment obligation under that provision a further examination concerning the existence of the elements mentioned in Article 6(4).

17 As to the first, second, fourth and seventh complaints made by the Commission, the Kingdom of the Netherlands acknowledges that the provisions of Directives 79/409 and 92/43 which are the subject of the action have not been fully transposed into Netherlands law. In that connection, it states that on 19 December 2001 a draft law amending the Nature Conservancy Law was submitted to Parliament. That draft law is intended to ensure that those directives are fully transposed, particularly as regards the provisions on the basis of which the first, second, fourth and seventh complaints have been raised.

18 As to the fifth and sixth complaints the Netherlands Government contends that measures are planned in order to eliminate the legal lacunas pointed out by the Commission in its action.

*Findings of the Court*

19 Since the Kingdom of the Netherlands accepts that the first, second, fourth, fifth, sixth and seventh complaints are well founded, the application must be upheld in that regard.

20 As regards the third complaint, although the Kingdom of the Netherlands admits that it has not completely transposed Article 6(3) of Directive 92/43 into its domestic law, nevertheless it contests the Commission's complaint in so far as, according to the Commission, the appropriate assessment referred to in Article 6(3) must also cover the elements referred to in Article 6(4).

21 In that connection, in order to determine the scope of the obligation to carry out an appropriate assessment of a plan or project likely to affect a site which falls within the scope of Article 6(3) of Directive 92/43, it must be stated, as a preliminary point, that the protection scheme established by that article consists of several aspects designed to permit examination of the effects of such a plan or project, and various stages of assessment where the plan or project is likely to have serious repercussions on a protected site.

22 As the Advocate General stated in points 12 and 13 of her Opinion, this 'appropriate assessment' is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question, as set out in Article 6, particularly as regards the protection of natural habitats and priority species.

23 As the Court stated in paragraphs 33 and 34 of its judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, it is clear from Article 6(3) of Directive 92/43 that in every case of a plan or project not directly connected with or necessary to the management of the site, but likely to have a significant effect thereon, either individually or in combination with other plans and projects, the competent authorities are required to carry out an appropriate assessment in that respect. That assessment must relate to the implications of the plan or project for the site in view of the site's conservation objectives.

24 In accordance with Article 6(3), it is only in the second stage, that is on completion of the appropriate assessment and in the light of the conclusions on the implications for the site in question of the plan or project, that the competent authorities adopt a decision on it.

25 It should be added that, in accordance with that provision, the competent authorities, when taking their decision, agree to the plan or project only after having ascertained that the planned operation does not adversely affect the integrity of the site concerned. Furthermore, those authorities must, if appropriate, obtain the opinion of the general public on that subject.

26 Within the procedural context thus outlined, it is only where the assessment required under Article 6(3) of Directive 92/43 is negative and in the absence of alternative solutions that, where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the examination laid down in Article 6(4) must be undertaken. It is stated in Article 6(3) that the decision is to be adopted by the competent authorities 'subject to the provisions of paragraph 4'.

27 As to the examination which must be carried out within the framework of Article 6 (4), it should be noted that the complex factors to which it relates, such as the absence of alternative solutions and the existence of imperative reasons of overriding public interest, are intended to enable a Member State to take all compensatory measures to ensure that the overall coherence of Natura 2000 is preserved. Furthermore, where the site concerned hosts a priority natural habitat type and/or a priority species, only a limited number of such imperative reasons may be relied on in order to justify a plan or project nevertheless being carried out.

28 In those circumstances, having regard to the particular characteristics of each of the stages referred to in Article 6 of Directive 92/43, it must be held that the various requirements set out in Article 6(4) cannot constitute elements that the competent national authorities are obliged to take account of where they carry out an appropriate assessment provided for in Article 6(3).

29 Therefore, the complaint alleging that the Netherlands national legislation does not provide that the assessment referred to in Article 6(3) of Directive 92/43 must also be carried out with regard to the elements mentioned in Article 6(4) must be dismissed.

30 In the light of the foregoing, it must be held that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Directive 79/409 and of Article 6(1) of Directive 92/43, in conjunction with Articles 2(2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law, which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

## Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

1. **Declares that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and of Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Articles 2 (2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives;**

2. **Dismisses the remainder of the application;**

3. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]

# JUDGMENT OF THE COURT (Second Chamber)

13 January 2005 *

In Case C-117/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by order of 17 December 2002, received at the Court on 18 March 2003, in the proceedings

**Società Italiana Dragaggi SpA and Others**

v

**Ministero delle Infrastrutture e dei Trasporti,**

**Regione Autonoma del Friuli-Venezia Giulia,**

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 June 2004,

after considering the observations submitted on behalf of:

— Società Italiana Dragaggi SpA, acting in its own name and as agent of Associazione Temporanea di Imprese Mantovani SpA and HAM BV, by R. Titomanlio, avvocato,

— Regione Autonoma del Friuli-Venezia Giulia, by G. Marzi, avvocato,

— the French Republic, by C. Mercier, acting as Agent,

— the Kingdom of Sweden, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by M. van Beek and L. Cimaglia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

## Judgment

1 The reference for a preliminary ruling relates to the interpretation of Articles 4(5), 6(3) and 21 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

2 The reference was submitted in proceedings between, first, Società Italiana Dragaggi SpA ('Dragaggi') amongst others and, second, the Ministero delle Infrastrutture e dei Trasporti (Ministry for Infrastructure and Transport) and the Regione Autonoma Friuli-Venezia Giulia (Autonomous Region of Friuli-Venezia Giulia) concerning the annulment, by the contracting authority, of a tender procedure relating to dredging works and the dumping of sediment on reclaimed land in the port of Monfalcone.

### Legal context

*Community law*

3 The sixth recital in the preamble to the Directive states that, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

4 According to Article 3(1) of the Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.'

5 Article 4 of the Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most ...

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

6 Under paragraph 1 of Annex III (Stage 2) to the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'.

7 Article 6 of the Directive states:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Article 21 of the Directive provides that measures envisaged are to be adopted in accordance with a committee procedure.

9 Under Article 23, the Member States had to transpose the Directive into national law within two years of notification thereof. Notification took place on 10 June 1992.

*National legislation*

10 The Directive was transposed into Italian law by Decree No 357 of the President of the Republic of 8 September 1997 entitled 'Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (GURI No 248, 'supplemento ordinario No 219/L', of 23 October 1997; 'Decree No 357/97').

11 Article 4 of Decree No 357/97 ties conservation measures for sites to establishment by the Commission of the list of sites of Community importance.

## The main proceedings and the question referred for a preliminary ruling

12 On 14 May 2001 Dragaggi was awarded a contract relating to dredging works and the dumping of the sediment on reclaimed land in the port of Monfalcone.

13 Four months later the contracting authority annulled the entire tender procedure on the ground that the reclaimed land on which the sediment resulting from the works was intended to be deposited was classified as a site of Community interest, requiring an impact assessment under the relevant national legislation. According to the authority, such an assessment could not have a positive outcome.

14 Dragaggi challenged the legality of the decision annulling the tender procedure before the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia (Regional Administrative Court of Friuli-Venezia Giulia, Italy). It contended in particular that the procedure for classifying as a site of Community importance the 'mouth of the Timavo' site where the reclaimed land in question was situated had not yet been completed. Although the Italian authorities had proposed a list of sites, including the site at the mouth of the Timavo, to the Commission, the latter had not yet adopted

the Community list under the third subparagraph of Article 4(2) of the Directive. Therefore, the obligation to carry out a prior assessment of projects that had significant implications for the site was not yet applicable.

15 In its judgment, the court rejected the argument alleging that the impact assessment procedure was not applicable to the project. According to the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia, where a Member State has, as in the present instance, identified a site hosting a priority species and has included it in the list proposed to the Commission, that site must, under paragraph 1 of Schedule III (Stage 2) to the Directive, be considered to be of Community importance. Accordingly it is subject, pursuant to Article 4(5) of the Directive, to the protective measures referred to in Article 6(2), (3) and (4) thereof, and in particular to the impact assessment which is provided for in Article 6(3).

16 According to that court, this approach is the only one capable of giving logical meaning to the Directive which, inasmuch as it seeks to protect habitats or species in danger of disappearance and extinction, must be capable of applying directly, if only in order to provide a safeguard. Furthermore, the measures proposing the classification of the mouth of the Timavo as a priority site, in particular the decree of the Minister for the Environment of 3 April 2000, were not challenged.

17 Holding that an impact assessment was necessary, the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia upheld Dragaggi's other complaints alleging that the persons concerned by the carrying out of the project had not been consulted, that alternative solutions to those defined in the project had not been considered before the tender procedure was annulled and that the competent authority had not considered the possibility of giving a positive assessment accompanied by conditions.

18 Dragaggi brought an appeal against the judgment of the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia before the Consiglio di Stato (Council of State). In particular, it repeated before the Consiglio di Stato the argument that Article 4(5) of the Directive requires the protective measures envisaged in Article 6 of the Directive to be applied only once the Community list has been established. In its submission, this view is confirmed by Article 4 of Decree No 357/97 which provides that the protective measures must be adopted within three months following the inclusion of the site on the list established by the Commission.

19 The Consiglio di Stato observed that, inasmuch as the listing of sites of Community importance hosting priority habitats appeared to be a purely declaratory act that did not require the exercise of any discretion by the Community authority, the interpretation placed on Article 4(5) of the Directive by the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia could not be considered to be manifestly unfounded.

20 In those circumstances the Consiglio di Stato decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(5) of Directive 92/43 of 21 May 1992 to be interpreted as meaning that the measures under Article 6 and, in particular, under Article 6(3) of that directive are mandatory for the Member States only after final approval at Community level of the list of sites under Article 21 or, alternatively, in addition to determination of the ordinary commencement date of conservation measures, must a distinction be drawn between declaratory listing and determinative listing (including in the first category the listing of priority sites) with the result that, in order to ensure the

effectiveness of the directive, where a Member State identifies a site of Community importance sustaining priority natural habitat types or species, there must be considered to be an obligation to carry out an assessment of plans and projects with a significant effect on the site even before the Commission draws up the draft list of sites or the adoption of the final version of that list pursuant to Article 21 of the directive and, in fact, with effect from the drawing up of the national list?'

## Consideration of the question referred

21 Pursuant to Article 4(5) of the Directive, the regime for the protection of special areas of conservation that is laid down in Article 6(2), (3) and (4) thereof applies to a site once it is placed, in accordance with the third subparagraph of Article 4(2), on the list of sites selected as sites of Community importance as adopted by the Commission under the procedure laid down in Article 21.

22 The fact that, according to paragraph 1 of Annex III (Stage 2) to the Directive, all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance cannot render the protection regime prescribed in Article 6(2), (3) and (4) of the Directive applicable to them before they appear, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission.

23 The contrary proposition referred to by the Consiglio di Stato, that where a Member State has, as in the main proceedings, identified a site as hosting a priority habitat and has included it in the list proposed to the Commission pursuant to Article 4(1) of the Directive, that site must, in view of paragraph 1 of Annex III (Stage 2) to the Directive, be considered to be of Community importance and is therefore subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4), cannot succeed.

24 First, this proposition clashes with the wording of Article 4(5) of the Directive, which expressly links application of those protective measures to the fact that the site concerned has been placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. Second, the proposition presupposes that, where a site has been identified by a Member State as hosting priority natural habitat types or priority species and has been referred to on the list proposed to the Commission pursuant to Article 4(1) of the Directive, the Commission is required to place it on the list of sites of Community importance which it adopts in accordance with the procedure laid down in Article 21 of the Directive and is mentioned in the third subparagraph of Article 4(2). If that were the case, the Commission would be precluded, when establishing, in agreement with each Member State, a draft list of sites of Community importance within the meaning of the first subparagraph of Article 4(2), from contemplating not including on the draft list any site proposed by a Member State as hosting priority natural habitat types or priority species, even if it were to consider, notwithstanding the contrary opinion of the Member State concerned, that a given site did not host priority natural habitat types and/or species as referred to in paragraph 1 of Annex III (Stage 2) to the Directive. Such a situation would be contrary, in particular, to the first subparagraph of Article 4(2) of the Directive, read in conjunction with paragraph 1 of Annex III (Stage 2).

25 It thus follows from the foregoing that, on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.

26 This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

27 If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.

28 In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora (see Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

29 It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

30 The answer to the question referred must therefore be that:

— on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive;

— in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

## Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

**On a proper construction of Article 4(5) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the protective measures prescribed in Article 6(2), (3) and (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the directive, are on the list of sites selected as sites of Community importance adopted by the Commission of the European Communities in accordance with the procedure laid down in Article 21 of the directive.**

**In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of Directive 92/43, required to take protective measures that are appropriate, from the point of view of the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.**

Signatures.

# JUDGMENT OF THE COURT (Grand Chamber)

7 September 2004 *

In Case C-127/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Raad van State (Netherlands), made by decision of 27 March 2002, registered at the Court on 8 April 2002, in the proceedings brought by

**Landelijke Vereniging tot Behoud van de Waddenzee,**

**Nederlandse Vereniging tot Bescherming van Vogels**

against

**Staatssecretaris van Landbouw, Natuurbeheer en Visserij,**

* Language of the case: Dutch.

intervener:

**Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA,**

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann (Rapporteur), J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen, S. von Bahr and R. Silva de Lapuerta, Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 November 2003,

after considering the observations submitted on behalf of:

— Landelijke Vereniging tot Behoud van de Waddenzee, by C.A.M. Rombouts, advocaat,

— Nederlandse Vereniging tot Bescherming van Vogels, by A.J. Durville, advocaat,

— Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, by G. van der Wal, advocaat,

— the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

— the Commission of the European Communities, by G. Valero Jordana, acting as Agent, and J. Stuyck, avocat,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

## Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The reference was made in proceedings between the Landelijke Vereniging tot Behoud van de Waddenzee (National association for conservation of the Waddenzee, 'the Waddenvereniging') and the Nederlandse Vereniging tot Bescherming van Vogels (Netherlands association for the protection of birds, 'the Vogelbeschermingsvereniging') on the one hand and the Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Secretary of State for agriculture, nature conservation and fisheries, 'the Secretary of State') on the other in respect of licences which the latter issued to the Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA (Cooperative producers' association of Netherlands cockle fisheries, 'the PO Kokkelvisserij') for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee, classified within the meaning of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive').

## Legal framework

*The Birds Directive*

3 Article 4(1) and (2) of the Birds Directive requires Member States to classify as SPAs the territories satisfying the ornithological criteria established by those provisions.

4 Article 4(4) of the Birds Directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or

any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

*The Habitats Directive*

Article 6 of the Habitats Directive states :

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment

of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

6 Article 7 of the Habitats Directive states that 'obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later'.

*National legislation*

7 Under Article 12(1) of the Natuurbeschermingswet (Nature Conservation Law), it is prohibited to carry out, to have carried out or to allow actions which are harmful to the natural integrity or the scientific importance of a protected natural site or disfigure it, without authorisation by the Minister van Landbouw, Natuurbeheer en Visserij (Minister for Agriculture, nature conservation and fisheries, 'the Minister') or in breach of the conditions accompanying that authorisation. Under Article 12(2), activities harmful to the essential characteristics of a protected natural site, as set out in the designation decision, are always to be considered harmful to the natural integrity of such a site or its interest in natural science terms.

8 It is clear from the order of 17 November 1993 designating the Waddenzee as a national natural site and from the explanatory memorandum for that order, which is an integral part of it, that the policy of authorisations and revocations under the Natuurbeschermingswet is linked to that followed under the Planologische Kernbeslissing Waddenzee (Key planning decision for the Waddenzee, hereinafter 'the PKB Waddenzee'). According to that explanatory memorandum, applying the procedures of the Natuurbeschermingswet creates an adequate framework for controlling activities which might harm the main objective of the PKB Waddenzee, namely, sustainable protection and development of that sea as a natural site and, in particular, of feeding, nesting and resting areas for birds frequenting that site. Human activities for economic purposes are allowed subject to an adequate assessment in the light of the main objective. Activities envisaged in the Waddenzee must therefore be examined in the light of the abovementioned objective and policy guidelines and assessed in terms thereof.

9 The section in the PKB Waddenzee devoted to coastal fisheries management is implemented in the Government decision of 21 January 1993, namely, the Structuurnota Zee- en kustvisserij 'Vissen naar evenwicht' (Structure Document on Marine and Inshore Fisheries 'Fishing for equilibrium'). This establishes the policy for shellfish fishing, inter alia in the Waddenzee, for the years 1993 to 2003 and includes a number of restrictions as regards cockle fishing. Certain areas in the national natural site are permanently closed to cockle fishing and in years in which food is scarce, 60% of the average food requirement of birds in the form of cockles and mussels is reserved for them. While 100% of their average food requirement is not thus reserved, that is because they can also turn to alternative food sources (Baltic clams, surf clams and shore crabs).

10 Under the PKB Waddenzee, it follows from the precautionary principle that where the most reliable information available leaves obvious doubt as to the absence of possible significant adverse effects on the ecosystem, the benefit of the doubt will favour conservation of the Waddenzee. The order for reference makes clear that most of the available scientific studies consulted do not unequivocally indicate the existence of significant adverse effects on the ecosystem of the Waddenzee linked to mechanical cockle fishing.

## The main action and the questions referred

11 By decisions of 1 July 1999 and 7 July 2000 ('the decisions at issue in the main action'), the Secretary of State issued licences to PO Kokkelvisserij, subject to certain conditions, to engage in mechanical cockle fishing in the Waddenzee SPA during the periods from 16 August to 25 November 1999 and 14 August to 30 November 2000 respectively.

12 The Waddenvereniging and the Vogelbeschermingsvereniging challenged those decisions before the Secretary of State, who, by decisions of 23 December 1999 and 19 February 2001, held that the complaints made against the decisions at issue in the main action were not founded and rejected the applications against them.

13 Those nature protection associations brought an action against those rejections before the Raad van State (Council of State). They claimed in essence that cockle fishing, as authorised by the decisions at issue in the main action, causes permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed. They also submitted that such fishing reduces the food stocks of birds which feed on shellfish, causing a decline in their populations, in particular for oystercatchers and eider ducks. The Waddenvereniging and the Vogelbeschermingsvereniging also claimed that those decisions were contrary to the Habitats and Birds Directives.

14 As regards the correct transposition of Article 6(2) to 6(4) of the Habitats Directive into Netherlands law, the Raad van State states that Article 12 of the Natuurbeschermingswet, although not expressly intended to implement the obligations laid down in Article 6(2) of the Habitats Directive, may be interpreted in a manner consistent with that provision. Similarly, the Natuurbeschermingswet does not contain rules which implement Article 6(3) and (4) of that directive. Nor are there generally binding rules intended to implement the provisions of those two paragraphs which are otherwise applicable to the Waddenzee.

15 The national court also states that according to the Waddenvereniging and the Vogelbeschermingsvereniging, in view of the expansion of cockle fishing in the Waddenzee SPA, there is a 'plan or project' which should be subject to 'appropriate assessment' in accordance with Article 6(3) of the Habitats Directive whereas the Secretary of State contends that the activity in question, inasmuch as it has been

carried on for many years without any intensification, falls within Article 6(2) of that directive.

16 As regards the relationship between Article 6(2) and 6(3) of the Habitats Directive, the Waddenvereniging and the Vogelbeschermingsvereniging submit that although the activity for which licences were granted must be described as a 'plan' or 'project' within the meaning of Article 6(3), it must nevertheless be examined in the light of Article 6(2). It is therefore appropriate to consider whether Article 6(3) must be regarded as a specific application of the rules in Article 6(2), so that those two paragraphs must be applied cumulatively, or as a provision with a separate, independent purpose, so that Article 6(2) relates to existing use while Article 6(3) applies to new plans or projects.

17 The Raad van State asks under what conditions an 'appropriate assessment' of the effect of the plan or project on the site concerned must be carried out. In addition, it asks what the criteria are on the basis of which it must be determined whether 'appropriate steps' or an 'appropriate assessment' are concerned, also in the light of the requirement laid down in Article 6(3) of the Habitats Directive for the competent authorities to agree to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

18 Finally, the national court considers it relevant to know whether Article 6(2) and (3) of the Habitats Directive has direct effect.

19 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Are the words "plan or project" in Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

(b) If the answer to Question 1(a) is in the negative, must the relevant activity be regarded as a "plan or project" if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?

2. (a) If it follows from the answer to Question 1 that there is a "plan or project" within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example:

(i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or

(ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or

(iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities?

(b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively?

3. (a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a "plan or project" once a particular activity is likely to have an effect on the site concerned (and an "appropriate assessment" must then be carried out to ascertain whether or not the effect is "significant") or does this provision mean that an "appropriate assessment" has to be carried out only where there is a (sufficient) likelihood that a "plan or project" will have a significant effect?

(b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects?

4. (a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are "appropriate steps" within the meaning of Article 6(2) or an "appropriate assessment", within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

(b) Do the terms "appropriate steps" or "appropriate assessment" have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?

5. Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held inter alia in Case C-312/93 *Peterbroeck* [1995] ECR I-4599?'

20 By order of 28 April 2004, the application by PO Kokkelvisserij to be allowed to submit written observations in response to the Advocate General's Opinion or otherwise to be given an opportunity to respond to that Opinion was rejected.

## The questions referred

*First question*

Question 1(a)

21 By Question 1(a), the national court in essence asks whether mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may take place, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.

22 The 10th recital in the preamble to the Habitats Directive states that 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'. That recital finds expression in Article 6(3) of the Directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects.

23 The Habitats Directive does not define the terms 'plan' and 'project'.

24 By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1(2):

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

25 An activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337.

26 Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

27 Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive.

28 The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.

29 The answer to Question 1(a) must therefore be that mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.

Question 1(b)

30 In the light of the reply to Question 1(a), there is no need to reply to Question 1(b).

*Second question*

31 By its second question, the national court in essence asks what the relationship is between Article 6(2) and Article 6(3) of the Habitats Directive.

32 It should be recalled that Article 6(2) of the Habitats Directive, in conjunction with Article 7 thereof, requires Member States to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated.

33 Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site.

34 That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.

35 The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the

action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2).

36 Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).

37 Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.

38 The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

*Third question*

Question 3(a)

39 According to the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.

41 Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume — as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/EEC)' — that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42 As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to

have significant effects on the environment (see to that effect Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 85).

43 It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management

of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

Question 3(b)

46 As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives.

47 So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48 Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

49 The answer to Question 3(b) must therefore be that, pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

*Fourth question*

50 By Questions 4(a) to 4(c), the national court in essence asks the Court to clarify the concepts of 'appropriate steps' within the meaning of Article 6(2) of the Habitats Directive and 'appropriate assessment' within the meaning of Article 6(3) thereof and the conditions under which an activity such as mechanical cockle fishing may be authorised.

51 In the light of the context of the main action, as well as the foregoing observations, and in particular the answers to the first two questions, there is no need, as stated in point 116 of the Advocate General's Opinion, to answer the fourth question as regards Article 6(2) of the Habitats Directive.

52 As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53 None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54 Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55 As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Article 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58 In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraphs 106 and 113).

60 Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Article 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

61 In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the

aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

*Fifth question*

62 In the light of the finding in paragraph 51 above, it is not necessary to consider the fifth question in so far as it relates to Article 6(2) of the Habitats Directive.

63 It is therefore appropriate to consider that question only in so far as it concerns Article 6(3) of the Habitats Directive.

64 By its fifth question, the national court asks in essence whether, when a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it may examine whether the limits of discretion of the competent national authorities laid down by that provision have been complied with even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

65 It should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 55).

66 As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive (see *Kraaijeveld and Others*, paragraph 56). That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.

67 More particularly, as regards the limits of discretion set by Article 6(3) of the Habitats Directive, it follows from that provision that in a case such as that in the main action, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise

such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects (see paragraph 59 above).

68 Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned.

69 It follows that Article 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.

70 Consequently, the answer to the fifth question must be that where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

## Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

1. **Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.**

2. **Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).**

3. (a) **The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.**

   (b) **Pursuant to the first sentence of Article 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the**

management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

4. Under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

5. Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

Signatures.

ARRÊT DE LA COUR (cinquième chambre)
15 juillet 2004 (1)

«Manquement d'État – Conservation des habitats naturels – Faune et flore sauvages»

Dans l'affaire C-407/03,

Commission des Communautés européennes, représentée par MM. M. van Beek et M. Huttunen, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République de Finlande, représentée par M^me^ A. Guimaraes-Purokoski, en qualité d'agent,

partie défenderesse,

ayant pour objet de faire constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, l'évaluation appropriée, visée à l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7), la république de Finlande a manqué aux obligations qui lui incombent en vertu de ladite directive,

LA COUR (cinquième chambre),

composée de M. C. Gulmann, président de chambre, M. S. von Bahr et M^me^ R. Silva de Lapuerta (rapporteur), juges,

avocat général: M^me^ J. Kokott,
greffier: M. R. Grass,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

# Arrêt

1
Par requête déposée au greffe de la Cour le 29 septembre 2003, la Commission des Communautés européennes a introduit, en vertu de l'article 226 CE, un recours visant à faire constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, l'évaluation appropriée, visée à l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7, ci-après la «directive»), la république de Finlande a manqué aux obligations qui lui incombent en vertu de ladite directive.

2
La directive a pour objet de favoriser le maintien de la biodiversité par la conservation des habitats naturels ainsi que de la faune et de la flore sauvages dans les États membres. Conformément aux dispositions de la directive, ces mêmes États désignent des zones spéciales de conservation en vue du maintien ou du rétablissement, dans un état de conservation favorable, des habitats naturels d'intérêt communautaire.

3
L'article 6 de la directive impose un certain nombre d'obligations aux autorités nationales si celles-ci approuvent des projets ou des programmes qui sont susceptibles d'affecter une zone spéciale de conservation. Le paragraphe 3 de cet article prévoit que tout plan ou projet non directement lié ou nécessaire à la gestion du site mais susceptible d'affecter ce site de manière significative, individuellement ou en conjugaison avec d'autres plans et projets, fait l'objet d'une évaluation appropriée de ses incidences sur le site eu égard aux objectifs de conservation de ce site et que, compte tenu des conclusions de l'évaluation des incidences sur le site et sous réserve des dispositions du paragraphe 4, les autorités nationales compétentes ne marquent leur accord sur ce plan ou projet qu'après s'être assurées qu'il ne portera pas atteinte à l'intégrité du site concerné et après avoir pris, le cas échéant, l'avis du public.

4
La mise en œuvre de l'article 6 de la directive est régie en Finlande par l'article 65 de la loi n° 1096/1996 sur la protection de la nature (ci-après la «loi sur la protection de la nature»). Par ailleurs, la loi nº 468/1994 concernant l'évaluation des incidences sur l'environnement prévoit des dispositions relatives à la planification et à la prise de décision de projets susceptibles d'avoir des répercussions sur l'environnement.

5
Après avoir reçu une plainte concernant l'impact d'un projet de ligne à haute tension sur des sites proposés par la république de Finlande comme sites d'importance communautaire au sens de la directive et désignés par cet État membre comme zones spéciales de conservation, la Commission a adressé à celui-ci, par lettre du 16 février 2000, une demande de renseignements concernant les incidences du projet en cause sur ces sites.

6
N'ayant pas jugé satisfaisantes les réponses fournies par la république de Finlande, la Commission lui a adressé une lettre de mise en demeure en date du 10 avril 2001. Ultérieurement, elle a adressé à ce même État membre une lettre de mise en demeure complémentaire, datée du 24 octobre 2001, dans laquelle elle relevait que l'article 65 de la loi sur la protection de la nature exemptait des obligations prévues à l'article 6, paragraphe 3, de la directive tous les projets auxquels la procédure d'évaluation des incidences sur l'environnement est applicable.

7

Par lettre datée du 26 juin 2002, la Commission a adressé à la république de Finlande un avis motivé. Par lettres des 27 août 2002 et 2 juillet 2003, cet État membre lui a répondu qu'il avait l'intention de modifier l'article 65, premier alinéa, de la loi sur la protection de la nature et a précisé les initiatives qu'il entendait prendre à cette fin. Estimant que le gouvernement finlandais ne lui avait pas fourni d'éléments démontrant qu'il avait mis sa législation en conformité avec l'article 6, paragraphe 3, de la directive, la Commission a décidé d'introduire le présent recours.

8
Le gouvernement finlandais admet le bien-fondé du recours. Selon lui, il est vrai que la loi sur la protection de la nature n'indique pas avec suffisamment de clarté que les projets qui font l'objet des procédures d'évaluation de l'incidence sur l'environnement en général doivent aussi être soumis à une évaluation au sens de la directive.

9
Dans ces conditions, il y a lieu de considérer comme fondé le recours introduit par la Commission.

10
En conséquence, il convient de constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer une évaluation appropriée pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, la république de Finlande a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive.

Sur les dépens

11
Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la république de Finlande et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs,

LA COUR (cinquième chambre)

déclare et arrête:

1)
En ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer une évaluation appropriée pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, la république de Finlande a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages.

2)
La république de Finlande est condamnée aux dépens.

Gulmann von Bahr Silva de Lapuerta

Ainsi prononcé en audience publique à Luxembourg, le 15 juillet 2004.

Le greffier — Le président de la cinquième chambre

R. Grass — C. Gulmann

---

1 – Langue de procédure: le finnois.

# JUDGMENT OF THE COURT (Third Chamber)
20 March 2003 *

In Case C-143/02,

**Commission of the European Communities,** represented by G. Valero Jordana and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Italian Republic,** represented by U. Leanza, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, in adopting legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann (Rapporteur) and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 January 2003,

gives the following

## Judgment

1 By application lodged at the Court Registry on 17 April 2002, the Commission of the European Communities brought an action under Article 226 EC in which it sought a declaration that, in adopting legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the habitats directive'), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

## The law

2 Article 5 of the habitats directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat

type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

3 Article 6(2) to (4) of the habitats directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

4 Article 7 of the habitats directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly

recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

## Pre-litigation procedure

5 Considering that Decree No 357 of the President of the Republic of 8 September 1997 (GURI No 248, Ordinary Supplement No 219/L of 23 October 1997, 'the presidential decree'), notified to it by the Italian authorities, did not bring about a correct implementation of the habitats directive, the Commission sent a letter of formal notice to the Italian Republic on 4 April 2000 requesting it to submit its observations in that regard.

6 By letter of 27 June 2000, the Italian Government forwarded to the Commission a note from the Ministry of the Environment stating that it was already aware of the shortcomings pointed out by the Commission and that it had identified other issues likely to give rise to serious problems when it came to applying the presidential decree, and submitting that, for a year, it had been in consultations with the regional authorities with a view to amending the text of that decree.

7 On 8 September 2000, the Italian Government sent to the Commission a further note from the Ministry of the Environment dated 29 August 2000 stating that the draft legislation amending the presidential decree had been approved and that any subsequent amendment made during the revision and adoption process would be notified to the Commission.

8 Since it received no further information concerning the adoption of the legislation amending the presidential decree, the Commission issued a reasoned opinion to the Italian Republic on 25 July 2001 repeating the complaints set out in the letter of formal notice and requesting that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of its notification.

9 As the Commission received no reply from the Italian authorities, it decided to bring the present action.

## The action

10 The Italian Republic does not deny the complaints alleged against it. Indeed, it intended, in line with the Commission's proposals, to amend Articles 5 and 6 of the presidential decree in particular, concerning respectively the assessment of the implications for the environment of certain projects and the protection of areas other than special protection areas, and to insert into that decree an Article 4b transposing Article 5 of the habitats directive. However, the question of the competent authority to act in the matter gives rise to conflict between the regions and the Italian State.

11 It suffices to point out, in that regard, that according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-148/00 *Commission* v *Italy* [2001] ECR I-9823, paragraph 7) and that a Member State

cannot rely on provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period (see, to that effect, Case C-276/98 *Commission* v *Portugal* [2001] ECR I-1699, paragraph 20 and Case C-392/01 *Commission* v *Spain* [2002] ECR I-11111, paragraph 9).

12 Article 6(3) of the habitats directive does not allow projects not directly connected with or necessary to the management of sites to be excluded from the scope of the directive where they are likely to have a significant effect on those sites. Article 7 of that directive provides, in particular, that Article 6(2) applies to special protection areas designated under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). As for Article 5 of the habitats directive, this provides that during the period of bilateral consultation between the Member State and the Commission, and pending a Council decision, the site concerned is to be subject to the scheme of protection laid down by Article 6(2) of that directive.

13 Since Articles 5, 6 and 7 of the habitats directive were not fully implemented within the period prescribed by the reasoned opinion, the action brought by the Commission must be regarded as well founded.

14 Therefore, in adopting a measure transposing the habitats directive which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Declares that, in adopting a measure transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive;

2. Orders the Italian Republic to pay the costs.

Puissochet Gulmann Macken

Delivered in open court in Luxembourg on 20 March 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Third Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

27 February 2003 *

In Case C-415/01,

**Commission of the European Communities**, represented by G. Valero Jordana and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Belgium**, represented by C. Pochet, acting as Agent,

defendant,

APPLICATION for a declaration that, in so far as the Région flamande (Flemish Region) has failed to transpose Article 4(1) and (2) of and Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), to demarcate special protection areas within its territory capable of being relied upon as against third parties, and to adopt the measures necessary to ensure that the classification of a site as a special protection area automatically

* Language of the case: French.

and simultaneously entails the application of a system of protection and conservation complying with Community law, the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1) and (2) in conjunction with Article 4(4), as partially amended, of Directive 79/409 in accordance with Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), by Article 6(2) to (4) of the latter directive,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, C. Gulmann (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2002,

gives the following

## Judgment

1 By application lodged at the Court Registry on 19 October 2001, as amended by the reply, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, in so far as the Région flamande (Flemish Region) has failed to transpose Article 4(1) and (2) of and Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter 'the directive on birds'), to demarcate special protection areas (hereinafter 'SPAs') within its territory capable of being relied upon as against third parties, and to adopt the measures necessary to ensure that the classification of a site as an SPA automatically and simultaneously entails the application of a system of protection and conservation complying with Community law, the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1) and (2) of the directive on birds and Article 4(4) of that directive, as partially amended, in accordance with Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the directive on habitats'), by Article 6(2) to (4) of the latter directive.

### Legal framework

2 Article 4(1), (2) and (4) of the directive on birds provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

3 Article 6(2) to (4) of the directive on habitats provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

4 Under Article 7 of the directive on habitats, obligations arising under Article 6(2), (3) and (4) thereof are to replace any obligations arising under the first sentence of Article 4(4) of the directive on birds in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of

implementation of the directive on habitats or the date of classification or recognition by a Member State under the directive on birds, where the latter date is later.

5 Member States were required under Article 23(1) of the directive on habitats to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification. Since the directive was notified in June 1992, that period expired in June 1994.

## Pre-litigation procedure

6 By a letter of formal notice sent to the Belgian Government on 4 April 2000, the Commission stated among other things that, according to its information, it appeared that the Région flamande had failed to transpose Article 4(1) and (2) of and Annex I to the directive on birds, to demarcate SPAs within its territory capable of being relied upon as against third parties, and to adopt the measures necessary to ensure that the classification of a site as an SPA automatically and simultaneously entails the application of a system of protection and conservation complying with Community law, and that, therefore, the Kingdom of Belgium had failed to fulfil its obligations under Article 4(1) and (2) of the directive on birds and Article 4(4), as partially amended, of that directive in accordance with Article 7 of the directive on habitats, by Article 6(2) to (4) of the latter directive.

7 Since it received no reply to that letter, the Commission, by letter of 19 July 2000, sent the Kingdom of Belgium a reasoned opinion repeating the complaints set out in the formal notice and requesting it to take the measures necessary to comply with that reasoned opinion within a period of two months from the date of its notification.

8 By letter of 6 October 2000, the Belgian Government forwarded to the Commission a reply from the Région flamande to the reasoned opinion.

9 Since it considered, in particular, that that reply did not enable it to conclude that the Kingdom of Belgium had adopted the measures necessary to put an end to the alleged default, the Commission decided to bring this action before the Court.

## The action

*The alleged failure to transpose Article 4(1) and (2) of and Annex I to the directive on birds*

10 The Commission claims that no legally binding provision applying to the territory of the Région flamande requires the classification as SPAs of the most appropriate

areas in terms of number and surface area for the conservation of the bird species listed in Annex I to the directive on birds and of the regularly occurring migratory species not listed in Annex I. Therefore, Article 4(1) and (2) of that directive have not been fully transposed.

11 The Belgian Government, whilst maintaining that Article 4(1) and (2) of the directive on birds has been partially transposed, does not dispute that complaint.

12 The action must therefore be upheld on that point.

*The alleged lack of a system of protection of SPAs*

13 The Commission points out the lack of any provision applying to the Région flamande which automatically links the classification of a site as an SPA to the application of the system of protection and conservation provided for by Community law in that respect.

14 While, on the one hand, the Belgian Government observes that there already exist, in the Région flamande, certain general and sectorial protection measures

which affect SPAs, it recognises, on the other hand, that no provision applying to that region provides that the classification of a site as an SPA is automatically accompanied by the application to that site of the system of protection established by the directive on birds.

15 In that regard, it must be borne in mind that, according to the Court's case-law, Article 4(1) and (2) of the directive on birds requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in that annex which are regular visitors (see Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21).

16 Since Article 7 of the directive on habitats provides that the obligations which arise, among others, under Article 6(2) of that directive are to replace those arising under the first sentence of Article 4(4) of the directive on birds in respect of SPAs, the legal status of protection of those areas must also guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been designated.

17 The absence of any provision applying to the Région flamande linking the classification of a site as an SPA to the application of a status of protection such as that described in paragraphs 15 and 16 of this judgment undermines the objective of special protection for wild bird life set out in Article 4 of the directive on birds (see, in particular, Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 55).

18 Accordingly, the action must be upheld on that point.

*The alleged unenforceability as against third parties of the demarcation of SPAs*

19 The Commission claims that the directive on birds has not been properly transposed on the ground that the maps demarcating the SPAs in the Région flamande do not have binding force with regard to third parties and cannot, therefore, be relied upon as against them. In Belgian law, measures adopted by the regional authorities must be published in the *Moniteur belge* in order to have binding force. Only such publication creates, as regards citizens, an irrebuttable presumption of their awareness of the measures adopted and ensures, thereby, that they are enforceable against third parties. The maps demarcating the SPAs in the Région flamande have not been published in the *Moniteur belge*. They have simply been lodged in municipal offices to enable the population to become acquainted with them.

20 The Kingdom of Belgium submits that the question of the binding force of the maps demarcating the SPAs is a matter for the domestic law of the Member States. They enjoy a broad discretion in determining the manner in which they ensure the binding force of measures transposing directives. The fact that, under Belgian law, publication in the *Moniteur belge* is the general rule does not prevent, in particular cases, the possibility of choosing another method of publication, on condition that all citizens may effectively become acquainted with the legislation in question. The Cour de cassation (Court of Cassation, Belgium) has accepted that principle concerning publication of regional and area plans in the context of town and country planning. The Belgian Government maintains that the deposit at the relevant municipal offices of the maps on which the SPAs are demarcated, as prescribed by Article 3 of the Arrêté de l'exécutif flamand

(Order of the Flemish Executive) of 17 October 1988 on the designation of special protection zones for the purposes of Article 4 of the directive on birds (*Moniteur belge* of 29 October 1988, p. 15068), constitutes, in this case, a sufficient method of publication, given that those concerned have a real possibility of becoming acquainted with those maps. Nevertheless, an amendment of the Décret de la Communauté flamande (Decree of the Flemish Community) of 21 October 1997 concerning nature conservation and the natural environment (*Moniteur belge* of 10 January 1998, p. 599), is being prepared in order for the maps demarcating the SPAs to be published in the *Moniteur belge*.

21 In that regard, it is important to recall that, according to consistent case-law, the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32). The principle of legal certainty requires appropriate publicity for the national measures adopted pursuant to Community rules in such a way as to enable the persons concerned by such measures to ascertain the scope of their rights and obligations in the particular area governed by Community law (see Case C-313/99 *Mulligan and Others* [2002] ECR I-5719, paragraphs 51 and 52).

22 With regard to maps demarcating SPAs, they must be invested with unquestionable binding force. If not, the boundaries of SPAs could be challenged at any time. Also, there would be a risk that the objective of protection under Article 4 of the directive on birds mentioned at paragraph 17 of this judgment would not be fully attained.

23 In the reply to the reasoned opinion, it is admitted that, in principle, only publication of a measure in the *Moniteur belge* ensures an irrebuttable presumption of awareness of that measure by third parties. The fact that the Cour de cassation has accepted, in the context of town and country planning, the binding nature of regional and area plans, although they have been published otherwise than in the *Moniteur belge*, does not, in this case, show that the same applies to maps demarcating SPAs in the Région flamande, which, according to the amendment referred to in paragraph 20 of this judgment, will in any case have to be published in the *Moniteur belge*.

24 Even assuming that a rebuttable presumption of awareness of a measure could, as maintained in the reply to the reasoned opinion, arise from a method of publication other than entire publication in the *Moniteur belge*, it must be pointed out that maps demarcating SPAs with the benefit of such a presumption do not appear to have unquestionable binding force.

25 It follows that the action is also well founded on that point.

26 Having regard to the foregoing, it must be held that, in so far as the Région flamande has failed to transpose Article 4(1) and (2) of and Annex I to the directive on birds, to demarcate SPAs within its territory capable of being relied upon as against third parties, and to adopt the measures necessary to ensure that the classification of a site as an SPA automatically and simultaneously entails the application of a system of protection and conservation complying with

Community law, the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1) and (2) of the directive on birds and the first sentence of Article 4(4) thereof, as amended, in accordance with Article 7 of the directive on habitats, by Article 6(2) to (4) of the latter directive.

## Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, in so far as the Région flamande has failed to transpose Article 4(1) and (2) of and Annex I to Council Directive 79/409/EEC of**

2 April 1979 on the conservation of wild birds, to demarcate special protection areas within its territory capable of being relied upon as against third parties, and to adopt the measures necessary to ensure that the classification of a site as a special protection area automatically and simultaneously entails the application of a system of protection and conservation complying with Community law, the Kingdom of Belgium has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409 and the first sentence of Article 4(4) thereof, as amended, in accordance with Article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, by Article 6(2) to (4) of the latter directive;

2. Orders the Kingdom of Belgium to pay the costs.

Puissochet Schintgen Gulmann

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 27 February 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

13 February 2003 *

In Case C-75/01,

**Commission of the European Communities,** represented by R.B. Wainwright and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Grand Duchy of Luxembourg,** represented by J. Faltz, acting as Agent,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive and under the third paragraph of Article 249 EC,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann (Rapporteur), V. Skouris, F. Macken and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2002,

gives the following

## Judgment

1 By application lodged at the Court Registry on 14 February 2001, the Commission of the European Communities brought an action pursuant to Article 226 EC for a declaration that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Directive') in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Directive and under the third paragraph of Article 249 EC.

### The Directive

2 Article 1 of the Directive defines the principal terms used. In particular, Article 1(m) defines specimen as 'any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species'.

3 Article 4 of the Directive establishes a procedure in several stages for designating as special areas of conservation ('SACs') sites which host the species and habitats protected by the Directive. Under Article 4(1), each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. The list must be sent to the Commission, together with information on each site, within three years of notification of the Directive.

4 Under Article 4(5) of the Directive, once a site is placed on the list of sites of Community importance drawn up by the Commission it falls subject to the provisions of Article 6(2), (3) and (4).

5 Article 5(1) and (4) of the Directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

...

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

6 Article 6 of the Directive provides:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Under Article 7 of the Directive, '[o]bligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

8 Under Article 11 of the Directive, 'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species'.

9 Article 12(1)(b) and (c), (2) and (4) of the Directive reads as follows:

'1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

...

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

...

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this directive is implemented.

...

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

10 Article 13(1)(b) and (2) provides:

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

...

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

11 Article 14 of the Directive provides:

'1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

— regulations regarding access to certain property,

— temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

— regulation of the periods and/or methods of taking specimens,

— application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,

— establishment of a system of licences for taking specimens or of quotas,

— regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

— breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens [in] the wild,

— assessment of the effect of the measures adopted.'

12 Article 15 of the Directive reads as follows:

'In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).'

13 Article 16(1) of the Directive provides:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

14 Article 22(b) and (c) of the Directive provides:

'In implementing the provisions of this directive, Member States shall:

...

(b) ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction. The results of the assessment undertaken shall be forwarded to the committee for information;

(c) promote education and general information on the need to protect species of wild fauna and flora and to conserve their habitats and natural habitats.'

15 Under Article 23(2) of the Directive, the laws, regulations and administrative provisions which the Member States must adopt in order to comply with the Directive must contain a reference to the Directive or be accompanied by such reference on the occasion of their official publication.

## The pre-litigation procedure

16 On 29 April 1999, having concluded that the various measures transposing the Directive into Luxembourg law communicated to it failed to conform to Articles 1, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 18, 22 and 23 of the Directive, the Commission gave the Grand Duchy of Luxembourg formal notice to submit its observations.

17 In his letter of reply of 13 July 1999, addressed to the Commission ('the letter of reply') the Minister for the Environment of the Grand Duchy of Luxembourg stated that various national laws and regulations could help to attain certain of the Directive's objectives and that the Law of 21 May 1999 on regional planning (*Mémorial* A 1999, p. 1402, hereinafter 'the Regional Planning Law'), the draft Grand-Ducal regulation on biodiversity and the Law of 11 August 1982 on the protection of nature and natural resources (*Mémorial* A 1999, p. 1486, hereinafter 'the Nature Protection Law') would shortly ensure that the Directive's objectives were fully met. The letter also expressly disputed certain of the Commission's complaints.

18 The Commission was not satisfied by the observations submitted to it by the Grand Duchy of Luxembourg in its letter of reply and on 21 January 2000 issued a reasoned opinion in which it observed that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of the Directive in conjunction with Annexes I, II, IV, V and VI to the Directive, the Grand Duchy of Luxembourg had failed to fulfil its obligations under the Directive and under the third paragraph of Article 249 EC. The Commission therefore called upon the Grand Duchy to adopted the measures required to comply with the reasoned opinion within two months of its notification.

19 By letter of 6 April 2000, the Luxembourg authorities acknowledged that, in order to transpose the Directive into national law, it would be necessary to supplement or amend its existing legislation.

20 Finding that the Grand Duchy of Luxembourg had failed to adopt the necessary measures to comply with the reasoned opinion within the time specified therein, the Commission brought the present action.

## The action

21 In its defence the Luxembourg Government merely indicates that a draft law transposing the Directive was approved by the government in council on 23 February 2001 and asks the Court to dismiss the action.

*Incomplete transposition of Article 1 of the Directive*

22 The Commission points out that, in its letter of formal notice, it observed that there were no provisions of Luxembourg law that had as their object or effect the correct, complete and precise transposition of the definitions set out in Article 1 of the Directive and that the Luxembourg authorities did not dispute that complaint in the letter of reply.

23 On this point, it should be borne in mind that the letter of reply stated that the Article 1 definitions were to be included in a sectoral plan provided for by the Regional Planning Law.

24 However, it appears that no such measure was adopted within the period of time specified in the reasoned opinion.

25 The complaint of incomplete transposition of Article 1 of the Directive must therefore be regarded as well founded.

*Failure to transpose Article 4(5) of the Directive*

26 According to the Commission, the transposing provisions notified by the Luxembourg authorities do not have the object or effect of transposing Article 4(5) of the Directive. Thus, sites of Community importance are not

automatically brought within the protection regime provided for in Article 6(2), (3) and (4) of the Directive. The letter of reply disputes this complaint but only to the extent that the Commission charged the Grand Duchy of Luxembourg with having failed to put in place a system for applying the protection regime provided for in Article 6(2) to sites of Community importance.

27 It is important to bear in mind that, according to the letter of reply, the administrative practice in Luxembourg of refusing the necessary authorisation for certain projects falling within the scope of the Nature Protection Law is an appropriate means of ensuring that the nuisances mentioned in Article 6(2) of the Directive do not occur on the sites referred to in Article 4(5). The Luxembourg Government has, however, acknowledged its failure as regards application of Article 6(3) and (4) of the Directive to sites of Community importance.

28 Now, according to the settled case-law of the Court of Justice relating to the obligations incumbent upon Member States in the transposition of Community directives, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations arising under the EC Treaty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32, and Case C-394/00 *Commission* v *Ireland* [2002] ECR I-581, paragraph 11).

29 Given the foregoing, the Commission's complaint of failure to transpose Article 4(5) of the Directive must be upheld.

*Failure to transpose Article 5(4) of the Directive*

30 The Commission argues that no laws in Luxembourg make the sites referred to in Article 5(4) of the Directive subject to the protection regime provided for by Article 6(2). The Luxembourg authorities dispute this complaint in the letter of reply.

31 As is clear from the letter of reply, the Luxembourg Government maintains, in essence, that the administrative practice of refusing the necessary authorisation for certain projects falling within the scope of the Nature Protection Law is an appropriate means of ensuring that the nuisances mentioned in Article 6(2) of the Directive do not occur on the sites referred to in Article 5(4).

32 However, having regard to the case-law of the Court mentioned in paragraph 28 of the present judgment, that argument must be rejected.

33 It is also submitted in the letter of reply that the Grand Duchy of Luxembourg has, in any event, probably already included in the list sent to the Commission pursuant to Article 4(1) of the Directive all the sites within its territory which are essential to maintaining certain types of habitat present in its territory and that, consequently, there would be no need to have recourse to the procedure laid down in Article 5(4) of the Directive.

34 That submission cannot be upheld either because, in any event, it cannot be ruled out that the Commission might find, pursuant to Article 5(1) of the Directive, that the list sent by the Grand Duchy of Luxembourg omits a site which it regards as essential to the preservation of a given priority natural habitat type or the survival of a given priority species and that the bilateral consultation procedure will therefore have to be initiated, during the currency of which the site in question will, in accordance with Article 5(4), have to be made subject to the protection regime laid down in Article 6(2).

35 Consequently, the complaint of failure to transpose Article 5(4) of the Directive must be regarded as well founded.

*Failure to transpose Article 6 of the Directive*

Article 6(1) of the Directive

36 The Commission complains that the Grand Duchy of Luxembourg has failed to transpose this provision.

37 In the letter of reply, the Luxembourg Government acknowledged that failure.

38 The complaint of non-transposition of Article 6(1) of the Directive must therefore be upheld.

Article 6(2) of the Directive

39 The Commission observes that, subject to exceptional ministerial derogation based on public interest, Article 14 of the Nature Protection Law prohibits the reduction, destruction or modification of certain types of biotope. A provision such as that, however, does not appear adequate to ensure that all habitats falling within SACs benefit from the protection provided for. The Commission also emphasises that the provisions of the Nature Protection Law envisage only certain types of disturbance. In particular, under Article 12 it is possible to prevent only certain types of disturbance in forests. There is therefore a lack of any general measure, binding upon third parties, making it possible to prevent, in SACs, disturbance of species which could have a significant effect on those species, in relation to the objectives of the Directive. The Commission also points out that, in the letter of reply, infringement of this aspect of the Directive is expressly disputed.

40 It is submitted in the letter of reply that Article 14 of the Nature Protection Law protects all biotopes, including those forming part of an SAC and that it is incorrect to say that this law contemplates only certain types of disturbance: Article 23, which has a general scope, prohibits disturbance of fauna and Articles 21 and 22 prohibit any kind of unjustified exploitation, use, mutilation or destruction of wild plants and animals that are not protected by means of a more stringent set of national rules. Moreover, the Nature Protection Law is backed by a ministerial circular, whose very purpose is to transpose the Directive, and this states that any degradation of habitats and disturbance of protected species must be avoided by means of rigorous application of the Nature Protection Law.

41 It should be borne in mind that, subject to exceptional ministerial derogation based on public interest, Article 14 of the Nature Protection Law prohibits the reduction, destruction or modification of biotopes such as ponds, fens, marshlands, land covered in reeds and rushes, hedgerows, scrub and groves.

42 A provision such as that, which makes express reference to certain types of biotope only does not appear to be capable of ensuring, as is required by Article 6(2) of the Directive, that all natural habitats and habitats of species found within SACs are protected against acts liable to deteriorate them.

43 In so far as concerns protection against deterioration, as provided for by Article 6(2) of the Directive, it is plain that, whilst certain provisions of the Nature Protection Law pleaded in the present case, and in particular Articles 12 and 23, may contribute to the prevention of certain types of disturbance, the fact remains that they are incapable of completely transposing Article 6(2) of the Directive because they do not cover all types of disturbance that are significant in relation to the objectives of the Directive of the species for which the SACs are designated.

44 As regards the ministerial circular to which the Luxembourg Government refers, it must be held that, in light of the case-law mentioned in paragraph 28 of the present judgment, it is not capable of ensuring proper transposition of Article 6(2).

45 It follows that the complaint of incomplete transposition of Article 6(2) of the Directive must be regarded as well founded.

Article 6(3) and (4) of the Directive

46 The Commission maintains that the Luxembourg legislation sent to it contains no provision for an assessment to be carried out of the effects on protected sites in all the cases mentioned in Article 6(3) of the Directive. Furthermore, Luxembourg law fails to ensure that projects and plans are approved by the competent authority only after the authority has satisfied itself that the project or plan will not compromise the integrity of the site in question. As far as Article 6(4) of the Directive is concerned, the Commission argues that no provision of national law requires that alternative solutions be pursued before approval is given to projects regarded as having an adverse effect on protected sites. Luxembourg law also fails to provide for the adoption of compensatory measures where such projects are authorised.

47 It is appropriate to observe that these complaints were already formulated in the same terms in the letter of formal notice and that, in the letter of reply, the Luxembourg Government acknowledged that the existing provisions of national law were inadequate as regards Article 6(3) and (4) of the Directive.

48 That being so, the Court must also uphold this aspect of the Commission's action.

*Failure to transpose Article 7 of the Directive*

49 The Commission submits that no provision of Luxembourg law provides for the application of Article 6(2), (3) and (4) of the Directive to special protection areas designated under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as is required by Article 7 of the Directive. The arguments put forward in the letter of reply also fail to persuade that Article 7 has been transposed.

50 It should be borne in mind that the letter of reply states that the sectoral plan which it anticipated drawing up would provide a precise legal framework, in particular as regards special protection areas classified under Directive 79/409.

51 Given that, and taking particular account of what is stated in paragraph 24 of the present judgment, it must be held that the complaint of failure to transpose Article 7 of the Directive is well founded.

*Inadequate transposition of Article 12(1)(b) and (c), (2) and (4) of the Directive*

52 The Commission maintains, first of all, that Article 12(1)(b) of the Directive has been incompletely transposed into Luxembourg law because none of the national

transposing provisions communicated to it prohibits the deliberate disturbance of the species concerned during the migration period. Secondly, none of the provisions has as its object or effect the complete transposition of Article 12(1)(c) of the Directive. Thirdly, the national provisions communicated to the Commission fail to prohibit the exchange and the offering for exchange of specimens of the species concerned, as is required by Article 12(2) of the Directive. Fourthly, no provision of Luxembourg law ensures that the definition of 'animal' in national law is as broad as that of 'specimen' within the meaning of the Directive. Lastly, none of the provisions communicated has as its object or effect the transposition of Article 12(4) of the Directive. According to the Commission, the arguments to the contrary set out in the letter of reply cannot be accepted.

Article 12(1)(b) of the Directive

53 As the Commission rightly observes, Article 23 of the Nature Protection Law, which the Luxembourg Government regards as conforming to Article 12(1)(b) of the Directive, is incapable of transposing the latter provision fully because, whilst prohibiting the disturbance of fauna during the periods of breeding, rearing and hibernation, the prohibition fails expressly to mention the migration period.

54 Consequently, the complaint of inadequate transposition of Article 12(1)(b) of the Directive must be regarded as well founded.

Article 12(1)(c) of the Directive

55 The letter of reply maintains that Article 12(1)(c) of the Directive has been transposed into national law by Article 17 of the Nature Protection Law and Article 6 of the Convention on the Conservation of European Wildlife and Natural Habitats, signed in Bern on 19 September 1979 and approved by the Law of 26 November 1981 (*Mémorial* A 1981, p. 2130), to which the Community became a party by Council Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1) (hereinafter 'the Bern Convention'). Article 17 of the Nature Protection Law provides that animals which are the subject of complete protection may not be disturbed, killed, hunted, captured, kept in captivity or tamed, at any stage of their development. As regards Article 6 of the Bern Convention, that provision prohibits the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty.

56 In this connection, it should be pointed out that Article 17 of the Nature Protection Law does not expressly mention the collection of eggs in the wild. The prohibition in Article 17 on keeping in captivity animals which are the subject of complete protection at any stage of their development does not appear to include with sufficient certainty the collection of eggs in the wild, particularly as, under Article 144 et seq. of the Nature Protection Law, this prohibition is one that is backed by criminal sanction.

57 As regards Article 6(d) of the Bern Convention, which prohibits the deliberate destruction or taking of eggs from the wild or keeping such eggs, it is appropriate to point out that that provision applies only to the species listed in Annex II to the convention, which does not include certain of the species listed in Annex IV (a) to the Directive, to which Article 12 of the Directive refers.

58 It follows that Article 12(1)(c) of the Directive has not been correctly transposed into Luxembourg law.

Article 12(2) of the Directive

59 The letter of reply states that, in so far as it prohibits the keeping of animals which receive complete protection, Article 17 of the Nature Protection Law also precludes the exchange of such animals. Indeed, to exchange something which may not be held is impossible. Moreover, Article 15 of the Nature Protection Law, read together with the Grand-Ducal Regulation of 8 April 1986 on the Complete and Partial Protection of Certain Species of Wild Animal (*Mémorial* A 1986, p. 1174), provides for the classification of rare wild animals for the purposes of their conservation, without restriction to indigenous species. In addition, Article 20 of the Nature Protection Law extends the definition of animal beyond the meaning conferred by national law.

60 The Luxembourg Government's argument cannot be accepted.

61 Indeed, the prohibition, laid down in Article 17 of the Nature Protection Law, on keeping animals which receive complete protection would not seem to include the exchange or the offering for exchange of such animals, the concept of keeping being distinct from that of exchanging or offering for exchange, particularly from the viewpoint of a system of criminal sanctions, such as that mentioned in paragraph 56 of the present judgment.

62 As regards the meaning of the term animal in Luxembourg law, it must be held that, in any event, the law on which the Luxembourg Government relies in the letter of reply does not include within the definition of animal 'any... derivative [of any animal]... as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other

circumstances, to be... derivatives of animals... of those species', as is provided for in Article 1(m) of the Directive, which defines the meaning of specimen as it appears, in particular, in Article 12(2) of the Directive.

63 Article 12(2) of the Directive has not, therefore, been correctly transposed into Luxembourg law.

Article 12(4) of the Directive

64 It is appropriate to recall that the Luxembourg Government acknowledged in the letter of reply that there had yet to be established in Luxembourg law a monitoring system such as that provided for by Article 12(4) of the Directive.

65 It also appears that no such monitoring system was adopted within the period of time laid down in the reasoned opinion.

66 It thus appears that Article 12(4) of the Directive has not been transposed into the internal legal system of the defendant Member State.

67 In light of the foregoing, it must be held that the complaint of inadequate transposition of Article 12(1)(b) and (c), (2) and (4) of the Directive is well founded.

*Inadequate transposition of Article 13(1)(b) and (2) of the Directive*

Article 13(1)(b) of the Directive

68 The Commission submits that, despite the arguments advanced by the Luxembourg authorities in the letter of reply, Article 13(1)(b) of the Directive has not been completely transposed into Luxembourg law, which neither prohibits the keeping, exchange or offering for sale or exchange of specimens of the plant species protected under that provision nor ensures that the prohibitions laid down in the provision apply also to the non-indigenous species protected under it.

69 The letter of reply states that the sale of plants which receive complete protection is prohibited by Article 16 of the Nature Protection Law and that, in so far as is necessary, keeping such plants is prohibited by Article 5 of the Bern Convention. Moreover, Article 15 of the Nature Protection Law does not exclude the protection of non-indigenous species. In this connection it would be sufficient to incorporate the species concerned into the Grand-Ducal Regulation of 19 August 1989 on the Complete and Partial Protection of Certain Species of Wild Flower (*Mémorial* A 1989, p. 1102, hereinafter 'the Wild Flower Regulation'). Article 20 of the Nature Protection Law extends the definition of plant beyond the meaning conferred by national law.

70 It should be observed that whilst Article 16 of the Nature Protection Law prohibits the sale of plants that receive complete protection, it does not prohibit the possession, exchange or offering for sale or exchange of such plants. Article 5 of the Bern Convention provides that each contracting party must, as appropriate, prohibit the possession of protected species. However, it does not appear that

the Luxembourg authorities have adopted any supplementary measure further defining application of the Bern Convention as regards this point. As far as this aspect is concerned, therefore, Article 13(1)(b) of the Directive has not been properly transposed into Luxembourg law.

71 As regards the complaint that Luxembourg law fails to ensure that the prohibitions laid down in Article 13(1)(b) of the Directive apply to the non-indigenous plant species protected by the Directive, it is important to recall that the Luxembourg Government itself has acknowledged that the non-indigenous plant species covered by Article 13(1)(b) are not protected by Article 15 of the Nature Protection Law, read together with the Wild Flower Regulation. Also, Article 20 of the law provides that the plants and animals protected under approved and published international conventions may be purchased, imported, offered for sale, exported or held only pursuant to the relevant provisions of such conventions. However, Article 20 is, in any event, incapable of ensuring as such the protection of non-indigenous species provided for by Article 13(1)(b) of the Directive. Moreover, the Luxembourg Government has provided no further information as to which international conventions are relevant in the matter.

72 It follows that Article 13(1)(b) of the Directive has not been properly transposed into Luxembourg law.

Article 13(2) of the Directive

73 According to the Commission, the Luxembourg Government's assertion that Article 13(2) of the Directive has been transposed by Article 16 of the Nature

Protection Law, which extends the prohibitions laid down in that provision to parts of the plants concerned, fails to establish that the definition of plant in national law is as broad as that of specimen given in Article 1(m) of the Directive, particularly in so far as concerns the inclusion of any part of or derivative obtained from a plant and any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts of derivatives of plants of those species.

74 It is important to bear in mind that, under Article 13(2) of the Directive, the prohibitions referred to in Article 13(1)(a) and (b) apply to all stages of the biological cycle of the plants to which Article 13 applies.

75 Even if the definition of plant in national law is narrower than that of specimen in Article 1(m), the Court finds that the Commission has failed to demonstrate why that should be inconsistent with Article 13(2) of the Directive, which makes no direct reference to specimens but instead refers to Article 13(1)(b) which does refer to specimens and lays down precise prohibitions in relation to specimens of protected specimens.

76 Consequently, the complaint of incomplete transposition of Article 13(2) of the Directive, as formulated by the Commission, must be rejected.

77 In view of the foregoing, the complaint of incomplete transposition of Article 13(1)(b) of the Directive must be upheld.

*Non-transposition of Article 14 of the Directive*

78 The Commission maintains that Article 14 of the Directive is not optional but contains an unconditional obligation of surveillance of the species listed in Annex V together with an obligation to take appropriate measures to ensure that those species are maintained at a favourable conservation status where the competent authorities deem it necessary, that is to say where surveillance reveals that, without such measures, the conservation status of the species would be endangered.

79 In the letter of reply, the Luxembourg authorities acknowledged that national law fails to provide for the surveillance obligation relating to completely and partially protected species or the associated obligation to adopt appropriate measures to ensure that those species are maintained at a favourable conservation status. They have acknowledged the need to modify the law on this point.

80 It therefore appears that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V to the Directive as well as their exploitation is not coupled in Luxembourg law with an obligation to adopt, where their conservation status so warrants, appropriate measures to ensure that those species are maintained at a favourable conservation status.

81 The complaint of non-transposition of Article 14 of the Directive must therefore be regarded as well founded.

*Incorrect transposition of Article 15 of the Directive*

82 The Commission maintains that the transposition measures communicated to it by the Grand Duchy of Luxembourg fail to ensure the correct transposition of Article 15 of the Directive. It refutes the reasoning put forward in the letter of reply in support of the contrary view.

83 Indeed, the letter of reply states that, since the Grand Duchy of Luxembourg intended to avail itself of the derogation provided for by Article 16 of the Directive, it was necessary for it to transpose Article 15 of the Directive. The means of capture and killing mentioned in Article 15(a) and (b) of the Directive are exactly the same as those provided for in and prohibited by the Bern Convention. They are also prohibited, without exception, by the rules on hunting and fishing. Moreover, the Luxembourg Government has stated that the arrêté grand-ducal du 10 mars 1959 ayant pour objet la destruction des animaux malfaisants et nuisibles (Grand-Ducal Decree of 10 March 1959 on the elimination of harmful animals and vermin, hereinafter 'the Grand-Ducal Decree'), which imposes no restriction on the means of destruction used, is to be repealed by a new Grand-Ducal regulation of which a draft already exists.

84 It is important to bear in mind that Annex VI (a) to the Directive, to which Article 15 refers, includes amongst the prohibited methods and means of capture and killing traps which are non-selective according to their principle or their conditions of use and smoking out. However, in so far as it authorises the destruction of animals of the species listed in Annex V (a) to the Directive such as the marten and polecat, by means of smoking out with terriers or with the aid of traps, which, moreover, are not expressly required to be selective, the Grand-Ducal Decree is inconsistent with Article 15 of the Directive. Furthermore, it is not apparent from the file that the Grand-Ducal Decree was repealed within the period laid down in the reasoned opinion.

85 It follows that, in any event, the complaint of incorrect transposition of Article 15 of the Directive must be regarded as well founded.

*Unsatisfactory transposition of Article 16(1) of the Directive*

86 According to the Commission, the transposition measures mentioned in the letter of reply are unsatisfactory as regards Article 16(1) of the Directive.

87 As far as concerns Article 26 of the Nature Protection Law, which provides that the competent minister may grant derogations from Articles 13 to 18 of that law for scientific purposes or in the public interest, it should be observed that the grant of such derogations has not been made conditional upon there being no other satisfactory solution, as is required by Article 16(1) of the Directive.

88 As regards Article 9 of the Bern Convention, even if that provision makes the grant of derogations from the protection rules laid down in the convention subject to the same conditions as those specified in Article 16(1) of the Directive, and in particular the condition that there be no other satisfactory solution, the fact that that system of derogations and that implemented by Article 26 of the Nature Protection Law coexist in Luxembourg's national law is, in any event, contrary to Article 16(1) of the Directive because that situation in fact creates in this case an ambiguity liable to render compliance with Article 16(1) less than certain.

89 The complaint of unsatisfactory transposition of Article 16(1) of the Directive must therefore be upheld.

*Incorrect transposition of Article 22(b) and (c) of the Directive*

Article 22(b) of the Directive

90 In reply to the complaint of incorrect transposition of Article 22(b) of the Directive, as formulated in the letter of formal notice, the Luxembourg authorities state that that provision was transposed by Article 25 of the Nature Protection Law, which prohibits the introduction of non-indigenous species into the wild except with the authorisation of the competent minister, to which appropriate conditions may be attached.

91 In this connection it should be observed that Article 25 of the Nature Protection Law does not make the grant of the ministerial authorisation referred to in that provision conditional upon satisfaction of the requirements of Article 22(b) of the Directive, particularly the requirement that authorisation should be granted only where no harm would be caused to natural habitats.

92 Consequently, Article 25 of the Nature Protection Law does not correctly transpose Article 22(b) of the Directive. The Commission's complaint in this regard must therefore be regarded as well founded.

Article 22(c) of the Directive

93 The letter of reply maintains that Article 22(c) of the Directive, which is designed to promote education and general information on the need to protect species of wild fauna and flora and to conserve natural habitats, is transposed by Article 3(3) of the Bern Convention, by Article 13 of the Convention on Biological Diversity concluded in Rio de Janeiro on 5 June 1992 and approved by the Law of 4 March 1994 (*Mémorial* A 1994, p. 429), to which the European Community became a party by Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ 1993 L 309, p. 1), and by the Law of 10 August 1992 on freedom of access to environmental information and rights of action of associations for the protection of nature and the environment (*Mémorial* A 1992, p. 2204).

94 Whilst it maintains that the Law of 10 August 1992 just mentioned contains no provision for actively supplying the public with information, the Commission acknowledges that Article 3(3) of the Bern Convention and Article 13 of the Convention on Biological Diversity are in principle capable of transposing Article 22(c) of the Directive satisfactorily. Nevertheless, the institution objects that the Grand Duchy of Luxembourg has failed to show that its legal system includes the principle of direct effect of the so-called self-executing provisions of international conventions that are properly approved and published.

95 Since it is not disputed that the provisions of the Bern Convention and of the Convention on Biological Diversity just mentioned are capable of satisfactorily transposing Article 22(c) of the Directive, the Court must confine itself to considering whether those provisions have in fact been incorporated into Luxembourg law.

96 There is no doubt that the provisions have been incorporated in the present case. Indeed the conventions in question were approved by laws of the Grand Duchy of Luxembourg and require no further measures to be taken in order for them to achieve their full effect in the internal legal system of that Member State.

97 That being so, the complaint of incorrect transposition of Article 22(c) of the Directive must be rejected.

98 In view of the foregoing, the Court must uphold the complaint of inappropriate transposition of Article 22(b) of the Directive.

*Infringement of Article 23(2) of the Directive*

99 The Commission maintains that the Grand Duchy of Luxembourg has infringed Article 23(2) of the Directive in that the transposition measures which that Member State adopted after the Directive's entry into force and communicated to the Commission contain no reference to the Directive or were not accompanied by any such reference when officially published.

100 The letter of reply states that the essential purpose of the proposed sectoral plan provided for by the Regional Planning Law is the implementation of Directives 79/409 and 92/43 and that a list of all national measures transposing the Directive is to be published in the *Mémorial*.

101 However, it is apparent that no such list has been published within the period laid down in the reasoned opinion.

102 It follows that the complaint of infringement of Article 23(2) of the Directive is well founded.

103 In light of the foregoing, it must be held that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b), 14, 15, 16(1), 22(b) and 23(2) of the Directive in conjunction with Annexes I, II, IV, V and VI to the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Directive.

Costs

104 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if there has been an application to that effect. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful in the majority of its pleas, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b), 14, 15, 16(1), 22(b) and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;**

2. **Orders the Grand Duchy of Luxembourg to pay the costs.**

Puissochet Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 13 February 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

30 January 2002 *

In Case C-103/00,

Commission of the European Communities, represented by R. Wainwright and P. Panayotopoulos, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni-Rantou and P. Skandalou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos (Greece) so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed

* Language of the case: Greek.

to fulfil its obligations under the EC Treaty and under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, R. Schintgen and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2001,

gives the following

## Judgment

1 By application lodged at the Court Registry on 17 March 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos (Greece) so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, the 'Directive').

### The relevant provisions

2 Article 2(1) of the Directive states that the aim of the Directive is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

3 Article 2(2) states that measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

4 Article 12(1) provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

5 The sea turtle *Caretta caretta* is one of the species listed in Annex IV(a) of the Directive.

6 Under Article 23(1), Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification, and to forthwith inform the Commission thereof. Since notification of the Directive took place in June 1992, the relevant time-limit expired in June 1994.

Pre-litigation procedure

7 The deterioration in the conservation conditions for the sea turtle *Caretta caretta* on the island of Zakinthos was criticised by non-governmental organisations. In addition, by a letter of 3 July 1998, the Commission requested information from the Greek authorities on measures for the protection of that species on the island.

8 On 16 and 17 July 1998, Commission officials went on a mission to Zakinthos to verify whether any measures for the protection of the sea turtle *Caretta caretta* had in fact been implemented. In the course of the mission, they visited the beaches at Laganas, Kalamaki, Sekania, Dafni and Gerakas, the places where that species lays its eggs. They found that the protective measures at all of the places visited were inadequate, in particular:

— there was no supervision and there were no notices on the beaches;

— there were pedalos and boats in the sea area where their use is prohibited;

— there were a significant number of beach umbrellas and deck-chairs on various beaches (Kalamaki, Gerakas, Dafni);

— there were illegal buildings and recent works on the beach at Dafni.

9 In response to the Commission's letter of 3 July 1998, the Greek authorities, by letter of 22 July 1998, referred *inter alia* to port regulations adopted during the first half of the 1990s, to the implementation of programmes for monitoring sea turtles and to public information and awareness campaigns.

10 The Commission took the view that the Hellenic Republic had not taken the requisite measures to introduce an effective system of protection for the sea turtle *Caretta caretta* at Zakinthos and, consequently, had failed to fulfil its obligations under Article 12(1)(b) and (d) of the Directive. By letter of 2 December 1998, it therefore gave the Greek Government formal notice to submit its observations on the matter.

11 The Greek authorities replied in a letter of 17 March 1999, stating that a draft presidential decree on the creation of a marine park of Zakinthos had been submitted to the Greek Council of State for finalisation. They also informed the Commission that they had established a committee charged with drafting a special presidential decree, of general nature, containing financial provisions applicable to all the protected natural regions in Greece. In addition, they notified

the Commission of their intention to draft a third presidential decree on compensatory measures for the marine park of Zakinthos. In the same letter, the Greek authorities also announced a series of measures such as, in particular, the demolition of all illegal buildings on the beaches, the establishment of a national land register, the prohibition of vehicle access to the beaches, the replacement of the current lighting which disturbs the sea turtles, and the removal of deck-chairs and beach umbrellas. They also stated that a contract had been signed on the construction of a high-speed patrol boat for the use of the Zakinthos port police for the purpose of ensuring compliance with the planned measures.

12 The Commission concluded that the Greek authorities had still not adopted the measures needed to introduce an effective system of protection for the sea turtle *Caretta caretta* on Zakinthos by creating the appropriate institutional framework or taking measures at the sites to protect that species. By letter of 15 June 1999, the Commission therefore delivered a reasoned opinion to the Hellenic Republic in which it reiterated the complaints contained in its letter of formal notice and requested that Member State to comply with the reasoned opinion within two months from the date of its notification.

13 On 24 and 25 August 1999, Commission officials carried out another mission to Zakinthos, in which they once again inspected the principal beaches used for breeding by the sea turtle *Caretta caretta*. They noted, in particular, a certain amount of progress in comparison with the situation prevailing at the time of their earlier mission, including *inter alia* the presence of supervisors and notices on the beaches, the publication and distribution of information pamphlets and the fact that a high-speed patrol boat had been put into service. However, they also found that:

— there were pedalos and small boats in Sea Area A at Gerakas and Dafni;

— pedalos and small boats were moored in Sea Area B at Kalamaki;

— there were beach umbrellas and deck-chairs on various beaches (Gerakas, Dafni, Kalamaki, Laganas) in numbers clearly exceeding the number permitted by the draft presidential decree on the creation of the marine park of Zakinthos;

— the number of illegal buildings on the beach at Dafni had increased;

— mopeds were being driven on the sand beach to the east of Laganas;

— supervisory measures on certain beaches were inadequate.

14 On 29 October 1999, the Greek authorities replied to the reasoned opinion by informing the Commission that a budget of GRD 30 million for a public information programme and for the supervision, cleaning and protection of the sand beaches on the biotope of the bay of Laganas on Zakinthos had been approved for the summer of 1999. The Greek authorities also stated that the beach umbrellas had been removed from the beach at Dafni and that the number of beach umbrellas on the beach at Gerakas had been considerably reduced so as not to exceed the limit fixed for that beach by the draft presidential decree on the creation of the marine park of Zakinthos.

15 Since the Commission did not receive any other information to lead it to conclude that the Hellenic Republic had complied with its obligations under the Directive, it decided to bring the present action.

Substance

16 The Commission states that the sea turtle *Caretta caretta* only lays eggs every two or three years. In Greece, the laying season starts at the end of May and finishes at the end of August. The turtle leaves the sea at night and moves towards the driest area of the beach, where it digs a hole of 40 to 60 centimetres in which it lays an average of 120 eggs. The Commission explains that two months later the eggs hatch and the baby turtles then crawl onto the sand and head towards the sea. The baby turtles are very vulnerable and a large number of them die.

17 The Commission emphasises the fact that the bay of Laganas on Zakinthos is a vital breeding region, perhaps even the most important in the Mediterranean, for the sea turtle *Caretta caretta*. Given the significance of the bay of Laganas, the Greek authorities have proposed that the region be classified as one of the sites of Community importance for the Natura 2000 network.

18 The Commission's principal complaint is that the Hellenic Republic has infringed its obligations under the Treaty and Article 12(1)(b) and (d) of the Directive, first, by failing to adopt a legislative framework which would ensure the strict protection of the sea turtle *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration or destruction of its breeding sites and, second, by failing to take specific measures to prevent such nuisances.

*Legislative provisions for the protection of the Caretta caretta species*

19 According to the Commission, the Greek Government has not adopted an institutional framework within the prescribed time-limit capable of ensuring the effective long-term protection of the sea turtle *Caretta caretta*.

20 The Greek Government claims that by issuing a presidential decree on 22 December 1999 which classifies the land and sea regions of the bay of Laganas and the Strofada islands as a national marine park and the costal areas of the communes of Zakinthos and Laganas as a regional park (FEK D'906/22.12.1999, the 'Decree of 1999'), it has instituted a system of strict protection for the sea turtle *Caretta caretta*.

21 The Greek Government submits that, over the last 20 years, measures have been progressively taken to ensure the protection of that species on the island of Zakinthos. It refers to various laws, regulations and administrative measures adopted to that end from 1980 onwards. The Decree of 1999 constitutes only the most recent measure in a process of progressive implementation of a system of strict protection for that species.

22 According to the Greek Government, the lack of grounds for the Commission's action is also demonstrated by the nesting figures available for the sea turtle *Caretta caretta* on the bay of Laganas over the last 15 years. These figures do not show that the number of nests has decreased.

23 It should be observed in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 18, and Case C-220/99 *Commission* v *France* [2001] ECR I-5831, paragraph 33).

24 The Decree of 1999, on which the Greek Government has based a significant part of its pleadings, was adopted after the expiry of the two-month time-limit laid down in the reasoned opinion.

25 Consequently, it is not necessary to examine whether the system of protection for the sea turtle *Caretta caretta* provided for by that decree meets the protection requirements set out in Article 12(1)(b) and (d) of the Directive.

26 As regards the other measures which, according to the Greek Government, are intended to implement an effective system of protection for that species, it must be remembered that Article 12(1)(b) and (d) of the Directive require that the requisite measures be taken to establish a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural habitats, prohibiting the deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, and the deterioration or destruction of breeding sites or resting places.

27 First, it is undisputed that the bay of Laganas is a vital breeding region for the protected species *Caretta caretta*.

28 Second, according to the findings of the Greek Council of State in a report in 1999 annexed to the draft presidential decree establishing the marine park of Zakinthos, the provisions in force at that time did not ensure, to the extent necessary, the effective protection of the sea and land areas of the bay of Laganas. In particular, given the pressure and the erosion caused to the breeding beaches at Dafni, Gerakas and Kalamaki by the construction of access routes to those beaches and given the noise resulting from human activity, the Council of State recommended the prohibition not only of the opening of new access routes to those beaches, but also of the creation of infrastructure such as kiosks, tents or parking facilities. The Greek Government does not contest those matters.

29 Third, it should be observed that during the pre-litigation period, the Greek Government particularly stressed that the adoption of a decree creating a marine park at Zakinthos would introduce a system of strict protection for the sea turtle *Caretta caretta*. In its defence, the Greek Government claimed that, in respect of that species, the Decree of 1999 met the protection objectives set out in Article 12 of the Directive. In its rejoinder, the Greek Government submitted, for the first time, that the requisite measures to establish a system of strict protection for that species pursuant to Article 12(1)(b) and (d) of the Directive had been taken prior to 14 August 1999, the date on which the time-limit set by the Commission expired. However, in the oral hearing, the Greek Government admitted that the Decree of 1999 had established a system creating stricter protection than had been afforded by the system of protection previously in force. It should also be observed that, when asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system on 14 August 1999 which it

believed met the requirements laid down by Article 12(1)(b) and (d) of the Directive, the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements.

30 In the light of the foregoing, it must be held that the Greek Government did not adopt a legal framework within the prescribed time-limit which was capable of ensuring strict protection for the sea turtle *Caretta caretta* against any deliberate disturbance during the breeding period and against any deterioration or destruction of its breeding sites. Consequently, the Commission's application must be granted on this point.

31 The fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question.

*Specific measures for the protection of the Caretta caretta species*

32 The Commission points out that, during a visit to the breeding beaches of the sea turtle *Caretta caretta* on the island of Zakinthos at the end of August 1999, its officials reported *inter alia* the use of mopeds on the sand beach to the east of Laganas, the presence of pedalos and small boats in the sea around Gerakas and Dafni and the presence of illegal buildings on the beach at Dafni.

33 The Greek Government does not dispute the accuracy of those findings.

34 It is undisputed that the use of mopeds on a beach used for breeding by the *Caretta caretta* turtle is, particularly owing to the noise pollution, liable to disturb that species during the laying period, the incubation period and the hatching of the eggs, as well as during the baby turtles' migration to the sea. It is also established that the presence of small boats near the breeding beaches constitutes a source of danger to the life and physical well-being of the turtles.

35It is apparent from the documents before the Court that at the time the facts were ascertained by the Commission's officials, the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.

36 It follows that the use of mopeds on the sand beach to the east of Laganas and the presence of pedalos and small boats in the sea area around Gerakas and Dafni constitute the deliberate disturbance of the species in question during its breeding period for the purposes of Article 12(1)(b) of the Directive.

37 Moreover, the acts were not isolated occurrences. As regards the use of mopeds on the breeding beaches, this is clear from the Greek Government's assertion that nocturnal supervision of the eastern part of beach at Laganas was, at the material time, particularly difficult to ensure owing to the length of the beach, the high number of access points and the low number of supervisors. As far as the presence of small boats in the relevant sea area is concerned, it should be noted that these were observed on two visits to Zakinthos by Commission officials, as stated at paragraphs 8 and 13 of this judgment.

38 Finally, there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive.

39 It must, therefore, be held that the Hellenic Republic did not take, within the prescribed time-limit, all the requisite specific measures to prevent the deliberate disturbance of the sea turtle *Caretta caretta* during its breeding period and the deterioration or destruction of its breeding sites. Consequently, the Commission's application must also be granted on this point.

40 In the light of the foregoing, the Court finds that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of the Directive.

## Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

2. Orders the Hellenic Republic to pay the costs.

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 30 January 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2001 *

In Case C-67/99,

**Commission of the European Communities**, represented by R. Wainwright and P. Stancanelli, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland**, represented by M.A. Buckley, acting as Agent, H.A. Whelehan SC and A.M. Collins BL, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), together with the information on each site required by the second subparagraph of Article 4(1) thereof, Ireland has failed to fulfil its obligations under that directive,

* Language of the case: English.

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, R. Schintgen, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

## Judgment

1 By application lodged at the Court Registry on 25 February 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992

L 206, p. 7) ('the directive'), together with the information on each site required by the second subparagraph of Article 4(1) thereof, Ireland has failed to fulfil its obligations under that directive.

## Community law

2 According to its Article 2, the aim of the directive is to contribute towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 Article 3(1) and (2) of the directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

4 A 'site' is defined by Article 1(j) of the directive as a geographically defined area whose extent is clearly delineated. Article 1(k) of the directive defines a 'site of Community importance' as being a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance must correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction.

5 The procedure governing the designation of special areas of conservation ('SACs'), which is laid down in Article 4 of the directive, consists of four stages. First, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II native to its territory the sites host (Article 4(1)). Second, the Commission, on the basis of the Member States' lists and in agreement with each of them, must establish a draft list of sites of Community importance (Article 4(2), first and second subparagraphs). Third, the list of sites selected as sites of Community importance must be adopted by the Commission in accordance with the procedure laid down in Article 21 of the directive (Article 4(2), third subparagraph, and 4(3)). Fourth, Member States are required to designate sites of Community importance as SACs (Article 4(4)).

6 With more specific regard to the first stage, Article 4(1), first subparagraph, of the directive requires Member States to propose the list of sites there mentioned

on the basis of the criteria set out in Annex III (Stage 1) to the directive and relevant scientific information.

7 Annex III (Stage 1), Parts A and B, to the directive sets out the following criteria:

'A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.'

8 Under Annex III (Stage 1), Part C, to the directive, Member States are required, on the basis of the criteria set out in Annex III (Stage 1), Parts A and B, to classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

9 Under the second subparagraph of Article 4(1) of the directive, the list of sites proposed must be transmitted to the Commission within three years of notification of the directive, together with information on each site. This information must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1), and must be provided in a format established by the Commission in accordance with the procedure laid down in Article 21 of the directive ('the format').

10 Since the directive was notified on 10 June 1992, Member States ought to have transmitted the list of proposed sites and the information on those sites to the Commission before 11 June 1995.

11 The format was established only by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1). That decision was notified to the Member States on 19 December 1996 and published in the *Official Journal of the European Communities* on 24 April 1997.

## Pre-litigation procedure

12 Having failed to receive from the Irish authorities either a full list of sites hosting the natural habitat types and native species referred to in Annexes I and II to the directive respectively or the information on those sites, and in the absence of anything else indicating to it that Ireland had adopted the measures necessary to meet its obligations under Article 4 of the directive, the Commission, on 24 April

1996, put the Irish Government on formal notice to submit its observations on that matter within two months, in accordance with the procedure laid down in Article 169 of the EC Treaty.

13 By letter of 28 April 1997, the Irish authorities communicated a list of 207 sites covering 5 530 $km^2$ which had been publicly proposed for designation as SACs and which hosted priority natural habitats.

14 Bearing in mind the fact that the format had been available only from 19 December 1996, the Commission sent to the Irish Government on 11 July 1997 an additional letter of formal notice in which it once again complained that it had failed to transmit a full list of sites and relevant site information and called on it to submit its observations on that infringement of Article 4(1) of the directive within one month. The Commission stressed, in particular, the need to use the format for transmission of the relevant data.

15 By letter of 5 September 1997, the Irish authorities informed the Commission of their intention to give effect to the first subparagraph of Article 4(1) of the directive by preparing the required list in three tranches, the first consisting of sites hosting priority natural habitat types, the second consisting of sites hosting non-priority natural habitats and species, and the third consisting of marine sites. With regard to the list transmitted on 28 April 1997, concerning the first of the three tranches, the Irish authorities pointed out that this had never been intended to replace or remove the need for the formal transmission mechanism.

16 Since its correspondence with the Irish authorities did not allow it to conclude that Ireland had transmitted a full list of the sites hosting the natural habitat types and native species listed in Annexes I and II to the directive respectively or the information relating to those sites, the Commission, acting in accordance with

Article 169 of the EC Treaty, issued a reasoned opinion to Ireland on 19 December 1997, in which it called on that Member State to comply therewith within two months of its notification.

17 By letter of 23 February 1998, the Irish authorities informed the Commission that their failure to transmit the list of sites and the information relating to those sites was attributable to delays associated with the public consultation process in Ireland, and indicated that they expected to be in a position to transmit a list by about mid-1998. By a letter of 30 September 1998 Ireland transmitted a first partial definitive list of 39 sites for purposes of Article 4(1) of the directive. Information on the 39 sites contained on this first partial definitive list had been transmitted separately with a letter of 6 August 1998. By letter of 12 October 1998, the Irish authorities submitted a second partial definitive list of nine sites for purposes of Article 4(1) of the directive. The information on the sites contained on this second list had been sent separately with a letter of 6 October 1998.

18 Taking the view that these communications did not allow it to conclude that Ireland had put an end to the infringement in question, the Commission decided to bring the present action before the Court.

## Admissibility

19 The Irish Government submits that the action must be declared inadmissible in its entirety. It argues that the reasoned opinion fails to satisfy the requirements laid down in the Court's case-law. It does not, it contends, contain a coherent and detailed statement of the reasons which led the Commission to conclude that Ireland had failed to fulfil its Treaty obligations.

20 Moreover, it continues, that opinion does not contain the same grounds and complaints as those which feature in the application. The Irish Government submits in that regard that the reasoned opinion merely mentions Ireland's dilatory compliance with the provisions of Article 4(1) of the directive but makes no reference to the specific heads of complaint in the application which allege that Ireland has failed to comply with the substantive requirements of Article 4(1).

21 It should be noted in this regard that a reasoned opinion must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil its obligations under Community law (see, *inter alia*, Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 15).

22 In addition, the subject-matter of proceedings brought under Article 169 of the EC Treaty is circumscribed by the pre-litigation procedure provided for by that provision and the Commission's reasoned opinion and application must consequently be based on the same complaints (see, *inter alia*, *Commission* v *Italy*, cited above, paragraph 24).

23 That rule, however, does not prevent the Commission from setting out its initial complaints in greater detail in its application, on condition that it does not alter the subject-matter of the dispute (see, along these lines, Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraphs 30 and 31).

24 In its reasoned opinion, the Commission complained that Ireland had failed to forward either the definitive and complete list of sites eligible for designation as

SACs or the information relating to those sites, as required under Article 4(1), first and second subparagraphs, of the directive. The Commission has pointed out in that regard that the indicative and partial list forwarded by the Irish authorities on 28 April 1997 could not be treated as being a full list either from the geographical point of view or with regard to the types of natural habitats and species' habitats to be covered, and that the site information communicated did not relate to all of the sites in question.

25 In its application, the Commission set out the same heads of claim as in the reasoned opinion. It pointed out that, in view of the scientific reference sources, the definitive and partial list of sites proposed by Ireland was insufficient. It stated that Ireland had not proposed any sites for 26 natural habitat types of Community interest — including seven priority natural habitats extensively represented within its territory, such as coastal lagoons, Atlantic decalcified fixed dunes (*Cannulo-Ulicetea*), decalcified fixed dunes with *Empetrum nigrum*, active raised bogs, bog woodland, and *Taxus baccata* woods of the British Isles — or for 20 species of Community interest, such as *Rhinolophus hipposideros*, *Phoca vitulina*, *Alosa fallax*, *Geomalacus maculosus* and *Margaritifera margaritifera*, of which it has sizeable populations. The Commission also noted that, for certain natural habitat types and certain species, the number of sites definitively proposed by Ireland was inadequate.

26 It first of all follows from the foregoing that, in this case, the reasoned opinion does satisfy the requirements of the Court's case-law referred to in paragraph 21 of the present judgment.

27 Second, this analysis makes possible the finding that the Commission did not, in its application, alter the subject-matter of the dispute, but confined itself to illustrating the head of complaint set out in its reasoned opinion, concerning the failure to transmit a list of all the sites eligible for designation as SACs, by providing precise examples of the shortcomings in the lists which had already been forwarded by Ireland.

28 The plea of inadmissibility raised by Ireland must for those reasons be rejected.

## Substance

### *The first plea in law*

29 With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the directive respectively. It is clear from the combined provisions of Article 4(1) of and Annex III to the directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

— only criteria of a scientific nature may guide the choice of the sites to be proposed;

— the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be

submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

— the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural habitat types listed in Annex I and all the species' habitats listed in Annex II to the directive which exist on its territory.

30 So far as the Irish national list is concerned, the Commission notes that, when the period laid down in the reasoned opinion expired on 19 February 1998, Ireland had forwarded to it a list of 207 sites, but that this was no more than an indicative list. When the Commission brought its action before the Court on 25 February 1999, Ireland had not confirmed this indicative list but had merely sent a partial definitive list of 48 sites and related information, and at the date of the hearing, 18 January 2001, Ireland had transmitted in total a list of 362 sites.

31 The Commission states that it instituted the present proceedings with a view to securing a declaration that the Irish national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion given to Member States. Not only is such inadequacy evident with regard to the situation existing when the period set in the reasoned opinion expired, but also a whole series of provisos concerning the list of 362 sites still remained to be formulated. The Irish national list, the Commission concludes, did not therefore meet the criteria set out in Article 4(1) of the directive, read in conjunction with Annex III thereto.

32 The Irish Government accepts that, when the period laid down in the reasoned opinion expired, it had not forwarded to the Commission any list of sites capable

of being designated as SACs. It argues that this delay was attributable to domestic difficulties. In order to obtain approval of the population for the ambitious objectives pursued by the directive, it was considered necessary to launch a vast programme of public consultation. It points out that the 362 Irish sites officially notified up to January 2001 are protected under Irish law, which goes much further than what is required under the directive.

33 Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the directive.

34 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

35 Only in that way, moreover, is it possible to realise the objective, in the first subparagraph of Article 3(1) of the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the

directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies (*First Corporate Shipping*, cited above, paragraph 23).

36 It is also necessary to recall that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes (see, *inter alia*, Case C-266/99 *Commission* v *France* [2001] ECR I-1981, paragraph 38).

37 When the period laid down in the reasoned opinion expired on 19 February 1998, the content of the Irish national list sent to the Commission was manifestly inadequate, going well beyond the margin of discretion available to Member States for the purpose of drawing up the list of sites mentioned in Article 4(1), first subparagraph, of the directive. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.

38 It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, Ireland has failed to fulfil its obligations under that directive.

*The second plea in law*

39 With regard to the obligation to transmit information on the sites eligible for designation as SACs, the Irish Government acknowledges that it had not sent that

information by the expiry of the period laid down in the reasoned opinion, but at the same time argues that, since the format was not adopted until December 1996 and the Commission insisted that the information in question be transmitted by means of that format, it was not possible to complete this important work within the set period.

40 The Commission submits that the obligation to transmit the site information had to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission.

41 The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to Ireland on 11 July 1997, thus well after the date on which the format was notified. The Irish authorities were therefore fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 19 February 1998, Ireland had not sent to the Commission the information on the sites to be proposed.

42 It is necessary first to point out that, even though the Commission had initially sent to the Irish Government a letter of formal notice on 24 April 1996, that is to say, before the format was notified, it sent to the Irish Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph, of the directive.

43 Next, it must be noted that, following notification of the directive on 10 June 1992, the Member States were aware which types of information they would be

required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the directive expressly states that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1).

44 The period which the Commission gave to the Irish Government for meeting its obligation to include on the format the site information, which it was required to have at its disposal prior to 11 June 1995, must consequently be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 19 February 1998, when the period laid down in the reasoned opinion expired, the Irish Government benefited from a period of more than one year to comply with that specific obligation.

45 Since the Irish Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, on the basis of the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the period prescribed, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1) of the directive, pursuant to the second subparagraph of that article, Ireland has failed to fulfil its obligations under that directive.

## Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for an order for costs against Ireland and the latter has been unsuccessful, Ireland must be ordered to bear the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to transmit to the Commission, within the period prescribed, the list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, together with the information on those sites required by the second subparagraph of Article 4(1) thereof, Ireland has failed to fulfil its obligations under that directive;**

2. **Orders Ireland to bear the costs.**

Gulmann Skouris Schintgen

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)
11 September 2001 *

In Case C-71/99,

**Commission of the European Communities**, represented by G. zur Hausen and P. Stancanelli, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany**, represented by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

defendant,

APPLICATION for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council

* Language of the case: German.

Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, R. Schintgen, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

## Judgment

1 By application lodged at the Court Registry on 1 March 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the directive'), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

### Community law

2 According to Article 2, the aim of the directive is to contribute towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 Article 3(1) and (2) of the directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

4 A 'site' is defined by Article 1(j) of the directive as a geographically defined area whose extent is clearly delineated. Article 1(k) of the directive defines a 'site of Community importance' as being a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance are to correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction.

5 The procedure governing the designation of special areas of conservation ('SACs'), which is laid down in Article 4 of the directive, consists of four stages. First, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II native to its territory the sites host (Article 4(1)). Second, the Commission, on the basis of the lists of the

Member States and in agreement with each of them, must establish a draft list of sites of Community importance (Article 4(2), first and second subparagraphs). Third, the list of sites selected as sites of Community importance must be adopted by the Commission in accordance with the procedure laid down in Article 21 of the directive (Article 4(2), third subparagraph, and 4(3)). Fourth, Member States are required to designate sites of Community importance as SACs (Article 4(4)).

6 With more specific regard to the first stage, Article 4(1), first subparagraph, of the directive requires Member States to propose the list of sites there mentioned on the basis of the criteria set out in Annex III (Stage 1) to the directive and relevant scientific information.

7 Annex III (Stage 1), Parts A and B, to the directive sets out the following criteria:

'A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.'

8 Under Annex III (Stage 1), Part C, to the directive, Member States are required, on the basis of the criteria set out in Annex III (Stage 1), Parts A and B, to classify the sites which they propose on the national list as sites eligible for identification

as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

9 Under the second subparagraph of Article 4(1) of the directive, the list of sites proposed must be transmitted to the Commission within three years of notification of the directive, together with information on each site. This information must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1), and must be provided in a format established by the Commission in accordance with the procedure laid down in Article 21 of the directive ('the format').

10 Since the directive was notified on 10 June 1992, Member States ought to have transmitted the list of proposed sites and the information on those sites to the Commission before 11 June 1995.

11 The format was established only by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1). That decision was notified to the Member States on 19 December 1996 and published in the *Official Journal of the European Communities* on 24 April 1997.

## Pre-litigation procedure

12 Having failed to receive from the German authorities either the full list of sites hosting the natural habitat types and native species referred to in Annexes I and II

to the directive respectively or the information on those sites, and in the absence of any other information indicating to it that the Federal Republic of Germany had adopted the measures necessary to meet its obligations under Article 4 of the directive, the Commission, on 4 March 1996, put the German Government on formal notice to submit its observations on that matter within two months, in accordance with the procedure laid down in Article 169 of the EC Treaty.

13 The German authorities informed the Commission on 8 August 1996 that, under German law, the power to select sites eligible for designation as SACs is vested in the *Länder*. In view of the fact that the *Länder* had informed them that they would designate those areas only once the directive had been implemented in national law, the German authorities stated that they were not as yet in a position to submit the full list of national sites eligible for designation as SACs.

14 By letters of 30 September 1996, 24 January 1997, 28 January 1997 and 11 June 1997, the German authorities sent to the Commission a number of lists of sites in the *Länder* of Bayern and Sachsen-Anhalt.

15 Bearing in mind the fact that the format had not been available until 19 December 1996, the Commission sent to the German Government on 3 July 1997 an additional letter of formal notice in which it reiterated its criticism of that Government for having failed to send to it the full list of the sites and site information and called on it to submit, within one month, its observations on that infringement of Article 4(1) of the directive. The Commission stressed in particular the need to use the format for transmission of the relevant data.

16 By letter of 21 October 1997, the German authorities sent a list of sites in the *Land* of Schleswig-Holstein. By letter of 27 October 1997 they reiterated the special features of their national law, under which competence in this matter is conferred on the *Länder*. They pointed out in this regard that, since the transposing legislation had still not been adopted, the *Länder* did not intend to forward the complete list of sites which they were considering for selection.

17 Forming the view that its correspondence with the German authorities did not allow it to conclude that the Federal Republic of Germany had forwarded a complete list of sites hosting the natural habitat types and native species referred to respectively in Annexes I and II to the directive, together with the information relating to those sites, the Commission, in accordance with Article 169 of the EC Treaty, sent to that Member State on 19 December 1997 a reasoned opinion calling on it to comply therewith within two months of its notification.

18 By letters of 28 January 1998, 13 and 19 March 1998, 10 and 22 September 1998 and 14, 20 and 27 October 1998, the German authorities sent further lists of sites in the *Länder* of Hessen, Thüringen, Bayern, Sachsen-Anhalt, Saarland, Hamburg, Rheinland-Pfalz, Bremen, Niedersachsen and Berlin. Further, by letters of 25 March 1998, 7 April 1998, 11 May 1998 and 23 June 1998, they forwarded files on the sites previously notified to the Commission. Finally, by letters of 14 and 15 April 1998, they sent to the Commission a schedule proposing a timetable for the measures envisaged by each *Land* for compliance with the obligations arising under Article 4(1) of the directive.

19 Since it formed the view that the material thus forwarded did not allow it to conclude that the Federal Republic of Germany had brought an end to the infringement in question, the Commission decided to bring the present action before the Court.

## Findings of the Court

### *The first plea in law*

20 With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

— only criteria of a scientific nature may guide the choice of the sites to be proposed;

— the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

— the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural

habitat types listed in Annex I and all the species' habitats listed in Annex II to the directive which exist on its territory.

21 The Commission states that it instituted the present proceedings with a view to securing a declaration that the German national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion conferred on Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, and even though the German authorities have, since then, forwarded several other lists of sites, the infringements of which they stand accused still persist. The Commission submits in this connection that a comparison between the proposals of the German authorities and the scientific data provided by those authorities, in particular the manual entitled 'Das europäische Schutzgebietssystem Natura 2000' edited by the *Bundesamt für Naturschutz* (Federal Office for Nature Protection) amply demonstrates the true nature of those infringements. The German national list does not therefore, in the Commission's opinion, satisfy the criteria referred to in Article 4(1) of the directive, read in conjunction with Annex III thereto.

22 The German Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which it intended to include on the list of sites mentioned in the first subparagraph of Article 4(1) of the directive. However, it submits, first, that compliance with the obligation to forward such a list under the first subparagraph of Article 4(1) of the directive was conditional on the Member States' receiving the format, which is the first document to define the information enabling relevant sites to be selected. Consequently, the period provided for compliance with that obligation could have begun to run, at the earliest, only from notification of the format and had not yet expired at the date on which the action was brought.

23 Second, the German Government contends that the directive confers on the Member States a wide margin of discretion in regard to selection of the sites for inclusion on the list to be forwarded to the Commission. The Member States are

therefore entitled to notify only those sites which they consider to be appropriate and necessary for the establishment of a coherent European network of SACs, on the basis of technical criteria and having regard to the objectives of the directive. The national level, it argues, is the most appropriate one at which to carry out an adequate selection among the sites hosting the natural habitats and species' habitats referred to respectively in Annexes I and II to the directive. The Member States, it argues, are better informed as to the sites present within their territory.

24 Third, the German Government challenges the scientific sources to which the Commission referred in order to demonstrate that the German Government had forwarded an incomplete list. It contends that the manual mentioned in paragraph 21 of the present judgment is in no wise the German reference list, and is not even a scientifically certain basis of assessment.

25 It must first be stated that the obligation to forward the list of sites mentioned in the first subparagraph of Article 4(1) of the directive was not conditional on adoption of the format. The format is not the first text to have defined the information allowing Member States to select the relevant sites. Once the directive had been notified, the Member States were aware of all the selection criteria to be taken into consideration. Article 4(1) of the directive requires each Member State to propose, on the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, a list of sites indicating which types of natural habitat under Annex I and which native species under Annex II to the directive they host. It follows from Annex III (Stage 1) to the directive that the relevant criteria are the degree of representativity of the natural habitat type on the site, the area of the site covered by the natural habitat type and its degree of conservation, the size and density of the population of the species present on the site, their degree of isolation, the degree of conservation of their habitats and, finally, the comparative value of the sites.

26 Next, although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, that

Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the directive.

27 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

28 Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1) of the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies (*First Corporate Shipping*, cited above, paragraph 23).

29 Finally, it must be borne in mind that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned

opinion. The Court cannot therefore take account of any subsequent changes (see, *inter alia*, Case C-266/99 *Commission* v *France* [2001] ECR I-1981, paragraph 38).

30 When the period laid down in the reasoned opinion expired on 19 February 1998, the content of the German national list sent to the Commission was manifestly inadequate, far exceeding the margin of discretion which Member States enjoy in drawing up the list of sites mentioned in Article 4(1), first subparagraph, of the directive. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.

31 It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

*The second plea in law*

32 With regard to the obligation to transmit information on the sites eligible for designation as SACs, the German Government does not deny its failure to forward that information by the expiry of the period laid down in the reasoned opinion, but argues that the preparatory work necessary for collating information on the sites to be proposed, for the completion of which Member States had a three-year period, could not practically begin until the end of 1996, when the format had been notified to the Member States.

33 The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission.

34 The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the Federal Republic of Germany on 3 July 1997, well after the date on which the format was notified. The German authorities were thus fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 19 February 1998, the Federal Republic of Germany had not sent to the Commission the information on the sites to be proposed.

35 It is necessary first to point out that, even though the Commission had initially sent to the German Government a letter of formal notice on 4 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph, of the directive.

36 Next, it must be noted that, following notification of the directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the directive expressly states that the information to be transmitted, in a format established by the

Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1).

37 The period which the Commission gave to the German Government for meeting its obligation to include on the format the site information, which it was required to have at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 19 February 1998, when the period laid down in the reasoned opinion expired, the German Government benefited from a period of more than one year to carry out that specific operation.

38 Since the German Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the prescribed period, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1) of the directive, pursuant to the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

## Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, together with the information on those sites required by the second subparagraph of Article 4(1) thereof, the Federal Republic of Germany has failed to fulfil its obligations under that directive;**

2. **Orders the Federal Republic of Germany to bear the costs.**

Gulmann Skouris Schintgen

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2001 *

In Case C-220/99,

**Commission of the European Communities,** represented by P. Stancanelli and O. Couvert-Castéra, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**French Republic,** represented by K. Rispal-Bellanger and D. Colas, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the French Republic has failed to fulfil its obligations under that directive,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, V. Skouris, R. Schintgen, F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

## Judgment

1 By application lodged at the Court Registry on 9 June 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to transmit to the Commission the full list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive

92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the directive'), together with the information on each site required by the second subparagraph of Article 4(1) thereof, the French Republic had failed to fulfil its obligations under that directive.

## Community law

2 According to its Article 2, the aim of the directive is to contribute towards biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 Article 3(1) and (2) of the directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.'

4 A 'site' is defined by Article 1(j) of the directive as a geographically defined area whose extent is clearly delineated. Article 1(k) of the directive defines a 'site of Community importance' as being a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or contributes significantly to the maintenance of biological diversity within the biogeographical region or regions concerned. For animal species ranging over wide areas, sites of Community importance must correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction.

5 The procedure governing the designation of special areas of conservation ('SACs'), which is laid down in Article 4 of the directive, consists of four stages. First, each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II native to its territory the sites host (Article 4(1)). Second, the Commission, on the basis of the lists of the Member States and in agreement with each of them, must establish a draft list of sites of Community importance (Article 4(2), first and second subparagraphs). Third, the list of sites selected as sites of Community importance must be adopted by the Commission in accordance with the procedure laid down in Article 21 of the directive (Article 4(2), third subparagraph, and 4(3)). Fourth, Member States are required to designate sites of Community importance as SACs (Article 4(4)).

6 With more specific regard to the first stage, Article 4(1), first subparagraph, of the directive requires Member States to propose the list of sites there mentioned on the basis of the criteria set out in Annex III (Stage 1) to the directive and relevant scientific information.

7 Annex III (Stage 1), Parts A and B, to the directive sets out the following criteria:

'A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.'

8 Under Annex III (Stage 1), Part C, to the directive, Member States are required, on the basis of the criteria set out in Annex III (Stage 1), Parts A and B, to classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

9 Under the second subparagraph of Article 4(1) of the directive, the list of sites proposed must be transmitted to the Commission within three years of notification of the directive, together with information on each site. This information must include a map of the site, its name, location, extent and the

data resulting from application of the criteria specified in Annex III (Stage 1), and must be provided in a format established by the Commission in accordance with the procedure laid down in Article 21 of the directive ('the format').

10 Since the directive was notified on 10 June 1992, Member States ought to have transmitted the list of proposed sites and the information on those sites to the Commission before 11 June 1995.

11 The format was established only by Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1). That decision was notified to the Member States on 19 December 1996 and published in the *Official Journal of the European Communities* on 24 April 1997.

**Pre-litigation procedure**

12 Having failed to receive from the French authorities either a full list of sites hosting the natural habitat types and native species referred to in Annexes I and II to the directive respectively or the information on those sites, and in the absence of anything else indicating to it that the French Republic had adopted the measures necessary to meet its obligations under Article 4 of the directive, the Commission, on 27 March 1996, put the French Government on formal notice to submit its observations on that matter within two months.

13 Bearing in mind the fact that the format had been available only from 19 December 1996, the Commission sent to the French Government on 3 July 1997 an additional letter of formal notice in which it once again criticised it for failing to transmit a full list of sites and relevant site information and called on it

to submit its observations on that infringement of Article 4(1) of the directive within one month. The Commission stressed, in particular, the need to use the format for transmission of the relevant data.

14 By letter of 21 October 1997, the French authorities forwarded an initial list of 74 sites. Partial information on those sites was submitted only in respect of 25 of them. The remaining 49 sites were mentioned only by name, with no reference to the area which they covered or to the types of natural habitats or native species which they hosted.

15 Since its correspondence with the French authorities did not allow it to conclude that the French Republic had forwarded a full list of the sites hosting the natural habitat types and native species listed in Annexes I and II to the directive respectively or the information relating to those sites, the Commission, on 6 November 1997, issued a reasoned opinion to that Member State requesting compliance within two months of notification.

16 By letters of 9 December 1997, 22 and 26 January 1998, 12 February 1998, 17 November 1998, 21 and 28 January 1999 and 18 February 1999, the French authorities forwarded to the Commission site lists containing a total of 672 sites hosting natural habitat types and species' habitats listed in Annexes I and II to the directive respectively and representing a land area of 1 453 000 hectares, together with 381 formats relating to a number of those sites.

17 Taking the view that those communications did not allow it to conclude that the French Republic had put an end to the infringement in question, the Commission decided to bring the present action before the Court.

## Admissibility

18 The French Government argues that the part of the application relating, first, to the inadequate number of sites proposed when considered against the number of sites worthy of inclusion on the national list and, second, to the exclusion of sites on grounds not provided for under the directive must be declared inadmissible on the ground that the Commission did not raise those heads of complaint in the reasoned opinion.

19 It must be noted in this regard that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that the Commission's reasoned opinion and application must consequently be based on the same complaints (see, *inter alia*, Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 24).

20 That rule, however, does not prevent the Commission from setting out its initial complaints in greater detail in its application, on condition that it does not alter the subject-matter of the dispute (see, along these lines, Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraphs 30 and 31).

21 In its reasoned opinion, the Commission criticised the French Republic for having failed to forward either the complete list of sites eligible for designation as SACs or the information relating to those sites, as required under Article 4(1), first and second subparagraphs, of the directive. The Commission has pointed out in that regard that the partial list forwarded by the French authorities on 21 October

1997 could not be treated as being a full list either from the geographical point of view or with regard to the types of natural habitats and species' habitats to be covered, and that the site information communicated did not relate to all of the sites in question.

22 In its application, the Commission set out the same heads of claim as in the reasoned opinion. It first pointed out that the French Republic had not proposed any site situated in military areas but had stated that sites of this type which were eligible for inclusion in the Natura 2000 network would be forwarded subsequently. Second, the Commission noted that no site had been proposed for several types of natural habitats under Annex I and several native species under Annex II to the directive which were none the less to be found on French territory. Third, it pointed out that a comparison between the lists sent and the available scientific data concerning the natural habitat types and native species occurring in France indicated that several of these were not included on those lists. The Commission noted in particular that, of the 1 695 natural areas of ecological interest catalogued and classified according to value in the national scientific inventory compiled by the Muséum national d'histoire naturelle (National Museum for Natural History) under the aegis of the French Government, the latter had decided to exclude 319 of them. Likewise, the Commission contended that the French authorities had, in selecting sites and excluding some of them, taken account of criteria not mentioned in the directive.

23 It follows that, in its application, the Commission did not alter the subject-matter of the dispute but merely illustrated the head of complaint set out in its reasoned opinion, concerning failure to forward a list featuring all sites eligible for designation as SACs, by providing precise examples of the shortcomings in the lists already forwarded by the French Republic.

24 The plea of inadmissibility raised by the French Republic must for those reasons be rejected.

## Substance

*The first plea in law*

25 With regard to the obligation to transmit the site list referred to in Article 4(1), first subparagraph, of the directive, the Commission points out that each Member State's contribution to the setting up of a coherent European ecological network depends on the representation on its territory of the natural habitat types and species' habitats listed in Annexes I and II to the directive respectively. It is clear from a combined reading of Article 4(1) of and Annex III to the directive that Member States enjoy a certain margin of discretion when selecting sites for inclusion in the list. The exercise of that discretion is, however, in the Commission's view, subject to compliance with the following three conditions:

— only criteria of a scientific nature may guide the choice of the sites to be proposed;

— the sites proposed must provide a geographical cover which is homogeneous and representative of the entire territory of each Member State, with a view to ensuring the coherence and balance of the resulting network. The list to be submitted by each Member State must therefore reflect the ecological variety (and, in the case of species, the genetic variety) of the natural habitats and species present within its territory;

— the list must be complete, that is to say, each Member State must propose a number of sites which will ensure sufficient representation of all the natural

habitat types listed in Annex I and all the species' habitats listed in Annex II to the directive which occur within its territory.

26 So far as the French national list is concerned, the Commission notes that, when the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had forwarded to it a list of 535 sites; when it brought its action before the Court, this list had increased to 672 sites; at the date of the hearing, 18 January 2001, the French Republic had forwarded in total a list of 1 030 sites.

27 The Commission states that it instituted the present proceedings with a view to securing a declaration that the French national list was manifestly inadequate, and that such inadequacy far exceeded the margin of discretion given to Member States. Such inadequacy is evident with regard to the situation existing when the period set in the reasoned opinion expired, since the French Republic subsequently almost doubled the number of sites proposed. That inadequacy, moreover, still persists, notwithstanding indubitable progress. The French national list, the Commission concludes, does not therefore meet the criteria set out in Article 4(1) of the directive, read in conjunction with Annex III thereto.

28 The French Government acknowledges that, when the period set in the reasoned opinion expired, it had not forwarded all of the sites which ought to feature on the list of sites mentioned in Article 4(1), first subparagraph, of the directive.

29 The French Government does, however, point out that, at the date of the hearing, the French national list contained a total of 1 030 sites covering approximately 5% of French territory. The Commission, it argues, has failed to adduce any evidence capable of establishing that this list of 1 030 sites does not satisfy the obligation laid down in Article 4(1) of the directive. The first stage of the procedure for the designation of SACs does not, it contends, involve the establishment of an exhaustive inventory of the sites within the territory of each

Member State which host the natural habitat types and native species listed in Annexes I and II to the directive respectively. The relevance of the national list must be judged, not on the basis of the number of sites proposed, but on the basis of the representative nature of the natural habitats and species' habitats featuring on that list, assessed particularly with regard to their degree of rarity and their distribution throughout national territory.

30 Although it follows from the rules governing the procedure for identifying sites eligible for designation as SACs, set out in Article 4(1) of the directive, that Member States have a margin of discretion when making their site proposals, the fact none the less remains, as the Commission has noted, that they must do so in compliance with the criteria laid down by the directive.

31 It should be noted in this regard that, in order to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive (Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

32 Only in that way, moreover, is it possible to realise the objective, set out in the first subparagraph of Article 3(1) of the directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i) of the directive, read in conjunction with Article 2(1) thereof, that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies (*First Corporate Shipping*, cited above, paragraph 23).

33 It must also be recalled that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion. The Court cannot therefore take account of any subsequent changes (see, *inter alia*, Case C-266/99 *Commission* v *France* [2001] ECR I-1981, paragraph 38).

34 When the period laid down in the reasoned opinion expired on 6 January 1998, the content of the French national list sent to the Commission was manifestly inadequate, going well beyond the margin of discretion available to Member States for the purpose of drawing up the list of sites mentioned in Article 4(1), first subparagraph, of the directive. In accordance with the case-law cited in the preceding paragraph of the present judgment, the lists of sites communicated to the Commission after the expiry of that period are irrelevant for purposes of the present action.

35 It must therefore be concluded that, by failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, the French Republic has failed to fulfil its obligations under that directive.

*The second plea in law*

36 With regard to the obligation to transmit information on the sites eligible for designation as SACs, the French Government acknowledges that it did not send that information by the expiry of the period laid down in the reasoned opinion, but argues that it was quite impossible for it to meet that obligation within the time specified. It considers that the Commission's delay in drafting the format affected the entire national procedure. When the Commission notified Decision 97/266 adopting the format, the French authorities were obliged to transfer and amend all of the data already contained on a national schedule.

37 The Commission submits that the obligation to transmit the site information was to be met before 11 June 1995. Even if certain Member States which already had the list of proposed sites and relevant information before 11 June 1995 wished to await adoption of the format, they could, after the format was notified on 19 December 1996, rapidly have incorporated that information in the format and forwarded it to the Commission.

38 The Commission adds that, in order to take account of the late adoption of the format, it extended the pre-litigation procedure by addressing an additional letter of formal notice to the French Republic on 3 July 1997, thus well after the date on which the format was notified. The French authorities were therefore fully in a position to meet their obligation to transmit the information on each site. When the period laid down in the reasoned opinion expired on 6 January 1998, the French Republic had not sent to the Commission the information on the sites to be proposed.

39 It is necessary first to point out that, even though the Commission had initially sent to the French Government a letter of formal notice on 27 March 1996, that is to say, before the format was notified, it sent to that Government a new letter of formal notice, following notification of the format, giving it a new period within which to comply with Article 4(1), second subparagraph, of the directive.

40 Next, it should be noted that, following notification of the directive on 10 June 1992, the Member States were aware which types of information they would be required to collate for purposes of transmission within three years of that notification, that is to say, by 11 June 1995. They also knew that this information had to be provided on the basis of the format once it had been drawn up by the Commission. Article 4(1), second subparagraph, of the directive expressly states

that the information to be transmitted, in a format established by the Commission, must include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1).

41 The period which the Commission gave to the French Government for meeting its obligation to include on the format the site information, which it should have had at its disposal prior to 11 June 1995, must therefore be regarded as reasonable. From 19 December 1996, the date on which the format was notified, to 6 January 1998, when the period laid down in the reasoned opinion expired, the French Government benefited from a period of more than one year to comply with that specific obligation.

42 Since the French Government acknowledges that, when the period laid down in the reasoned opinion expired, it had not transmitted to the Commission, in the format, the information on the sites to be proposed, it must be held that, by failing to transmit to the Commission, within the period prescribed, the information relating to the sites on the list mentioned in the first subparagraph of Article 4(1) of the directive, pursuant to the second subparagraph of Article 4(1), the French Republic has failed to fulfil its obligations under that directive.

## Costs

43 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by failing to transmit to the Commission, within the period prescribed, the list of sites mentioned in the first subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, together with the information on those sites required by the second subparagraph of Article 4(1) thereof, the French Republic has failed to fulfil its obligations under that directive;**

2. **Orders the French Republic to bear the costs.**

Gulmann Skouris Schintgen

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2001.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 *

In Case C-374/98,

**Commission of the European Communities**, represented by P. Stancanelli, of its Legal Service, and O. Couvert-Castéra, a national civil servant on secondment to that Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**French Republic**, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration, first, that, by failing to classify the Basses Corbières site, France, as a special protection area for the conservation of certain species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, second, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat likely to have a significant effect, as a result of the opening and working of limestone quarries in the municipalities of Tautavel and Vingrau, France, contrary to Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), the French Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Sixth Chamber, V. Skouris and R. Schintgen, Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 December 1999, during which the Commission was represented by O. Couvert-Castéra and

the French Republic by A. Maitrepierre, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2000,

gives the following

## Judgment

1 By application lodged at the Court Registry on 16 October 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration, first, that, by failing to classify the Basses Corbières site, France, as a special protection area ('SPA') for the conservation of certain species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; 'the birds directive') and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, second, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat likely to have a significant effect, as a result of the opening and working of limestone quarries within the municipalities of Tautavel and Vingrau, France, contrary to Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the habitats directive'), the French Republic has failed to fulfil its obligations under the EC Treaty.

## Legislative background

2 Article 4 of the birds directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. [...]

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

3 Article 7 of the habitats directive provides that obligations arising under Article 6(2), (3) and (4) of that directive are to 'replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of

classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

4 Article 6(2) to (4) of the habitats directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

5 Article 23(1) of the habitats directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive within two years of its notification. The directive having been notified in June 1992, that period expired in June 1994.

## The pre-litigation procedure

6 On 2 July 1996, the Commission sent the French Government a letter of formal notice in respect of failure to comply with Article 4 of the birds directive, as amended by the habitats directive, in relation to the Basses Corbières site which straddles the Aude and Pyrénées-Orientales départements. In that letter, the Commission maintained, first, that, having regard to its importance for the conservation of wild birds, particularly the Bonelli's eagle, the Basses Corbières site should have been classified as an SPA, and, second, that the opening and working of limestone quarries on that site had caused its deterioration without the required conditions being met.

7 In its reply of 28 November 1996, the French Government argued that the French authorities had recognised the interest of the site in question by passing a special conservation measure designed to protect the Bonelli eagle, namely a prefectoral decree on the conservation of the biotope of that species within the Vingrau and Tautavel municipalities. The Government, moreover, referred to the fact that a classification of those territories as an SPA was envisaged. It also stated that the

OMYA company had been working a limestone deposit in the Tautavel municipality for many years. The exhaustion of the deposit in that municipality had led the company to submit a request for authorisation to extend the working of the deposit into the neighbouring municipality of Vingrau. In that respect, the French Government argued that a judgment of the Administrative Court of Appeal of Bordeaux, which had annulled the prefectoral decree granting OMYA permission to build the quarrying installation in the Vingrau municipality, was capable of meeting the requirements of the birds directive.

8 By letter of 19 December 1997, the Commission delivered a reasoned opinion in which it held, first, that, by failing to classify the Basses Corbières site as an SPA for the conservation of certain species of birds listed in Annex I to the birds directive and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, secondly, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat, likely to have a significant effect, as a result of the opening and working of limestone quarries in the municipalities of Tautavel and Vingrau, contrary to Article 6(2) to (4) of the habitats directive, the French Republic had failed to fulfil its obligations under the EC Treaty. The Commission called upon the French Republic to take the necessary measures to comply with that reasoned opinion within two months from its notification.

9 By letter of 22 July 1998, the French authorities sent their reply to the reasoned opinion. They indicated in particular that a very full impact study had enabled the effects of the quarries in question on the attainment of the Community objectives to be assessed. In the light of that study, compensatory measures for reducing the effects of the project on habitats, species and landscape had been put into operation. In their letter, the French authorities also referred to the fact that a decision of the Conseil d'État, France, of 18 December 1996 and a decision of the Tribunal Administratif (Administrative Court) of Montpellier, France, of January 1998 confirmed the authorisations granted to the OMYA company to operate

and to set up a classified installation. The authorities also stated that a mediation mission was in progress between opponents and supporters of the operation of the Vingrau quarry and that, at the end of that mission, they would open a procedure for classifying the site as an SPA.

## Substance

10 The Commission charges the French Republic with:

— first, not having classified the Basses Corbières site as an SPA;

— second, not having taken sufficient special conservation measures concerning the habitat of the species referred to in Annex I to the birds directive and of migratory species which frequent that site;

— third, not having taken appropriate steps to avoid disturbances in that site affecting those species and a deterioration of their habitat.

### *The classification as an SPA*

11 The Commission states that the ornithological richness of the Basses Corbières site, which is situated in a migration corridor of European importance, caused the

French authorities to enter it as an important area for the conservation of wild birds (zone importante pour la conservation des oiseaux sauvages; 'ZICO'), and that the area thus designated as a ZICO amounts to 47 400 hectares. The Basses Corbières site both shelters several species listed in Annex I to the birds directive, particularly a pair of Bonelli's eagles, of which there are about 20 pairs in France, and constitutes an important area for the migration of birds of prey.

12 The French Government acknowledges that the classification of the Basses Corbières as an SPA has been delayed on account of fierce local controversy. Nevertheless, thanks to the work of a mediator sent by the French Government, it had been possible to classify a major part of the Basses Corbières site as an SPA. The French Government further argues that, under Article 4 of the birds directive, as interpreted by the Court of Justice, it is for the Government to classify as SPAs the territories which appear to it to be the most suitable in number and size for the conservation of birds. The French authorities were therefore not required to classify the whole of the area listed in the national inventory of ZICOs as SPAs. The Government also maintains that Bonelli's eagle is the most remarkable species of the area in terms of ornithological interest. As for migratory species, it claims that the area is more one of passage than of stopping or feeding. Certain species might, it is true, be observed on a migratory halt in that area for a resting or feeding period. However, the Basses Corbières region does not contain large gathering areas as is the case on coastal lakes.

13 In this connection, it should first be noted that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, *inter alia*, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13).

14 Second, it is well settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation

prevailing in that State at the end of the period laid down in the reasoned opinion (*Commission* v *France*, cited above, paragraph 18). On that point, it is undisputed that no part of the Basses Corbières site had been classified as an SPA before the expiry of the period laid down by the reasoned opinion.

15 Third, it is undisputed that the Basses Corbières site contains natural areas of particular ornithological interest, at least because of the presence of Bonelli's eagle, which is a species listed in Annex I to the birds directive. In that respect it should be noted that, in January 1999, the French authorities classified two nesting areas of Bonelli's eagle, representing a total area of around 360 hectares and already referred to by two prefectoral decrees for conserving the biotope of that species, as SPAs. One of those areas extends over the municipalities of Tautavel and Vingrau, the other over the municipalities of Maury, Planèzes and Raziguières.

16 However, it has not been shown that there are migratory species justifying the classification of the Basses Corbières site as an SPA by virtue of Article 4(2) of the birds directive. All the species mentioned for that purpose by the Commission as migratory species, such as the honey buzzard, the black kite, the kite, the Egyptian vulture, the short-toed eagle, the marsh harrier, the hen harrier and Montagu's harrier are listed in Annex I to the birds directive, whereas Article 4(2) of that directive applies only to migratory species not listed in Annex I.

17 Therefore, without there being any need in this case to consider what area the SPA in the Basses Corbières should cover for the obligations arising under the birds directive to be met, it must be concluded that the French Republic has not, within the prescribed period, classified any territory in the Basses Corbières site as an SPA within the meaning of Article 4(1) of the birds directive. The Commission's application must therefore be upheld on that point, within the limits stated above.

*The special conservation measures*

18 As regards the special conservation measures required by Article 4(1) of the birds directive, the Commission maintains that the measures adopted by the French authorities for the Basses Corbières site are insufficient. In particular, the three prefectoral decrees for conserving the biotope of Bonelli's eagle on that site, although they mention wild bird species other than Bonelli's eagle in their annexes, refer only to that latter species in their provisions and provide for specific measures only in respect of the latter. Those decrees do not, the Commission submits, ensure sufficient and complete protection of all the bird species required to be protected in that site by the birds directive, either in relation to the protection regime established or in relation to its geographical extent.

19 According to the French Government, those three decrees for the protection of the biotope ensure complete protection of the bird species present in the areas concerned. In that respect, it states in particular that the protection measures laid down by those decrees for the whole of those areas consist essentially of a prohibition on all forms of rock climbing from 15 January to 30 June and more generally a prohibition on all works which might adversely affect the integrity of the biotope. It maintains that such measures meet the objectives of conserving not only the most remarkable species of the Basses Corbières, namely Bonelli's eagle, but also the other species characteristic of that biotope. It also maintains that the areas defined by the decrees protecting the biotope correspond to biotopes generally favourable to rock species sharing their territory with Bonelli's eagle.

20 As regards the alleged insufficiency of the protection regime arising from the special conservation measures adopted by the French authorities, it should be noted in any event that, even though the three decrees for protecting the biotope are all aimed primarily at ensuring the conservation of the biotope of Bonelli's

eagle, and thus the protection of that species, their provisions nevertheless benefit all wild birds frequenting the areas covered by that legislation, by laying down in some detail the prohibition of activities capable of adversely affecting the integrity of the biotopes in question.

21 Moreover, there is nothing in the documents before the Court to show that the regime established by the three decrees for protecting the biotope is insufficient in relation to the conservation requirements of any of the bird species present in the areas covered by those decrees.

22 The complaint that the protection regime arising from the special conservation measures adopted by the French authorities is insufficient must therefore be rejected.

23 As regards the complaint that the geographical extent of those special conservation measures is insufficient, it should be noted that the Groupe Ornithologique du Roussillon ('GOR') filed a proposal in March 1999 that sectors situated in the Basses Corbières ZICO should be classified as an SPA. That file shows that the area extending over 950 hectares from the Serre de Vingrau-Tautavel to the Trou de Cavall was regarded as being suitable for classification as an SPA. That area falls entirely within the ZICO LR 07 which corresponds to the Basse Corbières site as referred to by the Commission in this case and was delimited in 1991, at the request of the Ministry of the Environment, by the GOR and the Groupe de Recherche et d'Information sur les Vertébrés et leur Environnement.

24 According to the GOR, which the French Government recognises as a naturalist association independent of the administration that has shown scientific seriousness and objectivity for many years, that area, which has already suffered deterioration around 1990, must be regarded as classifiable as an SPA

particularly on account of the presence of large birds of prey such as Bonelli's eagle, the golden eagle, the peregrine and the eagle owl, and of a corvid such as the red-billed chough. The presence of those species in the area in question is of fairly long standing, as the various documents submitted to the Court in this case show. The golden eagle, which has been living in this area since January 1998, appears to be the most recently-arrived species.

25 It should also be noted that the inventory of areas which are of great importance for the conservation of wild birds, more commonly known under the acronym IBA (Inventory of Important Bird Areas in the European Community) includes the area in question. The Court of Justice has held that that inventory, although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its obligation to classify as SPAs the most suitable territories in number and size for conservation of the protected species (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraphs 69 and 70).

26 It follows from the general scheme of Article 4 of the birds directive that, where a given area fulfils the criteria for classification as an SPA, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to that directive.

27 In this case, the maps with the Court's file show that, of the three decrees for protecting the biotope issued in relation to the Basses Corbières area, only one refers to the area indicated by the GOR as requiring classification as an SPA, and that the decree in question covers only part of that area. Moreover, the 231 hectares protected by that decree are not entirely included in that area.

28 Furthermore, it does not appear that the part of the area indicated by the GOR which lies outside the scope of the decree in question is subject to any special conservation measures whatsoever.

29 In those circumstances, in the absence of any evidence capable of reopening the question whether the GOR's proposal that the 950-hectare area extending from the Serre de Vingrau-Tautavel to the Trou de Cavall should be classified as an SPA is well founded, it must be held that, since a considerable part of that area does not benefit from a special conservation regime, the special conservation measures taken by the French authorities are insufficient in their geographical extent.

30 Therefore, without there being any need in this case to consider whether other parts of the Basses Corbières area are suitable for classification as SPAs, it appears that the French Republic has failed to fulfil its obligations under Article 4(1) of the birds directive by not taking sufficient special conservation measures as to their geographical extent. It follows that the Commission's application must also be upheld on this point, within the limits specified above.

*The disturbance and deterioration caused by the limestone quarries of Vingrau and Tautavel*

31 According to the Commission — given that, as from the implementation date of the habitats directive, namely 10 June 1994, the obligations under Article 6(2) to (4) of that directive were substituted, pursuant to Article 7 thereof, for the obligations under the first sentence of Article 4(4) of the birds directive — those

obligations under the habitats directive have had to be complied with since that date in the case of the Basses Corbières site, even if the latter has not yet been classified as an SPA under Article 4(1) and (2) of the birds directive.

32 In reply to the Court's question on that point, the Commission maintains that, since Article 7 of the habitats directive does not in any way amend Article 4(1) and (2) of the birds directive, the grounds which led the Court to extend the protection regime under the first sentence of Article 4(4) of the birds directive to areas not classified as SPAs are equally relevant in relation to the protection regime under Article 6(2) to (4) of the habitats directive, which replaced it. The Commission further argues that, if the provisions of Article 7 of the habitats directive had to be interpreted as being intended to make the obligations under Article 6(2) to (4) applicable only to SPAs actually classified as such by the national authorities pursuant to Article 4(1) and (2) of the birds directive, the result would be a duality in the protection schemes that would be hard to justify. The protection regime laid down in the birds directive is, the Commission submits, stricter than that under the habitats directive, and it would be paradoxical to place areas of ornithological interest that have not been the subject of a national classification measure such as an SPA under a stricter protection scheme than that applicable to areas which have actually been classified as SPAs by Member States.

33 The Commission states that the realisation of the project to open and work limestone quarries in the territory of the Vingrau and Tautavel municipalities within the Basses Corbières site is likely to cause disturbance to the species present in that site and a deterioration of their habitat. It argues that, for Bonelli's eagle in particular, the opening of the quarries involves the disappearance of part of its hunting territory and risks disturbing its reproduction on account of the visual and noise pollution connected with the quarries' activity.

34 The Commission also argues that in this case, even if, for determining the areas due to benefit from the special protection regime, one were to take only those

classified as SPAs by the French authorities and which correspond to the territories covered by the two decrees for protecting the biotope referred to in paragraph 15 of this judgment, it appears that the quarrying project of the OMYA company is likely significantly to affect those areas, which are of undisputed ornithological interest.

35 The Commission maintains that, in those circumstances, an appropriate assessment of the impact of the project on the conservation of the site concerned should have been carried out. The impact study prior to the authorisation to operate quarries, dated 1994, did not meet that requirement.

36 The French Republic also infringed the obligation to adopt appropriate compensatory measures. The Commission submits that the cultivation of prey for Bonelli's eagle, the scientific monitoring of that species, the construction of a merlon and a plan for managing the natural environment, besides the fact that they do not concern the other bird species requiring protection, cannot compensate for the disturbance and deterioration caused, since the latter have not been assessed.

37 Since there had been no appropriate assessment of the impact of the quarries project on the site to be classified as an SPA in the municipality of Vingrau and, moreover, a negative impact was far from being excluded, the Commission claims that the French authorities should have refused to give their agreement to that project without demonstrating that there was no alternative solution and that a major public interest was capable of justifying the project. In that respect, the Commission states that several reports emanating from qualified universities conclude that solutions do exist which are equivalent to that of the Vingrau deposit. In any event, neither the OMYA company nor the French authorities had seriously studied those other solutions.

38 The French Government maintains that the Commission does not present any scientific or other evidence to demonstrate that the quarries create significant

disturbance for the pair of Bonelli's eagles or for the other species. In any event, the Government denies that the opening and operation of the quarries are capable of entailing serious consequences for the species present in the site. In that respect, it argues, first, that none of the scientific studies carried out concluded that operation of the quarries might involve such consequences for the wild birds and in particular Bonelli's eagle; second, that such operation was preceded by a detailed impact study which concluded that the project had no significant effect on the environment; and, finally, that important precautionary measures designed to avoid potential negative effects of the project on the environment have been put into operation.

39 The French Government states that Bonelli's eagle was present before the Tautavel quarry began operating in 1968, and that it has since maintained itself on the site without the working of the limestone noticeably causing a disturbance of the species. Nothing in the monitoring of that species, carried out by local bird protection associations independent of the administration, supports the conclusion that moving the Tautavel workings to Vingrau might have negative effects, the nesting area of Bonelli's eagle being in any event unaffected by either of the working sites.

40 Concerning the hunting area of Bonelli's eagle, the French Government points out that, in the impact study referred to above, it is stated, first, that the area needed for working the quarries should not unduly disturb the habits of that species, which has a hunting territory of several square kilometres, and, secondly, that precautionary measures to encourage proliferation of the small prey upon which that eagle feeds have been taken.

41 As regards possible alternative solutions to the deposit currently being worked by the OMYA company in the Vingrau and Tautavel municipalities, the French

Government claims that they have been seriously studied by that company but are not equivalent to that deposit.

42 In reply to the question put by the Court as to the applicability of Article 6(2) to (4) of the habitats directive to areas not yet classified as SPAs, the French Government, which acknowledges that it has not pleaded the inapplicability of those provisions to the Basses Corbières area, maintains that the substitution of the obligations contained therein for those in the first sentence of Article 4(4) of the birds directive, as provided for in Article 7 of the habitats directive, concerns only areas already classified as SPAs under the birds directive.

43 It first needs to be considered whether Article 6(2) to (4) of the habitats directive apply to areas which have not been classified as SPAs but should have been so classified.

44 In that respect, it is important to note that the text of Article 7 of the habitats directive expressly states that Article 6(2) to (4) of the directive apply, in substitution for the first sentence of Article 4(4) of the birds directive, to the areas classified under Article 4(1) or (2) of the latter directive.

45 It follows that, on a literal interpretation of that passage of Article 7 of the habitats directive, only areas classified as SPAs fall under the influence of Article 6(2) to (4) of that directive.

46 Moreover, the text of Article 7 of the habitats directive states that Article 6(2) to (4) of that directive replace the first sentence of Article 4(4) of the birds directive

as from the date of implementation of the habitats directive or the date of classification by a Member State under the birds directive, where the latter date is later. That passage of Article 7 appears to support the interpretation to the effect that the application of Article 6(2) to (4) presupposes the classification of the area concerned as an SPA.

47 It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive.

48 The Commission's arguments to the contrary cannot be accepted.

49 Thus, the fact that, as the case law of the Court of Justice shows (see, in particular, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 22), the protection regime under the first sentence of Article 4(4) of the birds directive applies to areas that have not been classified as SPAs but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the habitats directive replaces the first regime referred to in relation to those areas.

50 Moreover, as regards the Commission's argument concerning a duality of applicable regimes, it should be noted that the fact that the areas referred to in the previous paragraph of this judgment are, under the first sentence of Article 4(4) of the birds directive, made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the habitats directive in relation to areas classified as SPAs does not appear to be without justification.

51 As the Advocate General points out in paragraph 99 of his Opinion, a Member State cannot derive an advantage from its failure to comply with its Community obligations.

52 In that respect, if it were lawful for a Member State, which, in breach of the birds directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the habitats directive, that State might enjoy such an advantage.

53 Since no formal measure for classifying such a site as an SPA exists, it is particularly difficult for the Commission, in accordance with Article 155 of the EC Treaty (now Article 211 EC), to carry out effective monitoring of the application by Member States of the procedure laid down by Article 6(3) and (4) of the habitats directive and to establish, in appropriate cases, the existence of possible failures to fulfil the obligations arising thereunder. In particular, the risk is significantly increased that plans or projects not directly connected with or necessary to the management of the site, and affecting its integrity, may be accepted by the national authorities in breach of that procedure, escape the Commission's monitoring and cause serious, or irreparable ecological damage, contrary to the conservation requirements of that site.

54 Natural or legal persons entitled to assert before the national courts interests connected with the protection of nature, and especially wild bird life, which in this case means primarily environmental protection organisations, would face comparable difficulties.

55 A situation of this kind would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in Article 4 of the birds

directive, as interpreted by the case-law of the Court (see, in particular, Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 23 and 25).

56 As the Advocate General has, essentially argued in paragraph 102 of his Opinion, the duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA.

57 It follows from the above that Article 6(2) to (4) of the habitats directive do not apply to areas which have not been classified as SPAs but should have been so classified.

58 The complaint alleging infringement of Article 6(2) to (4) of the habitats directive must therefore be rejected.

59 It must therefore be held that, by not classifying any part of the Basses Corbières site as an SPA and by not adopting special conservation measures for that site sufficient in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of the birds directive.

60 The remainder of the application must be dismissed.

## Costs

61 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first paragraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads. Since the Commission has been only partially unsuccessful, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by not classifying any part of the Basses Corbières site as a special protection area and by not adopting special conservation measures for that site sufficient in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

**2. Dismisses the remainder of the application;**

**3. Orders the parties to bear their own costs.**

Gulmann Skouris Schintgen

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass C. Gulmann

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT

7 November 2000 *

In Case C-371/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for a preliminary ruling in the proceedings pending before that court between

**The Queen**

and

**Secretary of State for the Environment, Transport and the Regions,**

**ex parte First Corporate Shipping Ltd,**

interveners:

**World Wide Fund for Nature UK (WWF)**

and

**Avon Wildlife Trust,**

* Language of the case: English.

on the interpretation of Articles 2(3) and 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— First Corporate Shipping Ltd, by G. Barling QC, M. Shaw and M. Hoskins, Barristers, instructed by Arnheim Tite & Lewis, Solicitors,

— World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust, by P. Sands and J.H. Marks, Barristers, instructed by Leigh Day & Co., Solicitors,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and Richard Drabble QC,

— the Finnish Government, by H. Rotkirch and T. Pynnä, Valtionasiamiehet, acting as Agents,

— the Commission of the European Communities, by R.B. Wainwright, Principal Legal Adviser, and P. Stancanelli, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of First Corporate Shipping Ltd, World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust, the United Kingdom Government, the Finnish Government and the Commission at the hearing on 7 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2000,

gives the following

## Judgment

1 By order of 21 July 1998, received at the Court on 16 October 1998, the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 2(3) and

4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive').

2 The question arose in proceedings brought by First Corporate Shipping Ltd (hereinafter 'FCS') for judicial review of the act by which the Secretary of State for the Environment, Transport and the Regions indicated that he was minded to propose the Severn Estuary to the Commission of the European Communities as a site eligible for designation as a special area of conservation (SAC) under Article 4(1) of the Habitats Directive.

## The Community legislation

3 According to Article 2 of the Habitats Directive:

'1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4 Article 4 of the Habitats Directive states:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of

Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

5 Annex III to the Habitats Directive reads as follows:

'Criteria for selecting sites eligible for identification as sites of Community importance and designation as special areas of conservation

Stage 1: Assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (including priority natural habitat types and priority species)

A. *Site assessment criteria for a given natural habitat type in Annex 1*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.

C. On the basis of these criteria, Member States will classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A and B above.

...'

6 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or

economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

## The main proceedings and the question referred for a preliminary ruling

7 FCS is the statutory port authority for the port of Bristol, on the Severn Estuary, and owns considerable land in the neighbourhood of the port. Since acquiring the port, FCS has invested, in partnership with other undertakings, nearly GBP 220 million in capital in developing its facilities. It employs 495 permanent full-time employees. The number of workers employed at the port, including FCS's own employees, is between 3 000 and 5 000.

8 The Secretary of State indicated that he was minded to propose the Severn Estuary to the Commission as a site eligible for designation as an SAC under Article 4(1) of the Habitats Directive, most of the intertidal part of the estuary having already been classified as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). FCS thereupon applied to the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for leave to apply for judicial review.

9 FCS submitted before that court that Article 2(3) of the Habitats Directive obliged the Secretary of State to take account of economic, social and cultural requirements when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of that directive.

10 The Secretary of State contended that, in the light of the Court's reasoning in Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, he could not take economic, social and cultural requirements into account when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of the Habitats Directive.

11 In those circumstances, the High Court of Justice stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?'

## The question referred for a preliminary ruling

12 It should be noted that the question of interpretation referred for a preliminary ruling relates only to Stage 1 of the procedure for classifying natural sites as SACs laid down by Article 4(1) of the Habitats Directive.

13 Under that provision, on the basis of the criteria set out in Annex III (Stage 1) together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and native species in Annex II are to be found there.

14 Annex III to the Habitats Directive, which deals with the criteria for selecting sites eligible for identification as sites of Community importance and designation as SACs, sets out, as regards Stage 1, criteria for the assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II.

15 Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively.

16 It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

17 FCS submits that identifying and defining the boundaries of the sites to be notified to the Commission with a view to designation as SACs, as required by Article 4(1) of the Habitats Directive, constitute a measure taken pursuant to the directive within the meaning of Article 2(3). It follows that Article 2(3) imposes an obligation on a Member State to take account of economic, social and cultural requirements and regional and local characteristics when it applies the criteria in Annex III to the directive when drawing up the list of sites to be transmitted to the Commission.

18 According to the Finnish Government, it is open to a Member State, when proposing its list of sites to the Commission, to take account of economic, social and cultural requirements and regional and local characteristics, provided that it does not compromise realisation of the Habitats Directive's nature protection objectives. The Government observes that there may, for example, be such a large number of sites eligible to be considered of Community importance within the territory of a Member State that that State is entitled to exclude some of them from its list of proposed sites without jeopardising realisation of those objectives.

19 It should be noted that the first subparagraph of Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of SACs to be known as 'Natura 2000', composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

20 Moreover, Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2) of the directive.

21 In particular, the first subparagraph of Article 4(2) prescribes that the Commission is to establish, on the basis of the lists drawn up by the Member States and in agreement with each Member State, a draft list of sites of Community importance.

22 To produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission

must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive.

23 Only in that way is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1), of the directive that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

24 In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1) of the Habitats Directive, they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.

25 The answer to the national court's question must therefore be that, on a proper construction of Article 4(1) of the Habitats Directive, a Member State may not

take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

Costs

26 The costs incurred by the United Kingdom and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales by order of 21 July 1998, hereby rules:

**On a proper construction of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,**

**a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.**

| | | |
|---|---|---|
| Rodríguez Iglesias | Gulmann | Wathelet |
| Skouris | Edward | Puissochet |
| Jann | Sevón | Schintgen |

Delivered in open court in Luxembourg on 7 November 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President

# JUDGMENT OF THE COURT (Fifth Chamber)

6 April 2000 *

In Case C-256/98,

**Commission of the European Communities**, represented by P. Stancanelli, of its Legal Service, and O. Couvert-Castéra, a national civil servant on secondment to that Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**French Republic**, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by not adopting all the laws, regulations and administrative measures necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann (Rapporteur), J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

## Judgment

1 By application lodged at the Court Registry on 15 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting the laws, regulations and administrative measures necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; hereinafter 'the Directive'), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

### The applicable legislation

2 Article 2(1) of the Directive states that the aim of that measure is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

3 Article 2(2) states that measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

4 According to the sixth recital in the preamble to the Directive, it is necessary, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, to designate special areas of conservation in order to create a coherent European ecological network in accordance with a specified timetable.

5 Pursuant to Article 3(1) of the Directive, that network — termed 'Natura 2000' — is to comprise, not only those special areas of conservation, but also areas which the Member States have designated as 'special protection areas' pursuant to Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; hereinafter 'the Wild Birds Directive').

6 Article 1(l) of the Directive defines a special area of conservation as 'a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

7 Article 4 of the Directive lays down a three-stage procedure for the designation of special areas of conservation. Pursuant to Article 4(1), each Member State is to propose a list of sites and to indicate both the natural habitat types and the native species (of those listed, respectively, in Annexes I and II to the Directive) which those sites host. That list, together with information on each site, is to be transmitted to the Commission within three years of notification of the Directive.

8 Pursuant to Article 4(2) of the Directive, the Commission is to establish — on the basis of the criteria set out in Annex III to the Directive, and in agreement with each Member State — a draft list of sites of Community importance. The list of sites selected as sites of Community importance is to be adopted by the Commission in accordance with the procedure laid down in Article 21 of the

Directive. Pursuant to Article 4(3), the list is to be established within six years of notification of the Directive.

9 Article 4(4) provides that once a site has been adopted as a site of Community importance in accordance with the procedure laid down in Article 4(2), the Member State concerned is to designate it as a special area of conservation as soon as possible (within six years at most), establishing priorities in the light of the importance of the site for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which such a site is exposed.

10 Article 4(5) provides that as soon as a site is placed on the list of sites of Community importance drawn up by the Commission, it is subject to the provisions of Article 6(2), (3) and (4).

11 Article 6 of the Directive provides:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so

far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

12 Article 7 provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

13 Article 23(1) provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification and immediately to inform the Commission thereof. Since the Directive was notified to the French Republic on 5 June 1992, the period prescribed for its implementation in France expired on 5 June 1994.

The pre-litigation procedure

14 Since the French Government failed to communicate by 5 June 1994 the measures adopted to comply with the Directive, the Commission took the view that, in the absence of any other evidence to suggest that the necessary measures had indeed been adopted, the French Republic had failed to fulfil its obligations under the Directive. Accordingly, by letter of 9 August 1994, it sent the French Government formal notice to submit its comments in that regard within two months, in accordance with the procedure laid down in Article 169 of the Treaty.

15 By letter of 16 February 1995, the French Government informed the Commission that the Directive had been transposed into national law by Circular No 38 of 21 January 1993, supplemented by Circular No 24 of 28 January 1994. It also stated that the legal implications of the assessment of projects in accordance with Article 6(3) and (4) were under consideration, as was a draft decree concerning the list of habitats.

16 Under cover of a letter dated 18 April 1995, the French Government sent the Commission a copy of Law No 95-101 of 2 February 1995 concerning more stringent measures for the protection of the environment (*Journal Officiel de la République Française* of 3 February 1995, p. 1840). Appended was a table illustrating the provisions, both of the Directive and of the Wild Birds Directive, which were thereby transposed into national law. In addition, the French Government stated that a decree specifically concerning the Directive was under consideration at departmental level in the ministries responsible.

17 In the light both of the table relating to Law No 95-101 and the other information provided in the various letters from the French authorities, the Commission concluded that the Directive had only partly been transposed into national law and that additional measures were needed to ensure its full implementation, particularly with respect to Article 6.

18 When communication of those transposition measures was not forthcoming, the Commission sent the French Government by letter of 21 September 1995 a reasoned opinion calling upon it to adopt the measures necessary to comply with the Directive within two months of such notification.

19 Under cover of a letter dated 30 October 1995, the French Government sent the Commission a copy of Decree No 95-631 of 5 May 1995 on the conservation of natural habitats and habitats of wild species of Community interest (JORF of 7 May 1995, p. 7612). However, the Commission was unable on that basis to conclude that the Directive had been wholly transposed into French national law. Nevertheless, since the reasoned opinion of 21 September 1995 had neglected to

mention the letter of 18 April 1995 from the French authorities to the Commission, a complementary reasoned opinion was delivered by letter of 31 October 1997.

20 In the complementary reasoned opinion, the Commission expressed the view that, in failing to transpose Article 6 of the Directive into national law, the French Republic was denying future sites of Community importance a suitable regulatory framework which was in conformity with Community law. Pursuant to Article 4(5) of the Directive, such protection must be accorded to a site of that nature as soon as it is placed on the list referred to in the third subparagraph of Article 4(2). Secondly, the Commission maintained that, in neglecting to transpose Article 6(2), (3) and (4) of the Directive, the French Republic was also depriving the special protection areas designated earlier under the Wild Birds Directive of a suitable regulatory framework which is in conformity with Community law, contrary to the requirements of Article 7 of the Directive.

21 The Commission also noted that the information provided by the French Government indicated that the French authorities were contemplating the use of management projects, in accordance with Article 6(1) of the Directive. However, the French Government was silent as to the procedures and measures by which the requirements laid down in that provision would be satisfied. Article 6(1) clearly states that by the deadline set for compliance with the Directive — 5 June 1994 — a regulatory framework must be in place for the establishment of the conservation measures needed to meet the ecological requirements referred to in Annexes I and II to the Directive and which involve management projects and the appropriate statutory, administrative or contractual measures.

22 The Commission adds that, although French law already makes provision for the protection of nature in the form of measures and bodies of rules which were brought to the Commission's knowledge when it was notified of the special protection areas under the Wild Birds Directive, the French authorities have not specified which provisions, in their view, meet the objectives of the Directive and, in particular, of Article 6(1) and (2) thereof.

23 On receiving no communication thereafter regarding the adoption of measures to transpose the Directive into national law, the Commission decided to bring the present proceedings.

24 The Commission bases its application on the same complaints as were raised in the complementary reasoned opinion.

**The complaints concerning the transposition into national law of Article 6(1) and (2) of the Directive**

25 As regards the transposition into French law of Article 6(1) and (2) of the Directive, the Commission states in its application that the French authorities failed to communicate to it the measures which, in their view, satisfy the objectives of those provisions.

26 In its defence, the French Government refers to a number of French legal provisions which, in its view, constitute an adequate range of legislative, regulatory and contractual measures for ensuring that the objectives of the Directive, particularly of the above provisions, are realised in full.

27 The Commission acknowledges in its reply that French law includes measures designed to enable the obligations created by those provisions to be met. It maintains, however, that nowhere in French law are the French authorities expressly obliged to apply conservation and protection measures to special areas of conservation, in accordance with Article 6(1) and (2) of the Directive. According to the Commission, the very least required under the Directive, if Article 6(1) and (2) thereof are to be correctly transposed into national law, is the incorporation into French law, not only of legal instruments to ensure the

protection of special areas of conservation, but also — especially since the latter instruments were not specifically designed for the implementation of the Directive — of an express provision of general application requiring the French authorities to use those instruments in the situations envisaged and in accordance with the criteria set out in the Directive. Not only would such provision facilitate the transposition of the Directive into French law, it would also offer individuals greater legal certainty by lending more substance to their right to rely before the courts on failure by the competent authorities to comply with the obligation to adopt appropriate measures of protection.

28 It is clear from the foregoing that, both in the reasoned opinion and in the application, the Commission essentially imputes to the French Republic a failure to establish a legal framework to accommodate the measures necessary to ensure the protection of special areas of conservation, such measures being understood in the sense of measures defined by the national legislation and designed to take effect at the same time as the adoption, in accordance with Article 23, of the general measures necessary to ensure compliance with the Directive.

29 In its reply, the Commission amended its grounds of complaint to focus on the question of the existence in Community law of an obligation incumbent on Member States to incorporate in their laws express provisions requiring the competent national authorities to apply the conservation and protection measures provided for in Article 6(1) and (2) of the Directive to special areas of conservation.

30 It should be noted, however, that the amendment goes beyond a mere restatement, albeit in greater detail, of the initial complaints, thereby raising submissions before the Court which were not put forward during the pre-litigation procedure or in the application initiating the proceedings.

31 Those submissions are inadmissible because they are contrary to Article 38(1)(c) of the Rules of Procedure, under which the parties are required to state the subject-matter of the proceedings in the application initiating proceedings. Even though Article 42 of those Rules allows, subject to specific conditions, the introduction of new pleas in law, it is not permissible for a party to alter the very subject-matter of the proceedings. It follows that the merits of an application must be determined solely in the light of the submissions made in the application initiating the proceedings (see Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3).

32 Since the Commission must be deemed to have withdrawn its complaints in relation to Article 6(1) and (2) of the Directive, as initially formulated, the application must to that extent be dismissed as inadmissible.

33 Consequently, there is no need to consider the question — which, moreover, was not addressed during the proceedings — whether Member States were under an obligation to transpose the provisions at issue, particularly Article 6(1) of the Directive, into national law before the Commission adopted the list of sites of Community interest pursuant to the third subparagraph of Article 4(2) of the Directive.

**The complaint concerning the transposition into national law of Article 6(3) and (4) of the Directive**

34 First, as regards Article 6(3) of the Directive, the French Government admits that under the existing rules of French law relating to the prior assessment of the environmental implications of a development plan or project, the competent authorities are not able in all cases to refuse authorisation on the grounds that the findings of such an assessment were negative. The French Government states that, with a view to complying with the Directive on that point, it is preparing supplementary legislation.

35 However, the French Government disputes the Commission's assertions that its legislation does not enable the competent national authorities to comply fully with the obligation laid down in Article 6(3) of the Directive to carry out a prior assessment of the implications for the environment of any plan or project not directly connected with or necessary to the management of the site but likely nevertheless to have a significant effect thereon, citing in that respect Law No 76-629 of 10 July 1976 on the protection of nature (JORF of 12 and 13 July 1976, p. 4203).

36 It is common ground that there has long been provision in French law, notably in the rules provided for by Law No 76-629, for compulsory environmental impact assessments along the lines indicated by the Directive. Nevertheless, it is for the national authorities responsible for the transposition of the Directive into French law to make sure that those rules do indeed guarantee, with sufficient clarity and precision, the full implementation of Article 6(3).

37 However, as regards two of the three facets of French law as it stands which, in the view of the Commission, precludes full compliance with the obligations imposed by the Directive, the transposition into French law is not sufficiently clear and precise.

38 That does not apply to the first point raised by the Commission. As regards its assertion that the rules in force in France do not guarantee an assessment in the case of 'plans' likely to have a significant effect on sites, the Advocate General has properly pointed out in paragraphs 32 to 34 of his Opinion both that the Directive fails to define the term 'plan' and that French law (Article 2 of Law No 76-629) requires an environmental impact assessment in the case of both 'projets d'aménagement' (development projects) and 'documents d'urbanisme' (town planning). It cannot be regarded as established, therefore, that the French legislation in force does not satisfactorily transpose into national law the term 'plan' referred to in Article 6(3) of the Directive.

39 On the other hand, as regards the Commission's uncontested statement that, contrary to the Directive, the position in France is that the environmental impact assessment may be waived in the case of certain projects because of their low cost or their purpose, it should be noted that such exemptions cannot be justified in terms of the discretion of Member States implied, according to the French Government, by the expression 'likely to have a significant effect [on the site]'. On this point, it is enough to note that, in any event, that provision cannot authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to be waived because of the low costs entailed or the particular type of work planned.

40 Lastly, as regards the Commission's statement that, contrary to the requirements of Article 6(3) of the Directive, there is no provision in French law which couples the obligation to make an environmental impact assessment with consideration of the 'site's conservation objectives', it should be noted that none of the provisions to which the French Government refers in its pleadings requires the assessment to determine the environmental impact of development plans in the light of the site's particular conservation objectives. It must be concluded, therefore, that those implications of Article 6(3) have not been transposed into French law with sufficient clarity and precision.

41 It follows that, as regards two of the three facets examined in paragraphs 38 to 40 above, Article 6(3) of the Directive has not been transposed into French law in a sufficiently clear and precise manner. Consequently, the action brought by the Commission is well founded in this respect.

42 Secondly, as regards the transposition into French law of Article 6(4) of the Directive, the Commission claims that the French Republic has not implemented the substantive conditions laid down in that provision, concerning the carrying out of a plan or project notwithstanding a negative assessment of the impact on the site, in cases where there are no alternative solutions.

43 On that point, it is enough to note that the French Government acknowledges that it has not adopted the measures necessary to comply with Article 6(4) of the Directive.

44 In the light of the foregoing, it must be held that, by not adopting within the period prescribed all the laws, regulations and administrative provisions necessary to comply with Article 6(3) and (4) of the Directive, the French Republic has failed to fulfil its obligations under that Directive.

## Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. However, under the first paragraph of Article 69(3), the Court may order that the parties each bear their own costs where each party has succeeded on some and failed on other heads. Since both the Commission and the French Republic have been partially unsuccessful in their pleadings, they must be ordered to bear their own costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by not adopting within the period prescribed all the laws, regulations and administrative measures necessary to comply with Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the French Republic has failed to fulfil its obligations under that Directive;**

2. **Dismisses the remainder of the action;**

3. **Orders each of the parties to bear its own costs.**

Edward Moitinho de Almeida Gulmann

Puissochet Jann

Delivered in open court in Luxembourg on 6 April 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber

# JUDGMENT OF THE COURT
19 May 1998 *

In Case C-3/96,

**Commission of the European Communities**, represented by W. Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Kingdom of the Netherlands**, represented by M. A. Fierstra and J. S. van den Oosterkamp, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

supported by

**Federal Republic of Germany**, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and S. Maass, Regierungsrätin in that ministry, acting as Agents, D-53107 Bonn,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), the Kingdom of the Netherlands has failed to comply with its obligations under that directive and Articles 5 and 189 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, G. Hirsch and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 9 October 1997,

gives the following

## Judgment

1 By application lodged at the Court Registry on 5 January 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April

1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter 'the Directive'), the Kingdom of the Netherlands had failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty.

2 By order of the President of the Court of 15 July 1996 the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the defendant State.

3 Article 2 of the Directive provides that Member States are to 'take the requisite measures to maintain the population of [all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies] at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level'.

4 Article 3 of the Directive provides:

'1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

5 Article 4(1) of the Directive reads as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.'

6 Annex I to the Directive was replaced by the Annex to Commission Directive 85/411/EEC of 25 July 1985 amending Directive 79/409 (OJ 1985 L 233, p. 33).

7 Since it considered in particular that the Kingdom of the Netherlands had not classified a sufficient number of special protection areas (hereinafter 'SPAs') for the species of birds referred to in Annex I to the Directive, the Commission, on 25 September 1989, gave the Netherlands Government formal notice to submit its observations within two months.

8 By letter of 29 December 1989 the Netherlands Government denied the alleged infringement. It submitted essentially that it was not in breach of its obligations under Article 4(1) of the Directive, in that it had classified as SPAs a sufficient number of suitable territories for conservation of the species referred to in Annex I, taking into account the balance between the interests of conservation of protected species and economic and recreational interests, and that it had also introduced other instruments for the protection of birds.

9 Since those explanations did not cause it to alter its position on the alleged failure to fulfil obligations, the Commission sent the Netherlands Government on 14 June 1993 a reasoned opinion requiring the Kingdom of the Netherlands, within two months from notification of the opinion, to take the necessary action on the complaint of not having classified as SPAs sufficient territories to ensure effective protection of the species mentioned in Annex I to the Directive.

10 The Netherlands Government states that it replied to the reasoned opinion by letter of 1 December 1993. The Commission asserts, however, that it never received that reply.

## Admissibility

11 The Kingdom of the Netherlands challenges the admissibility of the application on several grounds.

*Failure to take account of reply by the Kingdom of the Netherlands to the reasoned opinion*

12 The Netherlands Government submits that, by omitting to take account of its reply to the reasoned opinion, the Commission failed to respect its right to a fair hearing, so that the action is inadmissible.

13 The Commission replies that, even supposing it did receive that letter, the fact that its application to the Court does not take account of the Netherlands Government's reply to the reasoned opinion cannot constitute a ground of inadmissibility. The period set in the reasoned opinion serves merely to give the Member State to which it is addressed a last opportunity to conform with the Commission's point of view. Besides, the only new element in the letter, which was brought to its knowledge during the present proceedings, was the statement that three more territories had been classified as SPAs in the meantime. The Commission says that it did in fact take that into account in its application.

14 The Court points out that the procedure laid down in Article 169 of the Treaty comprises two consecutive stages, the pre-litigation or administrative stage and the contentious stage before the Court (see the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 15).

15 Under the first paragraph of Article 169, '[i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'.

16 The aim of the pre-litigation procedure is thus to give the Member State an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure provided for in Article 169, within the period prescribed in that opinion (see *inter alia* Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 13, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 11).

17 As the Court has previously held, the proper conduct of the pre-litigation procedure constitutes an essential guarantee intended by the Treaty not only to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see the order in *Commission* v *Spain*, cited above, paragraph 17, and the judgment in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 15).

18 It should be borne in mind that the subject-matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion (see Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6).

19 In the present case, it is not disputed that the reasoned opinion and the procedure leading up to it were properly conducted.

20 In those circumstances, even assuming that the contentious procedure was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing has not been infringed. It is fully open to the State to raise those matters in the contentious procedure, to begin with in its first pleading in defence. It will be for the Court to examine their relevance for the outcome of the action for failure to fulfil obligations.

21 The first plea of inadmissibility must therefore be rejected.

*Nature of the obligation laid down in Article 4(1) of the Directive*

22 The Netherlands Government submits, second, that the alleged infringement consists not of a single act or omission but rather of a group of infringements of an obligation to take individual classification decisions. In order to guarantee the right to a fair hearing, it is essential in law to establish infringements of Article 4(1) of the Directive territory by territory. The Government submits essentially that the Commission is complaining that it failed generally to fulfil its obligations under Article 4(1), without first having engaged in an exchange of views with it on the specific complaints on which the action is founded.

23 According to the Commission, the submission that infringements of Article 4(1) of the Directive can only be established territory by territory is incorrect. An infringement may equally well be established if it is apparent that a Member State has clearly classified as SPAs many fewer habitats than required by ornithological criteria.

24 As the Advocate General notes in point 14 of his Opinion, since this plea of inadmissibility concerns the proper interpretation of Article 4(1) of the Directive and goes to the substance of the Commission's complaints, it should be examined in connection with the merits of the present action.

*New matters*

25 The Netherlands Government submits, third, that it was at the stage of its application to the Court that the Commission raised for the first time the complaint concerning the insufficient total area and quality of the areas classified as SPAs, as well as the specific complaints concerning the failure to classify the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, so preventing the defendant State from reacting at the pre-litigation stage. The same is true as regards the complaint that freshwater lakes and marshes and moorland were classified as SPAs only to a very limited extent. Those complaints are therefore inadmissible.

26 The Netherlands Government further submits that the report listing important areas for birds in the Netherlands (*Review of Areas Important for Birds in the Netherlands*, December 1994, hereinafter 'IBA 94'), published after the reasoned opinion had been sent to it, is not to be taken into consideration in the present proceedings, as the Government was not able to comment on it in the pre-litigation procedure.

27 The Commission replies that the alleged new pleas are in fact merely examples or developments of the single plea which has been consistently relied on since the beginning of the procedure, namely that the Netherlands has not designated sufficient SPAs from the point of view of Article 4(1) of the Directive. In the Commission's contention, Article 4(1), by providing that Member States are to classify as SPAs the most suitable territories in number and size for the conservation of the

species mentioned in Annex I to the Directive, implies an obligation which is not only quantitative but also qualitative, in that the obligation of result under that provision means that each Member State must designate SPAs of sufficient number, area and variety to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory.

28 The Commission also contends that it substantiated its allegations on the basis of an ornithological study published in 1989 (*Inventory of Important Bird Areas in the European Community*, July 1989, hereinafter 'IBA 89'), its reliance on IBA 94 being altogether redundant.

29 In so far as an application refers to complaints which were not the subject-matter of the pre-litigation procedure, it is inadmissible (see, to that effect, Case 298/86 *Commission* v *Belgium* [1988] ECR 4343, paragraph 10, and Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019, paragraph 11).

30 In the present case the Commission referred expressly, in both the letter of formal notice and the reasoned opinion, to the obligation of the Kingdom of the Netherlands to ensure that the number and size of classified areas in the Member States are in accordance with Article 4(1) of the Directive. The plea of inadmissibility must therefore be rejected, in so far as it concerns the complaint that the Kingdom of the Netherlands did not classify a sufficient total area of SPAs.

31 As to the Commission's complaint that the SPAs classified by the Kingdom of the Netherlands were qualitatively insufficient, and more specifically that freshwater lakes and marshes and moorland have been classified as SPAs only to a limited extent, it must be stated that while, in order to comply with Article 4(1), Member

States must classify as SPAs sufficient territories, in terms of quantity and quality, to ensure conservation of the species listed in Annex I, it does not follow that a complaint that a Member State has not classified sufficient SPAs from the point of view of that provision necessarily covers the qualitative aspect of the obligation in question.

32 It appears that in the course of the pre-litigation stage the Commission based its complaint against the Kingdom of the Netherlands on the alleged insufficient number and size of the territories classified as SPAs by that State, in other words a quantitative insufficiency. By contrast, the alleged qualitative insufficiency of the SPAs classified by that State was raised for the first time in the present case when the contentious procedure was initiated.

33 The action must therefore be declared inadmissible in this respect.

34 As to the references to the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, these do not constitute a separate new complaint inasmuch as they serve merely as examples to illustrate the alleged infringement and are taken from the list, annexed to the letter of formal notice and the reasoned opinion, of areas which the Commission considers suitable for classification as SPAs. Those references are therefore permissible, in that they do not require the Court to rule specifically on the question whether those two areas must be classified as SPAs.

35 As to the reference to IBA 94, it should be noted, first, that that report, which dates from December 1994, draws up a list of areas which must, according to the scientific criteria accepted by the Commission, be classified as SPAs in the Netherlands.

36 Second, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, in particular, Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15).

37 There is nothing in the documents before the Court to show that IBA 94 relates to a period prior to the expiry of the time allowed to the defendant State to comply with the reasoned opinion of 14 June 1993. On any view, therefore, the present action is inadmissible in so far as it refers to IBA 94 in order to prove the existence of the alleged infringement of the Directive.

38 In those circumstances, the action must be declared admissible within the limits described above.

**Substance**

39 The Commission observes, to begin with, that it follows from Article 4(1) of the Directive that each Member State has a specific obligation to designate sufficient SPAs to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory.

40 It states that, with respect to the Netherlands, IBA 89 identifies, on the basis of the ornithological criteria used and explained in that study, 70 territories with a total area of 797 920 hectares suitable for classification as SPAs.

41 The Commission points out that the Netherlands Ministry of Agriculture and Fisheries has drawn up its own list of potentially classifiable territories, which contains 53 sites with a total area of 398 180 hectares. Those 53 sites correspond in part to 57 sites mentioned in IBA 89. However, the Netherlands Government has given no explanation of the scientific criteria on which its list of territories potentially classifiable as SPAs is based.

42 In any event, the Commission submits that, by designating only 23 territories with a total area of 327 602 hectares as SPAs, the Kingdom of the Netherlands has manifestly exceeded the limits of the discretion conferred on Member States by Article 4 of the Directive.

43 On this point, the Commission maintains, first, that the sites classified by the Netherlands coincide, wholly or partly, with 33 sites mentioned in IBA 89, in other words less than half the total number of sites considered by that scientific report to be suitable for classification as SPAs, and that their number represents only slightly over half the 57 sites listed in IBA 89 which the Netherlands authorities themselves regarded as important areas for birds. Second, the total area of the 23 SPAs in the Netherlands is also quite insufficient: 327 602 hectares as against the 797 920 hectares covered by the 70 sites mentioned in IBA 89. Moreover, as one SPA, the Waddenzee, alone extends to 250 000 hectares, the remaining SPAs cover only 77 602 hectares, which is not sufficient to guarantee adequate protection for a large number of the species of birds listed in Annex I to the Directive.

44 According to the Commission, the obligation to classify is infringed if a Member State manifestly disregards the number and area of the territories listed in IBA 89. That is the case where a Member State designates as SPAs only less than half the sites listed by IBA 89, with respect to both the number of sites and their total area.

45 In the Commission's submission, another indication that the protection given by the Netherlands to the species of birds listed in Annex I to the Directive is insufficient is the fact that the population of nine of those species has declined by over 50%. Of particular significance in this respect is the fall in the population of sedentary species such as *Tetrao tetrix* and *Botaurus stellaris*.

46 The Netherlands Government contends that the designation of SPAs is only one of the measures by which a Member State may perform its obligation under Article 4(1) of the Directive to take special conservation measures. Member States may also have recourse to other conservation measures to comply with that obligation. There can therefore be an infringement of that provision only if a Member State has not taken any special conservation measures at all. The Netherlands Government contends that by taking other measures of relevance in this context, such as the Nature Conservation Law, the sale of sites to nature conservation organisations and bird conservation plans, it has complied with the Directive.

47 The Netherlands Government next observes that the Member States have a margin of discretion in implementing Article 4(1) of the Directive. With respect more particularly to the designation of SPAs, Article 4(1) merely requires designation of the most suitable territories. The scheme of the provision is thus based on an assessment in the specific case of the question whether a particular site is one of the most suitable territories.

48 On this point, the Netherlands Government observes that the previous cases before the Court all related to whether a Member State should have classified a particular site as an SPA. In the present case, however, the Commission has not shown, let alone proved, that in implementing Article 4(1) the Kingdom of the Netherlands exceeded the limits of its discretion in any specific cases.

49 The Netherlands Government further contends that, when adopting the special conservation measures provided for in Article 4(1), Member States must take account not only of the specific factors mentioned in that provision but also of economic and recreational requirements, in accordance with Article 2 of the Directive.

50 The German Government contends, on the basis of the Member States' margin of discretion, that Article 4(1) leaves the choice of SPAs to Member States and that the only decisive factor is that the areas must be suitable in number and area for conservation of the species concerned and capable, together with the areas classified by the other Member States, of constituting a coherent network of protection areas. In its contention, the provision does not require a particular number of areas to be classified, but rather requires Member States to ensure that the SPAs which are created are suitable for the conservation of endangered species of birds.

51 The Netherlands Government adds that it used three criteria, which also form the basis of IBA 89, to draw up its list of sites to be protected. However, because of the general character of those criteria, their application does not produce unequivocal results. That is why differences may appear between the territories which, according to IBA 89, satisfy the criteria of Article 4(1) of the Directive and those which are designated as SPAs by the Member State concerned.

52 The Netherlands Government observes, moreover, that the criterion applied by the Commission, namely that Member States must designate as SPAs at least half in number and area of the territories listed by IBA 89, does not appear in the Directive.

53 The German Government, for its part, states that IBA 89 contains only a list of sites which, according to scientific criteria, could potentially serve for the conservation of endangered species. However, the list is not included in the Directive and

is not legally binding. Moreover, there was no agreement at Community level either on the criteria on which the list is based or on the resulting list. The German Government adds that the fixing of a minimum of 50% of sites classified is arbitrary and has no scientific basis.

54 Finally, the Netherlands Government contends that to find that nine species have declined by over 50%, without taking account of the various factors which may be responsible, is not enough to establish that the Kingdom of the Netherlands has infringed Article 4(1) of the Directive. In particular, the fall in numbers of *Tetrao tetrix* is the consequence of a disastrous hatching season probably caused by an atmospheric deposit originating outside the territories in question. As to *Botaurus stellaris*, the Government observes that despite the fact that 10% of that species are in SPAs, its population is falling, as in all other European territories. That shows that the decline of that species is not due to the inadequacy of the special conservation measures adopted by the Kingdom of the Netherlands.

55 It must first be observed that, contrary to the contention of the Kingdom of the Netherlands, Article 4(1) of the Directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods.

56 It follows from that provision, as interpreted by the Court, that if such species occur on the territory of a Member State, it is obliged to define *inter alia* SPAs for them (see Case C-334/89 *Commission* v *Italy* [1991] ECR I-93, paragraph 10).

57 Such an interpretation of the obligation to classify SPAs is moreover consistent with the system of specifically targeted and reinforced protection laid down by Article 4 of the Directive in respect in particular of the species listed in Annex I (see Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 23), *a fortiori* since even Article 3 provides, for all the species of birds covered by the Directive, that the preservation, maintenance and re-establishment of biotopes and habitats is to include primarily measures such as the creation of protected areas.

58 Besides, as the Advocate General points out in point 33 of his Opinion, if Member States could escape the obligation to classify SPAs if they considered that other special conservation measures were sufficient to ensure survival and reproduction of the species mentioned in Annex I, the objective of creating a coherent network of SPAs, referred to in Article 4(3) of the Directive, might not be achieved.

59 Second, it must be pointed out that the economic requirements mentioned in Article 2 of the Directive may not be taken into account when selecting an SPA and defining its boundaries (see *Royal Society for the Protection of Birds*, paragraph 27).

60 Moreover, while the Member States have a certain margin of discretion in the choice of SPAs, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive (see Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26).

61 It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive.

62 Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question.

63 Thus where it appears that a Member State has classified as SPAs sites the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable for conservation of the species in question, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1) of the Directive.

64 Consequently, the Netherlands Government's argument that the Commission must establish, territory by territory, specific infringements of that provision cannot be accepted.

65 Third, it should be observed, that the Netherlands Government, while not questioning the scientific reliability of IBA 89, contends that the application of the criteria on which that report is based cannot, in view of their general character, lead to unequivocal results as regards the classification of SPAs. It has maintained that, although it applied the same criteria as those on which IBA 89 is based, it arrived in its inventory of sites potentially classifiable as SPAs at a result which was very different from that indicated by that report. At the hearing, however, it admitted that its criteria differed from those used in IBA 89.

66 In that regard, it is significant that the Kingdom of the Netherlands has to this very day failed to produce a single document from the national procedure for classifying SPAs which indicates the criteria which governed the designation of SPAs in that Member State.

67 Moreover, throughout the pre-litigation procedure and also in its defence and rejoinder, it stressed that when designating SPAs it had, under Article 2 of the Directive, to take account of economic and recreational requirements. That approach is inconsistent with the Netherlands Government's assertion that it applied exclusively ornithological criteria when designating SPAs.

68 In this connection, it must be pointed out that IBA 89 draws up an inventory of areas which are of great importance for the conservation of wild birds in the Community. That inventory was prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird Preservation and in cooperation with Commission experts.

69 In the circumstances, IBA 89 has proved to be the only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as SPAs the most suitable territories in number and area for conservation of the protected species. The situation would be different if the Kingdom of the Netherlands had produced scientific evidence in particular to show that the obligation in question could be fulfilled by classifying as SPAs territories whose number and total area were less than those resulting from IBA 89.

70 It follows that that inventory, although not legally binding on the Member States concerned, can, by reason of its acknowledged scientific value in the present case, be used by the Court as a basis of reference for assessing the extent to which the Kingdom of the Netherlands has complied with its obligation to classify SPAs.

71 It should be added that, even supposing that the application of the ornithological criteria in IBA 89 could lead different entities to produce markedly different classifications of SPAs, the mere possibility of this, which has not been shown to have occurred in the present case, cannot as such be taken into consideration in order to undermine the probative value of IBA 89 in this instance.

72 Since it thus appears that the Netherlands has classified as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable, according to IBA 89, for classification as SPAs, the requirements of Article 4(1) of the Directive cannot be regarded as satisfied.

73 Consequently, without there being any need to consider the other arguments which have been put forward, it must be held that by classifying as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as SPAs within the meaning of Article 4(1) of the Directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

## Costs

74 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been essentially unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene are to bear their own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that, by classifying as special protection areas territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;**

2. **Orders the Kingdom of the Netherlands to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen Moitinho de Almeida

Kapteyn Murray Edward

Hirsch Jann

Delivered in open court in Luxembourg on 19 May 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

# JUDGMENT OF THE COURT (Fifth Chamber)
26 June 1997 *

In Case C-329/96,

**Commission of the European Communities**, represented by Maria Condou Durande, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Hellenic Republic**, represented by Evi Skandalou, Legal Assistant, First Class, in the Special European Community Legal Service of the Ministry of Foreign Affairs, assisted by Nana Daphniou, Legal Assistant, Second Class, in the same Service, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by failing, within the prescribed period, to adopt and/or notify to the Commission the laws, regulations and administrative provisions necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive,

* Language of the case: Greek.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, C. Gulmann (Rapporteur), D. A. O. Edward and P. Jann, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

## Judgment

1 By application lodged at the Court Registry on 8 October 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing, within the prescribed period, to adopt and/or notify to it the laws, regulations and administrative provisions necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Directive'), the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and that directive.

2 Member States were required under Article 23 of the Directive to bring into force the laws, regulations and administrative provisions necessary to comply with it within two years of its notification and forthwith to inform the Commission

thereof. Since the Directive was notified to the Greek authorities on 5 June 1992, the period laid down for its implementation expired on 5 June 1994.

3 Noting that this period had expired, and not having been informed of the measures for transposing the Directive into Greek law, the Commission initiated proceedings for a declaration of failure to fulfil obligations under Article 169 of the Treaty. By letter of 9 August 1994 it put the Greek Government on formal notice to submit to it its observations within two months.

4 Since the Greek Government did not reply to that letter, the Commission sent to it, on 21 June 1995, a reasoned opinion requesting it to adopt the measures necessary for compliance within two months of notification.

5 In the absence of any notification of transposition measures by the Hellenic Republic, the Commission brought the present action.

6 In its defence the Greek Government does not deny that the Directive was not transposed within the prescribed period. It merely points out that the delay in transposing the Directive has been attributable to technical legislative problems.

7 Since the Directive was not transposed within the period which it prescribed, the action brought by the Commission must be held to be well founded.

8 It must accordingly be held that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with the Directive, the Hellenic Republic has failed to fulfil its obligations under Article 23 thereof.

## Costs

9 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

**1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Hellenic Republic has failed to fulfil its obligations under Article 23 thereof;**

**2. Orders the Hellenic Republic to pay the costs.**

Moitinho de Almeida Sevón Gulmann

Edward Jann

Delivered in open court in Luxembourg on 26 June 1997.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber

# JUDGMENT OF THE COURT

11 July 1996 *

In Case C-44/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords (United Kingdom) for a preliminary ruling in the case, pending before that court, of

**Regina**

v

**Secretary of State for the Environment**

ex parte **Royal Society for the Protection of Birds,**

Intervener: **The Port of Sheerness Limited,**

on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann (Rapporteur), J. L. Murray, P. Jann and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Royal Society for the Protection of Birds, by R. Gordon QC and R. Buxton, Solicitor;

— the Port of Sheerness Limited, by S. Isaacs QC and C. Lewis, Barrister, instructed by C. Holme, Solicitor;

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by S. Richards and A. Lindsay, Barristers;

— the French Government, by C. de Salins, Assistant Director, Directorate for Legal Affairs, Ministry of Foreign Affairs, and J.-L. Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents;

— the Commission, by C. O'Reilly and M. van der Woude, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from the Royal Society for the Protection of Birds, represented by R. Gordon and R. Buxton, the Port of Sheerness Limited, represented by S. Isaacs, the United Kingdom Government, represented by J. E. Collins, S. Richards and A. Lindsay, the French Government, represented by R. Nadal, Deputy Secretary for Foreign Affairs, Directorate for Legal Matters, Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by C. O'Reilly, at the hearing on 7 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1996,

gives the following

## Judgment

1 By order of 9 February 1995, received at the Court on 24 February 1995, the House of Lords referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103 p. 1, hereinafter 'the Birds Directive').

2 Those questions were raised in proceedings between an association for the protection of birds, the Royal Society for the Protection of Birds (hereinafter 'the RSPB'), and the Secretary of State for the Environment (hereinafter 'the Secretary of State') concerning a decision designating a special protection area for the protection of wild birds.

3 The Birds Directive, which covers all species of birds naturally occurring in the wild in the European territory of the Member States to which the Treaty applies, provides, in Article 2, that the Member States are to take all necessary measures to maintain the population of all those species of birds at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.

4 According to Article 3 of the Birds Directive, the Member States, having regard to the requirements mentioned in Article 2, are to take all necessary measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the protected species.

5 Pursuant to Article 4(1) of that directive, the species mentioned in Annex I are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In particular, the Member States are to classify the most suitable territories in terms of number and size as special protection areas for the conservation of those species in the geographical sea and land area where the Directive applies.

6 According to Article 4(2), 'Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance'.

7 Finally, according to Article 4(4), '[I] n respect of the areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollu-

tion or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats'.

8 Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive'), to be implemented in the United Kingdom by June 1994, provides in Article 7 that the obligations under Article 6(2), (3) and (4) are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) of that directive. Article 6(2), (3) and (4) of the Habitats Directive is worded as follows:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

9 The United Kingdom did not transpose the Habitats Directive until October 1994.

10 On 15 December 1993, the Secretary of State decided to designate the Medway Estuary and Marshes as a Special Protection Area (hereinafter 'SPA'). At the same time, he decided to exclude from it an area of about 22 hectares known as Lappel Bank.

11 According to the order for reference, the Medway Estuary and Marshes are an area of wetland of international importance covering 4 681 hectares on the north coast of Kent and listed under the Ramsar Convention. They are used by a number of wildfowl and wader species as a breeding and wintering area and as a staging post during spring and autumn migration. The site also supports breeding populations of the avocet and the little tern, which are listed in Annex I to the Birds Directive.

12 Lappel Bank is an area of inter-tidal mudflat immediately adjoining, at its northern end, the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. Lappel Bank shares several of the important ornithological qualities of the area as a whole. Although it does not support any of the species referred to in Article 4(1) of the Birds Directive, some of the bird species of the area are represented in significantly greater numbers than elsewhere in the Medway SPA. Lappel Bank is an important component of the overall estuarine ecosystem and the loss of that inter-tidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.

13 The Port of Sheerness is at present the fifth largest in the United Kingdom for cargo and freight handling. It is a flourishing commercial undertaking, well located for sea traffic and access to its main domestic markets. The Port, which is also a significant employer in an area with a serious unemployment problem, plans extended facilities for car storage and value added activities on vehicles and in the fruit and paper product market, in order better to compete with continental ports offering similar facilities. Lappel Bank is the only area into which the Port of Sheerness can realistically envisage expanding.

14 Accordingly, taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway SPA.

15 The RSPB applied to the Divisional Court of the Queen's Bench Division to have the Secretary of State's decision quashed on the ground that he was not entitled, by virtue of the Birds Directive, to have regard to economic considerations when classifying an SPA. The Divisional Court found against the RSPB. On appeal by the RSPB, the Court of Appeal upheld that judgment. The RSPB therefore appealed to the House of Lords.

16 Uncertain as to how the directive should be interpreted, the House of Lords stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Is a Member State entitled to take account of the considerations mentioned in Article 2 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to Article 4(1) and/or 4(2) of that Directive?

2. If the answer to Question 1 is "no", may a Member State nevertheless take account of Article 2 considerations in the classification process in so far as:

(a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (i. e. the test which the European Court has laid down in, for example, *Commission* v *Germany* ("Leybucht Dykes") Case 57/89, for derogation from the requirements of Article 4(4)); or

(b) they amount to imperative reasons of overriding public interest such as might be taken into account under Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora?'

## The first question

17 The point of this question is whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

18 As a preliminary point, it must be borne in mind that, according to the ninth recital in the preamble to the Birds Directive, 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds [covered by the directive]', that 'certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution', and, finally, that 'such measures must also take account of migratory species'.

19 That recital is formally reflected in Articles 3 and 4 of the directive. In paragraph 23 of its judgment in Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221 (hereinafter '*Santoña Marshes*') the Court pointed out that the first of those provisions imposes obligations of a general character, namely the obligation to ensure a sufficient diversity and area of habitats for all the birds referred to in the directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and the migratory species not listed in that annex.

20 According to the United Kingdom Government and the Port of Sheerness Limited, Article 4 cannot be considered in isolation from Article 3. They state that Article 4 provides, in relation to certain species of particular interest, for the specific application of the general obligation imposed by Article 3. Since the latter provision allows account to be taken of economic requirements, the same should apply to Article 4(1) and (2).

21 The French Government reaches the same conclusion, observing that, when an SPA is created, the Member States take account of all the criteria mentioned in Article 2 of the Birds Directive, which is general in scope, and, therefore, *inter alia*, of economic requirements.

22 Those arguments cannot be upheld.

23 It must be noted first that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (see Case C-169/89 *Van den Burg* [1990] ECR I-2143, paragraph 11).

24 Whilst Article 3 of the Birds Directive provides for account to be taken of the requirements mentioned in Article 2 for the implementation of general conservation measures, including the creation of protection areas, Article 4 makes no such reference for the implementation of special conservation measures, in particular the creation of SPAs.

25 Consequently, having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law (see in particular Case C-435/92 *APAS* v *Préfets de Maine-et-Loire and de la Loire Atlantique* [1994] ECR I-67, paragraph 20), Article 2 does not constitute an autonomous derogation from the general system of protection established by the directive, it must be held (see paragraphs 17 and 18 of *Santoña Marshes*) — that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements.

26 It is the criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs. It is clear from paragraphs 26 and 27 of *Santoña Marshes* that, notwithstanding the divergences between the various language versions of the last subparagraph of Article 4(1), the criteria in question are ornithological criteria.

27 In view of the foregoing, the answer to the first question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

## The second question

### *The first part of the second question*

28 By the first part of the second question, the national court seeks to ascertain whether Article 4(1) or (2) of the Birds Directive must be interpreted as allowing a Member State, when designating an SPA and defining its boundaries, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

29 In its judgment in Case C-57/89 *Commission* v *Germany* [1991] ECR I-883, paragraphs 21 and 22 (hereinafter '*Leybucht Dykes*'), the Court held that the Member States may, in the context of Article 4(4) of the Birds Directive, reduce the extent of a SPA only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the directive. It was held that economic requirements cannot be invoked in that context.

30 It is also clear from paragraph 19 of *Santoña Marshes* that, in the context of Article 4 of that directive, considered as a whole, economic requirements cannot on any view correspond to a general interest superior to that represented by the ecological objective of the directive.

31 Accordingly, without its being necessary to rule on the possible relevance of the grounds corresponding to a superior general interest for the purpose of classifying an SPA, the answer to the first part of the second question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

*The second part of the second question*

32 By the second part of the second question, the House of Lords asks essentially whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may, when designating an SPA and defining its boundaries, take account of economic requirements to the extent that they reflect imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

33 The United Kingdom Government considers that that question is relevant only to cases of classification decisions made after the expiry of the period for transposition of the Habitats Directive. Since that is not the case in the main proceedings, it considers that it is unnecessary to answer the question.

34 It is well settled that it is for the national courts alone, before which the proceedings are pending and which will be responsible for the eventual judgment, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is clear that the interpretation of Community law requested bears no relation to the true nature of the case or the subject-matter of the main action (see in particular Case C-129/94 *Ruiz Bárnáldez* [1996] ECR I-1829, paragraph 7). That is, however, not the case in the main proceedings.

35 Consequently, it is necessary to examine the second part of the second question submitted by the national court.

36 It is important first to bear in mind that Article 7 of the Habitats Directive provides in particular that the obligations arising under Article 6(4) thereof are to apply, in place of any obligations arising under the first sentence of Article 4(4) of

the Birds Directive, to the areas classified under Article 4(1) or similarly recognized under Article 4(2) of that directive as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, whichever is the later.

37 As the Commission submits in its observations, Article 6(4) of the Habitats Directive, as inserted in the Birds Directive, has, following *Leybucht Dykes* where the point in issue was the reduction of an area already classified, widened the range of grounds justifying encroachment upon SPAs by expressly including therein reasons of a social or economic nature.

38 Thus, the imperative reasons of overriding public interest which may, pursuant to Article 6(4) of the Habitats Directive, justify a plan or project which would significantly affect an SPA in any event include grounds relating to a superior general interest of the kind identified in *Leybucht Dykes* and may where appropriate include grounds of a social or economic nature.

39 Next, although Article 6(3) and (4) of the Habitats Directive, in so far as it amended the first sentence of Article 4(4) of the Birds Directive, established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did not make any amendments regarding the initial stage of classification of an area as an SPA referred to in Article 4(1) and (2) of the Birds Directive.

40 It follows that, even under the Habitats Directive, the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under Article 4(1) and (2) of the Birds Directive.

41 Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.

42 The answer to the second part of the second question must therefore be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

## Costs

43 The costs incurred by the Governments of the French Republic and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the House of Lords, by order of 9 February 1995, hereby rules:

**1. Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds is to be interpreted as meaning that a Member**

**State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating a Special Protection Area and defining its boundaries.**

2. **Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.**

3. **Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora.**

Rodríguez Iglesias Edward Puissochet

Hirsch Mancini Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Wathelet

Delivered in open court in Luxembourg on 11 July 1996.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

# JUDGMENT OF THE COURT
28 February 1991 *

In Case C-57/89,

**Commission of the European Communities,** represented by Ingolf Pernice, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

**Federal Republic of Germany,** represented by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent, assisted by G. Leibrock, Regierungsrat in that Ministry, and by Joachim Sedemund, Rechtsanwalt, Cologne, and Albert Bleckmann, Professor of Law in the Westfälische Wilhelms Universität, Münster, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile-Reuter,

defendant,

supported by

**United Kingdom of Great Britain and Northern Ireland,** represented by S. J. Hay, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of

* Language of the case: German.

wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, G. C. Rodriguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing the oral argument of the parties at the hearing on 16 October 1990, at which the Federal Republic of Germany was represented by Albert Bleckmann and Mr Montag, and the United Kingdom by G. Barling, Barrister,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1990,

gives the following

**Judgment**

1 By application lodged at the Court Registry on 28 February 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979 L 103, p. 1, hereinafter referred to as 'the directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 Article 4 of the directive is worded as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

(Omissis)

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

3 The application initially comprised two claims, the first concerning dredging and filling operations in the *Rysumer Nacken*, and the second concerning dyke-building operations carried out in the *Leybucht*.

4 With regard to the first claim, the Commission, at the hearing, formally acknowledged that the Rysumer Nacken is not covered by the regulation of the *Land* of Lower Saxony of 13 December 1985 creating the Niedersächisches Wattenmeer National Park and that, consequently, the Rysumer Nacken is not designated as a special protection area. However, the Commission argues that that is a new argument put forward by the defendant in its rejoinder, so that the defendant must bear the costs relating to that point.

5 The German Government replies that the Commission was aware, even before the commencement of proceedings before the Court, of all the information concerning the legal status of the Rysumer Nacken, in particular of maps showing the boundaries of the national park. It is clear from those maps that the Rysumer Nacken is not designated as a special protection area. According to the German Government, the details it provided in its rejoinder do not therefore constitute a new argument.

6 The information regarding the extent of the protected areas in the Wattenmeer was supplied by the German Government in its letter of 6 September 1988 sent pursuant to Article 4(3) of the directive. At the time it lodged its application, the Commission had at its disposal *inter alia* the maps appended to the abovementioned regulation, defining the boundaries of the protected area. It is evident from that information that the Rysumer Nacken is not one of the sites designated as a special protection area. Consequently, since the withdrawal of this part of the application is not the consequence of the conduct of the German Government, the Commission must bear the costs relating thereto.

7 With regard to the dyke-building operations in the Leybucht, the Commission claims that they disturb birds which enjoy special protection under the provisions of Article 4(1) of the directive, in conjunction with Annex I, and damage the

habitat of the birds, which is designated as a special protection area. The Commission emphasizes that the first sentence of Article 4(4) of the directive requires Member States to take positive steps to avoid any deterioration or pollution of habitats as part of the management of special protection areas.

8 The Commission states that coastal defence measures such as the strengthening of a dyke are acceptable in the case of a threat to human life, but only on condition that the necessary measures are restricted to those which cause only the minimum necessary deterioration of the special protection area in question.

9 According to the Commission, those conditions have not been fulfilled in the present case. It is of the opinion that both the construction work in the Leybucht and its results entail deterioration in the living conditions of protected birds and the loss of land areas of considerable ecological importance, thereby leading to lower population densities for some of the species of birds listed in Annex I to the directive, in particular the avocet.

10 The German Government observes that according to the information sent to the Commission pursuant to Article 4(3) of the directive, the new line of the dyke in the Leybucht and the areas located on the landward side of the dyke are excluded from the special protection area. It states that the boundaries of the area in question are defined in the regulation creating the national park in such a way that the protected area extends only to the foot of the dyke, in the form it will have once the construction work in question has been completed.

11 According to the German Government, the sole purpose of the operations is to secure the safety of the dyke. It emphasizes that during the planning stage of the project at issue the competent authorities took account of all bird conservation requirements and balanced them against the requirements of coastal protection.

The German Government states that the new line of the dyke and the temporary disturbances caused by the works constitute the smallest possible interference for bird life in the Leybucht. It adds that the Commission has not furnished any evidence at all that the measures at issue significantly impair the protection of those birds.

12 With regard to the interpretation of Article 4(4) of the directive, the German Government claims that that provision requires a balance to be struck between the various public interests likely to be affected by the management of a special protection area, so that the Member States must have a wide discretionary power in this field.

13 The United Kingdom considers that the Commission has not established that the project at issue has a significant effect within the meaning of the first sentence of Article 4(4) of the directive. It states that that condition must be interpreted as meaning that the deterioration of a special protection area must be such as to threaten the survival or reproduction of protected species within their area of distribution. In the United Kingdom's view, the material supplied by the Commission does not appear sufficient to support the conclusion that the operations in the Leybucht involve such deterioration.

14 The United Kingdom emphasizes the importance of the evidence supplied by the defendant which shows that the works at issue will significantly improve ecological conditions in the Leybucht. It considers that it is legitimate, when assessing whether a particular project will cause deterioration to a special protection area and whether any such deterioration will be significant, to consider whether the works will at the same time bring compensatory ecological improvements.

15 In the submission of the United Kingdom, within the context of Article 4(4) of the directive account can be taken of other important public interest considerations, including those referred to in Article 2 of the directive. It considers that the Member States must be able to take into account the interests of persons living in or around a special protection area.

16 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

17 With regard to the boundaries of the special protection area in question, it must be pointed out that the boundary of the Leybucht is defined by the regulation creating the national park and the maps appended thereto. Although the plan of the area does include a reference to the regional planning scheme, the legal measure designating the special protection area nevertheless sets out its precise territorial delimitation, constituted by the present line of the dyke. The displacement of the dyke towards the sea as part of the coastal defence project thus entails a reduction in the protected area.

18 Consequently, in order to resolve this dispute it is necessary to settle a number of questions of principle concerning the obligations of the Member States under Article 4(4) of the directive in relation to the management of the special protection areas. It must be determined whether — and if so, under what conditions — the Member States are authorized to reduce the size of a special protection area and to what extent other interests may be taken into account.

19 With regard to the powers of the Member States to review in that way a decision to classify an area as a special protection area, it must be stated that a reduction in the geographical extent of a protected area is not expressly envisaged by the terms of the directive.

20 Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Article 4(1) of the directive, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the

directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas.

21 That interpretation of Article 4(4) of the directive is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds.

22 Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration. As the Court pointed out in its judgments in Case 247/85 (*Commission* v *Belgium* [1987] ECR 3029) and Case 262/85 (*Commission* v *Italy* [1987] ECR 3073), that provision does not constitute an autonomous derogation from the general system of protection established by the directive.

23 With regard to the reason put forward in this case, it must be stated that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area.

24 With regard to the part of the project concerning the Leyhörn area, the line of the dyke was influenced by considerations relating not only to coastal protection but also to the concern to ensure that fishing vessels from Greetsiel had access to the harbour. In the light of the principles for the interpretation of Article 4(4) of the directive set out above, to take account of such an interest is in principle incompatible with the requirements of the provision.

25 However, that part of the project has at the same time specific positive consequences for the habitat of birds. Once the works are completed it will be possible to close two navigation channels which cross the Leybucht, with the result that the Leybucht will be left in absolute peace. Moreover, the decision approving the proposed works envisages a strict protection scheme for the Leyhörn area. The dyke which previously protected the Hauener Hooge site will be opened, thus once more exposing an extensive area to tidal movements and allowing the formation of salt meadows of considerable ecological importance.

26 The desire to ensure the survival of the fishing port of Greetsiel could thus be taken into account in order to justify the decision on the line of the new dyke because there were the abovementioned offsetting ecological benefits, and solely for that reason.

27 Finally, the disturbance arising from the construction work itself does not exceed what is necessary to carry it out. The information concerning the number of avocets in that sector of the Wattenmeer shows, moreover, that during the period in question there was no significant change, within the meaning of Article 4(4) of the directive, in population trends for that species. Furthermore, the Commission has not supplied any other evidence relating to population trends for protected species.

28 It follows from the foregoing that the application must be dismissed.

## Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs, including the costs of the intervener and those relating to the application for interim measures.

On those grounds,

THE COURT

hereby:

**(1) Dismisses the application;**

**(2) Orders the Commission to pay the costs, including the costs of the intervener and those relating to the application for interim measures.**

Due Mancini O'Higgins Rodríguez Iglesias Díez de Velasco

Slynn Kakouris Joliet Schockweiler Grévisse Zuleeg

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President

# JUDGMENT OF THE COURT
9 August 1994 *

In Case C-396/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bayerischer Verwaltungsgerichtshof for a preliminary ruling in the proceedings pending before that court between

**Bund Naturschutz in Bayern eV,**

**Richard Stahnsdorf and 40 Others**

and

**Freistaat Bayern,**

and

**Stadt Vilsbiburg,**

**Landkreis Landshut,**

interveners,

* Language of the case: German.

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris (Rapporteur), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bund Naturschutz in Bayern eV, by U. Kaltenegger, Rechtsanwalt, Landshut,

— plaintiffs 5 to 41 in the main proceedings, J. Birnkammer and Others, by E. Schönefelder, Rechtsanwalt, Munich,

— Freistaat Bayern, by M. A. Dauses, Professor at the University of Bamberg,

— Stadt Vilsbiburg, by P. Barteit, Mayor,

— the Federal Republic of Germany, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and Claus-Dieter Quassowski, Regierungsdirektor at the same Ministry, acting as Agents,

— the Kingdom of the Netherlands, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by S. Cochrane, Treasury Solicitor, acting as Agent, and Derrick Wyatt, Barrister,

— the Commission of the European Communities, by R. Wägenbaur, Principal Legal Adviser, acting as Agent, and A. Böhlke, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Bund Naturschutz in Bayern eV, J. Birnkammer and Others, Freistaat Bayern, Stadt Vilsbiburg, represented by P. Barteit and G. Nord, Deputy Mayor, the German Government and the United Kingdom, represented by S. L. Hudson, Assistant Treasury Solicitor, and D. Wyatt QC, and the Commission at the hearing on 22 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 3 May 1994,

gives the following

## Judgment

1 By order of 5 November 1992, received at the Court Registry on 18 November 1992, the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Regional

Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the directive').

2 The questions were raised in the course of proceedings between the Bund Naturschutz in Bayern eV, an ecological organization, with 41 other plaintiffs, mainly farmers, and Freistaat Bayern (Federal State of Bavaria) concerning the conformity with the requirements laid down in the directive of the consent procedure for construction plans for two sections of the new B 15 federal highway in Bavaria.

3 The directive was adopted on the basis of Articles 100 and 235 of the EEC Treaty. According to the first recital in its preamble, action programmes of the European Communities on the environment '... affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes ...' and, according to the eighth recital, '... projects belonging to certain types have significant effects on the environment and ... must as a rule be subject to systematic assessment'.

4 Article 1 of the directive states:

'1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive: "project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

— ...'

5 Article 2(1) of the directive provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects. Those projects are defined in Article 4.'

6 Under Article 2(2), the 'environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive' and, pursuant to Article 2(3), 'Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive'. In such cases the Member States must, however, under the same article, consider whether another form of assessment would be appropriate and inform the Commission of the reasons justifying the exemption granted.

7 Article 4(1) of the directive provides: 'Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Arti-

cles 5 to 10'. Annex I refers in Point 7 *inter alia* to the construction of motorways and express roads.

8 Articles 5 to 10 concern in particular the necessary measures to be adopted by the Member States to ensure that the developer supplies certain information, that the national authorities and also other Member States likely to be concerned by the project in question are consulted and that the public is kept informed. In that last respect, Article 6(2) provides more particularly that the Member States are to ensure that any request for development consent and the information supplied by the developer are made available to the public, who must be given the possibility of expressing an opinion.

9 In accordance with Article 12(1) of the directive, the Member States are to take the measures necessary to comply therewith within three years of its notification. Since the directive was notified to the Member States on 3 July 1985, that time-limit expired on 3 July 1988.

10 The file shows that in the Federal Republic of Germany the directive was belatedly transposed by a Law of 12 February 1990, which came into force on 1 August 1990 (BGBl 1990 I, p. 205). Article 1 of that transposition law contains the Gesetz über die Umweltverträglichkeitsprüfung (Environmental Impact Assessment Law, the 'UVPG'). Paragraph 22(1) of the UVPG laid down transitional rules under which procedures already initiated were to be completed in accordance with the provisions of the UVPG where the project had not yet been notified to the public when the UVPG came into force.

11 Provision was thus made for exemptions from the requirements laid down in the directive for pending consent procedures for which the relevant project had already been notified to the public when the UVPG came into force on 1 August 1990.

12 The dispute in the main proceedings concerns the construction of two sections of the new B 15 federal highway in Bavaria, a road of some 130 km, the plans and routing for which were decided many years ago. The first section at issue is from Geisenhausen to Haarbach and is 6.9 km in length; the second, known as the 'Vilstal link' and approximately 3 km in length, is to join the new B 15 highway to the B 388 by-passing Vilsbiburg.

13 It appears from the order for reference that the Bavarian Highways Department, the developer of the road construction project, lodged consent applications for the plans of the two sections on 7 September 1988 and 9 November 1989, that is to say after 3 July 1988, the deadline for transposition of the directive, and prior to 1 August 1990, the date on which the transposition law came into force. The plans were made available to the public at the end of 1989. By two decisions of 16 December 1991 the Government of Lower Bavaria approved the projects. Pursuant to Paragraph 22(1) of the UVPG no environmental impact assessment was carried out as required by the directive.

14 The Bund Naturschutz in Bayern eV and 41 other plaintiffs brought actions for the annulment of the two consent decisions referred to above before the Bayerischer Verwaltungsgerichtshof. The plaintiffs maintained that the directive, which was transposed belatedly in the Federal Republic of Germany, did not permit the

adoption of national transitional rules such as those in Paragraph 22(1) of the UVPG.

15 Since it had doubts as to whether the transitional rules in question complied with the requirements of the directive, the national court suspended proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is Article 12 of the directive to be interpreted as meaning that

(a) the Member States were under an obligation to take by 3 July 1988 the measures necessary to ensure that all public projects which fell within the ambit of the directive and for which development consent was granted for the first time after that date were in accordance with the requirements of the directive,

or

(b) the Member States had to adopt the necessary measures by 3 July 1988 but were not prevented from enacting transitional provisions for development consent procedures already initiated?

2. If Question 1 is to be answered as indicated under (b) above:

Is Article 12 of the directive to be interpreted as meaning that

(a) the relevant date for transitional provisions must be 3 July 1988,

or

(b) the Member States may in the case of transitional provisions take as the relevant date that of the later entry into force of their national measures for the transposition of the directive?

3. If Question 2 is to be answered as indicated under 2(b) above:

Is the concept of "project" in Articles 1, 3 and 4 of and Annex I, point 7, to the directive to be understood as meaning, in its application to motorways and express roads, that the environmental impact

(a) is to be assessed solely for the section of a road link for which development consent has been sought,

or

(b) in addition to the area covered by that section, for the road link as a whole?'

## Questions 1 and 2

16 As indicated in paragraph 13 above, it is clear from the order for reference that the procedure which resulted in the two consent decisions at issue in the main proceedings was initiated after 3 July 1988, the deadline for transposition of the directive. The first two questions must therefore be examined in the light of that fact.

17 The national court is asking essentially whether Article 12(1) of the directive should be interpreted as permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning environmental impact assessment required under the directive.

18 It must be pointed out in this connection that there is nothing in the directive which could be construed as authorizing the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out an environmental impact assessment. On the contrary, all the provisions in the directive were formulated on the basis that it was to be transposed into the legal systems of the Member States by 3 July 1988 at the latest.

19 Accordingly, regardless whether the directive permits a Member State to introduce transitional rules for consent procedures already initiated and in progress before the deadline of 3 July 1988, the directive in any case precludes the introduction in

respect of procedures initiated after that date of rules such as those at issue in the main proceedings by a national law which, in breach of the directive, transposes it belatedly into the domestic legal system. Such an interpretation would result in an extension of the deadline of 3 July 1988 and would be contrary to the obligations under the directive.

20 The reply to the first two questions referred to the Court must therefore be that Article 12(1) of the directive must be interpreted as not permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning the environmental impact assessment required by the directive.

## Question 3

21 The third question was asked solely in case the reply to the first two questions was contrary to that given above. Since the Court did not so reply, there is no need to answer the third question.

## Costs

22 The costs incurred by the United Kingdom, the Governments of the Federal Republic of Germany and the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in

the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bayerischer Verwaltungsgerichtshof, by order of 5 November 1992, hereby rules:

**Article 12(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as not permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning the environmental impact assessment required by the directive.**

Due Mancini Moitinho de Almeida

Diez de Velasco Edward

Kakouris Joliet Schockweiler

Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass — Registrar

O. Due — President

EUROPEAN
COMMISSION

Brussels, 26.10.2012
COM(2012) 628 final

2012/0297 (COD)

Proposal for a

# DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

(Text with EEA relevance)

{SWD(2012) 354 final}
{SWD(2012) 355 final}

# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE PROPOSAL

### General context – Grounds for and objectives of the proposal

Directive 2011/92/EU[1] contains a legal requirement to carry out an environmental impact assessment (EIA) of public or private projects likely to have significant effects on the environment, prior to their authorisation. There is consensus that the main objective of the Directive has been achieved; the principles of environmental assessment have been harmonised throughout the EU by the introduction of minimum requirements concerning the type of projects subject to assessment, the main developer's obligations, the content of the assessment and the participation of the competent authorities and the public. In parallel, as part of the development consent process, the EIA is a tool to assess the environmental costs and benefits of specific projects with the aim of ensuring their sustainability. Hence, the Directive has become a key instrument of environmental integration and has also brought environmental and socio-economic benefits.

After 25 years of application, the EIA Directive has not significantly changed, while the policy, legal and technical context has evolved considerably. The experience with implementation, as reflected in the Commission reports on the application and effectiveness of the EIA Directive, including the latest one published in July 2009[2], has identified a number of shortcomings. In its mid-term review of the 6th Environment Action Programme[3], the Commission stressed the need for improving the assessment of environmental impacts at national level and announced a review of the EIA Directive. In the context of Better Regulation, the Directive has also been identified as a potential instrument for simplification[4]. The general objective of the proposal is to adjust the provisions of the codified EIA Directive, so as to correct shortcomings, reflect ongoing environmental and socio-economic changes and challenges, and align with the principles of smart regulation.

### Consistency with other policies and objectives of the Union

As the revised EIA Directive can play a crucial role in achieving resource efficiency (e.g. by introducing new requirements for assessing issues such as biodiversity and climate change which are related to the use of natural resources), the proposal is part of the initiatives aiming to implement the Roadmap to a Resource-Efficient Europe[5]. Furthermore, the revision of the EIA Directive subscribes to the Europe 2020 strategy[6], in particular the priority of sustainable growth. The revised Directive can also contribute significantly to the duty of the Union to take cultural aspects into account in all its policies and actions.

---

1 Directive 2011/92/EU (OJ L 26, 28.1.2012, p.1) codifies Directive 85/337/EEC and its three subsequent amendments (Directives 97/11/EC, 2003/35/EC and 2009/31/EC).

2 COM(2009) 378. All reports are available on http://ec.europa.eu/environment/eia/eia-support.htm.

3 COM(2007) 225.

4 COM(2009) 15.

5 COM(2011) 571.

6 COM(2010) 2020.

## 2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

### Consultation of interested parties

The consultation took place in 2010, in line with the Commission's standards. From June to September 2010, a wide public consultation on the review of the EIA Directive was launched, using a web questionnaire available in all EU official languages. 1365 replies were received (684 from citizens, 479 from organisations, companies and NGOs, 202 from public authorities and administrations). In addition, the Institute of Environmental Management & Assessment (IEMA)[7] sent a contribution (1815 responses) in the form of a survey incorporating a number of the Commission's questions. The consultation phase was concluded with a Conference (on 18-19/11/2010, at Leuven, Belgium), which complemented the wide public consultation as it looked for input from specialised stakeholders. 200 representatives from the EU and international institutions, public authorities – at national, regional and local levels – industry, environmental organisations, and the academic community were present at the conference. The results of the public consultation[8] and the conclusions of the Conference[9] have provided useful input for the development of the Commission's proposal.

### Result of the impact assessment

The Impact Assessment (IA), which is submitted with this proposal, identified shortcomings in the current EIA legislation that lead to unsatisfactory implementation (no provisions that ensure quality of information and quality standards for the EIA process and implementation gaps) and socio-economic costs in the implementation of the Directive. If these problems are not adequately addressed, the Directive would become less effective and efficient and would not be able to ensure the integration of environmental considerations in decision-making. In addition, the socio-economic costs are likely to negatively affect internal market harmonisation. The shortcomings of the Directive can be grouped into three specific problem areas: (1) the screening procedure, (2) the quality and analysis of the EIA and (3) the risks of inconsistencies within the EIA process itself and in relation to other legislation.

The IA assessed a number of policy options with the aim of identifying cost-effective measures to address these problems. The outcome has led the Commission to propose a number of amendments, of which the main ones are as follows:

It is proposed to clarify the **screening** procedure, by modifying the criteria of Annex III and specifying the content and justification of screening decisions. These amendments would ensure that EIAs are carried out only for projects that would have significant environmental effects, avoiding unnecessary administrative burden for small-scale projects.

---

7 The largest professional membership body for the environment with over 15,000 members working across all industry sectors.

8 http://ec.europa.eu/environment/consultations/eia.htm

9 http://ec.europa.eu/environment/eia/conference.htm

As regards the **quality and analysis of the EIA**, it is proposed to introduce amendments to reinforce the quality of the process (i.e. mandatory scoping and quality control of EIA information), specify the content of the EIA report (mandatory assessment of reasonable alternatives, justification of final decisions, mandatory post-EIA monitoring of significant adverse effects) and adapt the EIA to challenges (i.e. biodiversity, climate change, disaster risks, availability of natural resources).

As regards the risks **of inconsistencies**, it is proposed to specify the time-frames for the main stages required by the Directive (public consultation, screening decision, final EIA decision) and introduce a mechanism, a kind of EIA one-stop shop to ensure coordination or joint operation of the EIA with the environmental assessments required under other relevant EU legislation, e.g. Directives 2010/75/EU, 92/43/EEC, 2001/42/EC.

Nine of the twelve amendments analysed are expected to provide significant environmental and socio-economic benefits without additional administrative costs; moderate savings are also expected. Two amendments (assessment of alternatives and monitoring) are expected to provide high environmental and socio-economic benefits at moderate costs for developers and with limited or negligible costs for public authorities; one amendment (adaptation of the EIA to new challenges) is expected to provide high benefits at moderate to high costs for developers and public authorities. In the long term, the significant environmental and socio-economic benefits and the moderate savings associated with the proposed amendments are likely to exceed the administrative costs.

## 3. LEGAL ELEMENTS OF THE PROPOSAL

### Summary of the proposed action

The proposal will strengthen the provisions concerning the quality of the EIA with the aim of achieving a high level of environmental protection. Indeed, the ability to make valid decisions on the environmental impact of a project depends – to a large extent – on the quality of the information used in the EIA documentation and the quality of the EIA process. Furthermore, the proposal will enhance policy coherence and synergies with other EU law instruments and simplify procedures, with a view to reducing unnecessary administrative burdens.

Specific information on the amended Articles and Annexes of the EIA Directive is provided below.

The changes to Articles 1(2), 1(3) and 1(4) aim to clarify the terms of the Directive, based on the implementation experience and the Court case-law. The definition of 'project' is amended to make it clear that demolition works are included, in accordance with the Court ruling in case C-50/09; relevant definitions are also inserted. The possibility of not applying the Directive is limited to projects with national defence as their sole purpose and is extended to cover civil emergencies, as it is already the case under Directive 2001/42/EC.

Article 2(3) is amended to introduce an EIA 'one-stop shop', allowing the coordination or integration of assessment procedures under the EIA Directive and other EU legislation.

The modifications to Article 3 aim to ensure consistency with Article 2(1), i.e. by referring to ‘significant’ effects, and adapt the EIA to environmental issues (biodiversity, climate change, disaster risks, use of natural resources).

The changes introduced in Article 4 streamline the screening procedure and enhance the consistency of Member States' approaches to ensure that EIAs are required only when it is clear that there are significant environmental impacts. As regards projects listed in Annex II, a new paragraph is inserted concerning the obligation of the developer to provide specific information to the competent authority (detailed in Annex II.A). This Article also allows for specification of the selection criteria listed in Annex III via delegated acts. The content of the screening decision is specified to acknowledge the successful practice of adapting projects under certain preconditions (on the basis of a consideration of the most relevant impacts and information generated under other Union environmental legislation), which can avoid having to conduct a full assessment, as the most relevant environment impacts are satisfactorily addressed by the adapted project. The likelihood of significant effects and the subsequent need for an EIA would take into account the account the nature, complexity, location and size of the proposed project and would be based on objective factors, such as the scale of the project, the use of valuable resources, the environmental sensitivity of the location, and the magnitude or irreversibility of the potential impact. Furthermore, the lessons drawn from the case-law, where the Court stressed the need for "sufficiently reasoned" (C-75/08) screening decisions, which contain or are accompanied by all the information that makes it possible to check that the decision is based on adequate screening (C-87/02), are taken on board. Finally, a time-frame is set for adoption of the screening decision.

Article 5 is comprehensively modified, with a view to reinforcing the quality of information and streamlining the EIA process. The core requirement for the developer to submit environmental information is maintained, but its form and content is streamlined and specified in Annex IV. The scoping process becomes obligatory and the content of the opinion delivered by the competent authority is specified. Mechanisms are introduced to guarantee the completeness and sufficient quality of the environmental reports.

Article 6(6), which refers to the time-frames for public consultation, is modified with a view to reinforcing the role of environmental authorities and defining concrete time-frames for the consultation phase on the environmental report.

Article 7(5) is amended in order to include the establishment of time-frames for consultations among the issues to be determined by Member States when defining the arrangements for the implementation of projects likely to have significant transboundary environmental effects.

Article 8 is substantially amended and includes several new provisions. Firstly, a time-frame is set for the conclusion of the environmental impact assessment procedure. Secondly, the competent authority is required to include in the development consent decision itself some items substantiating the decision; this reflects the case-law (e.g. C-50/09). Thirdly, mandatory ex-post monitoring is introduced only for projects that will have significant adverse environmental effects, according to the consultations carried out and the information gathered (including the environmental report), with the purpose of assessing the implementation and

effectiveness of mitigation and compensation measures. Some Member States already require such monitoring, which should not duplicate that which may be required by other Union legislation (e.g. on industrial emissions or water quality), and it is appropriate therefore to establish common minimum requirements. This new obligation is cost-effective, as it may help to avoid adverse impacts on the environment and public health and costs of reparation, and is relevant for addressing impacts related to new challenges such as climate change and disaster risks. Fourthly, the competent authority is required to verify that the information of the environmental report is up to date, before deciding to grant or refuse development consent.

The main modification to Article 9 is the inclusion of a description of the monitoring arrangements in the information provided to the public when development consent is granted.

Article 12 is amended in order to specify the information required to monitor the implementation of the Directive.

Two new Articles (12a and 12b) are inserted concerning the adaptation of Annexes II.A, III and IV to scientific and technical progress through delegated acts.

Annex II.A, which is a new Annex, sets out the information to be submitted by the developer as regards projects listed in Annex II, for which screening is carried out to determine whether an EIA is required. This amendment is intended to harmonise the screening process.

Annex III, which lays down the criteria used for screening Annex II projects, is amended to clarify the existing criteria (e.g. cumulative effects or links with other EU legislation) and to include additional ones (mainly those related to new environmental issues).

Annex IV contains the items to be considered in the environmental report required by Article 5. The main changes are additional information requirements concerning the assessment of reasonable alternatives, the description of monitoring measures and the description of aspects related to new environmental issues (e.g. climate change, biodiversity, disaster risks, use of natural resources).

The amended Directive contains transitional provisions, which draw on the case-law (e.g. case C-81/96). The EIA should apply to projects for which the request for development consent was introduced before the time-limit for transposition and for which the environmental impact assessment has not been concluded before that date.

**Explanatory documents**

The Commission considers that explanatory documents are necessary in order to improve the quality of information on the transposition of the Directive for the following reasons.

The complete and correct transposition of the Directive is essential to guarantee that its objectives (i.e. protecting human health and the environment and ensuring a level play field) are achieved. The EIA is part of the process for assessing and granting development consent to a wide range of private and public projects in the Member

States, as either a separate or integrated part of assessment procedures. In addition, the implementation of the Directive is often highly decentralised, as the regional and local authorities are responsible for its application and, in some Member States, even for its transposition. Finally, the codification of the EIA Directive is likely to result in changes to the national measures that transposing progressively the initial directive and its three subsequent amendments. In order to implement the provisions of the revised Directive, which amends the codified version, Member States may have to act in different policy fields and amend a wide variety of legislative acts at national, regional and local levels.

The above factors are likely to increase the risks of incorrect transposition and implementation of the Directive, and complicate the Commission's task of monitoring the application of EU law. Clear information with respect to the transposition of the revised EIA Directive is instrumental in ensuring the conformity of national legislation with its provisions.

The requirement to provide explanatory documents may create an additional administrative burden on those Member States which do not work on this basis in any case. However, explanatory documents are necessary to allow effective verification of complete and correct transposition, which is essential for the reasons mentioned above, and there are no less burdensome measures to allow efficient verification. Moreover, the explanatory documents can contribute significantly to reducing the administrative burden of compliance monitoring by the Commission; without them, considerable resources and numerous contacts with national authorities would be required to track the methods of transposition in all Member States. Hence, the possible additional administrative burden of providing explanatory documents is proportionate to the aim pursued, namely to ensure effective transposition and fully achieve the objectives of the Directive.

In view of the above it is appropriate to ask Member States to accompany the notification of their transposition measures with one or more documents explaining the relationship between the provisions of the Directive and the corresponding parts of national transposition instruments.

**Legal basis**

As the primary objective of the Directive is the protection of the environment, in accordance with Article 191 TFEU, the proposal is based on Article 192(1) TFEU.

**Subsidiarity and proportionality principles and choice of instrument**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the European Union.

The objectives of the proposal cannot be sufficiently achieved by the Member States. The existing legislation sets minimum requirements for the environmental assessment of projects throughout the EU and aims to comply with international conventions (e.g. Espoo, Aarhus, Convention on Biological Diversity). This principle is maintained in the proposal which further harmonises the principles of environmental assessment and addresses inconsistencies. All Member States must take measures to comply with the minimum requirements; individual national actions

could impair the functioning of the internal market, as varying national regulation might hamper transboundary economic activities.

EU action will better achieve the objectives of the proposal. Since the adoption of the Directive in 1985, the EU has enlarged, while the scope and seriousness of environmental issues to be tackled and the number of major EU-scale infrastructure projects have also increased (e.g. transboundary projects in the field of energy or transport). Because of the transboundary nature of environmental issues (e.g. climate change, disaster risks) and of some projects, action at EU level is necessary and brings added value compared to individual national actions. The EU's action will also address issues that are important to the EU as a whole, such as adaptation to climate change and disaster prevention, and has a role to play in the achievement of Europe's 2020 objectives for sustainable growth.

The proposal therefore respects the subsidiarity principle.

The chosen legal instrument is a directive, as the proposal aims to modify an existing directive. The proposal lays down general objectives and obligations, while leaving sufficient flexibility to the Member States as regards the choice of measures for compliance and their detailed implementation. The proposal therefore complies with the proportionality principle.

## 4. BUDGETARY IMPLICATIONS

The proposal has no implications for the EU budget.

## 5. OPTIONAL ELEMENTS

The proposal concerns a matter relevant to the European Economic Area and should therefore be applicable to it.

2012/0297 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[10],

Having regard to the opinion of the Committee of the Regions[11],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Directive 2011/92/EU has harmonised the principles for the environmental assessment of projects by introducing minimum requirements (with regard to the type of projects subject to assessment, the main obligations of developers, the content of the assessment and the participation of the competent authorities and the public), and contributes to a high level of protection of the environment and human health.

(2) The mid-term review of the sixth Environment Action Programme[12] and the latest Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC)[13], the predecessor to Directive 2011/92/EU, stressed the need to improve the principles of environmental assessment of projects and adapting the Directive to the policy, legal and technical context, which has evolved considerably.

---

10 OJ C , , p. .
11 OJ C , , p. .
12 COM(2007) 225.
13 COM(2009) 378.

(3) It is necessary to amend Directive 2011/92/EU in order to strengthen the quality of the environmental assessment procedure, streamline the various steps of the procedure and enhance coherence and synergies with other Union legislation and policies, as well as strategies and policies developed by Member States in areas of national competence.

(4) Over the last decade, environmental issues, such as resource efficiency, biodiversity, climate change, and disaster risks, have become more important in policy making and should therefore also constitute critical elements in assessment and decision-making processes, especially for infrastructure projects.

(5) In its Communication entitled 'Roadmap to a Resource Efficient Europe'[14], the Commission committed itself to including broader resource efficiency considerations in the context of the revision of Directive 2011/92/EU.

(6) The Soil Thematic Strategy[15] and the Roadmap to a Resource-Efficient Europe underline the importance of the sustainable use of soil and the need to address the unsustainable increase of settlement areas over time (land take). Furthermore, the final document of the United Nations Conference on Sustainable Development held in Rio de Janeiro on 20-22 June 2012 recognises the economic and social significance of good land management, including soil, and the need for urgent action to reverse land degradation. Public and private projects should therefore consider and limit their impact on land, particularly land take, and soil, including on organic matter, erosion, compaction and sealing, including through appropriate land use plans and policies at national, regional and local levels.

(7) The United Nations Convention on Biological Diversity ("the Convention"), to which the European Union is party, requires assessment, as far as possible and as appropriate, of the significant adverse effects of projects on biological diversity, which is defined in Article 2 of the Convention, with a view to avoiding or minimising such effects. This prior assessment of impacts should contribute to attaining the Union headline target adopted on 2010[16] of halting biodiversity loss and the degradation of ecosystem services by 2020 and restoring them where feasible.

(8) The measures taken to avoid, reduce and, if possible, offset significant adverse effects on the environment should contribute to avoiding any deterioration in the quality of the environment and any net loss of biodiversity, in accordance with the Union's commitments in the context of the Convention and the objectives and actions of the Union Biodiversity Strategy up to 2020[17].

(9) Climate change will continue to cause damage to the environment and compromise economic development. Accordingly, the environmental, social and economic resilience of the Union should be promoted so as to deal with climate change throughout the Union's territory in an efficient manner. Climate change adaptation and mitigation responses need to be addressed across many of the sectors of Union legislation.

---

14 COM(2011) 571.
15 COM(2006) 231.
16 European Council conclusions, March 2010.
17 COM(2011) 244.

(10) Following the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a Community approach on the prevention of natural and man-made disasters[18], in its conclusions of 30 November 2009, the Council of the EU invited the Commission to ensure that the implementation review and further development of EU initiatives take into consideration disaster risk prevention and management concerns and the United Nations Hyogo Framework for Action Programme (2005-2015), which stresses the need to put in place procedures for assessment of the disaster risk implications of major infrastructure projects.

(11) Protection and promotion of cultural heritage and landscapes, which are an integral part of the cultural diversity that the Union is committed to respect and promote in accordance with Article 167(4) of the Treaty on the Functioning of the European Union, can usefully build on definitions and principles developed in relevant Council of Europe Conventions, in particular the Convention for the Protection of the Architectural Heritage of Europe, the European Landscape Convention and the Framework Convention on the Value of Cultural Heritage for Society.

(12) When applying Directive 2011/92/EU, it is necessary to ensure a competitive business environment, especially for small and medium enterprises, in order to generate smart, sustainable and inclusive growth, in line with the objectives set out in the Commission's Communication entitled 'Europe 2020 – A strategy for smart, sustainable and inclusive growth'[19].

(13) Experience has shown that in cases of civil emergency compliance with the provisions of Directive 2011/92/EU may have adverse effects, and provision should therefore be made to authorise Member States not to apply that Directive in appropriate cases.

(14) The information which the developer is required to supply in order to enable the competent authority to determine whether projects listed in Annex II of Directive 2011/92/EU should be subject to an environmental assessment (screening procedure), should be specified.

(15) The selection criteria laid down in Annex III of Directive 2011/92/EU, which are taken into account by the Member States in order to determine which projects should be subject to assessment on the basis of their significant environmental effects, should be adapted and clarified in order to ensure that an environmental assessment is only required for projects likely to have significant environmental effects, such as projects using or affecting valuable resources, projects proposed for environmentally sensitive locations, or projects with potentially hazardous or irreversible effects.

(16) When determining whether significant environmental effects are likely to be caused, the competent authorities should identify the most relevant criteria to be considered and use the additional information that may be available following other assessments required by Union legislation in order to apply the screening procedure effectively. In this regard, it is appropriate to specify the content of the screening decision, in particular where no environmental assessment is required.

---

18 COM(2009) 82.

19 COM(2010) 2020.

(17) The competent authorities should be required to determine the scope and level of detail of the environmental information to be submitted in the form of an environmental report (scoping). In order to improve the quality of the assessment and streamline the decision-making process, it is important to specify at Union level the categories of information on which the competent authorities should make that determination.

(18) The environmental report of a project to be provided by the developer should include an assessment of reasonable alternatives relevant to the proposed project, including the likely evolution of the existing state of the environment without implementation of the project (baseline scenario), as a means to improve quality of the assessment process and to allow integrating environmental considerations at an early stage in the project's design.

(19) Measures should be taken to ensure that the data and information included in the environmental reports, in accordance with Annex IV of Directive 2011/92/EU are complete and of sufficiently high quality. With a view to avoiding duplication of the assessment, Member States should take account of the fact that environmental assessments may be carried out at different levels or by different instruments.

(20) With a view to ensuring transparency and accountability, the competent authority should be required to substantiate its decision to grant development consent in respect of a project, indicating that it has taken into consideration the results of the consultations carried out and the relevant information gathered.

(21) It is appropriate to establish common minimum requirements for the monitoring of the significant adverse effects of the construction and operation of projects to ensure a common approach in all Member States and to ensure that, after the implementation of mitigation and compensation measures, no impacts exceed those initially predicted. Such monitoring should not duplicate or add to monitoring required pursuant to other Union legislation.

(22) Time-frames for the various steps of the environmental assessment of projects should be introduced, in order to stimulate more efficient decision-making and increase legal certainty, also taking into account the nature, complexity, location and size of the proposed project. Such time-frames should under no circumstances compromise the high standards for the protection of the environment, particularly those resulting from other Union environmental legislation, and effective public participation and access to justice.

(23) In order to avoid duplication of the assessment, reduce administrative complexity and increase economic efficiency, where the obligation to carry out environmental impact assessments arises simultaneously from this Directive and other Union legislation, such as Directives 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment[20], 2009/147/EC on the conservation of wild birds[21], 2000/60/EC establishing a framework for Community action in the field of water policy[22], 2010/75/EU on industrial emissions[23] and Council Directive 92/43/EEC on

[20] OJ L 197, 21.7.2001, p.30.
[21] OJ L 20, 26.1.2010, p.7.
[22] OJ L 327, 22.12.2000, p.1.
[23] OJ L 334, 17.12.2010, p.17.

the conservation of natural habitats and of wild fauna and flora[24], Member States should provide for coordinated or joint procedures fulfilling the requirements of the relevant Union legislation.

(24) The new provisions should also apply to projects for which the request for development consent is introduced before the time-limit for transposition but for which the environmental impact assessment has not been concluded before that date.

(25) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(26) In order to adjust the selection criteria and the information to be provided in the environmental report to the latest developments in technology and relevant practices, the power to adopt acts, in accordance with Article 290 of the Treaty on the Functioning of the European Union, should be delegated to the Commission in respect of Annexes II.A, III and IV of Directive 2011/92/EU. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.

(27) The Commission, when preparing and drawing up delegated acts, should ensure the simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

(28) Since the objective of this Directive, namely to ensure a high level of protection of the environment and of human health, through the establishment of minimum requirements for the environmental assessment of projects, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scope, seriousness and transboundary nature of the environmental issues to be addressed, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) Directive 2011/92/EU should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

Directive 2011/92/EU is amended as follows:

(1) Article 1 is amended as follows:

[24] OJ L 206, 22.7.1992, p.7.

(a) in point (a) of paragraph 2, the first indent is replaced by the following:

"— the execution of construction or demolition works, or of other installations or schemes,"

(b) in paragraph 2, the following definition is added:

"(g) "environmental impact assessment" shall mean the process of preparing an environmental report, carrying out consultations (including with the public concerned and the environmental authorities), the assessment by the competent authority, taking into account the environmental report and the results of the consultations in the development consent procedure as well as the provision of information on the decision in accordance with Articles 5 to 10."

(c) paragraphs 3 and 4 are replaced by the following:

"3. Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects having as their sole purpose national defence or the response to civil emergencies, if they deem that such application would have an adverse effect on those purposes."

4. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, provided that the objectives of this Directive, including that of supplying information, are achieved through the legislative process. Every two years from the date specified in Article 2(1) of Directive XXX [OPOCE please introduce the n° of this Directive], Member States shall inform the Commission of any application which they have made of this provision."

(2) In Article 2, paragraph 3 is replaced by the following:

"3. Projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Union legislation shall be subject to coordinated or joint procedures fulfilling the requirements of the relevant Union legislation.

Under the coordinated procedure, the competent authority shall coordinate the various individual assessments required by the Union legislation concerned and issued by several authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

Under the joint procedure, the competent authority shall issue one environmental impact assessment, integrating the assessments of one or more authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

Member States shall appoint one authority, which shall be responsible for facilitating the development consent procedure for each project."

(3) Article 3 is replaced by the following:

"Article 3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect significant effects of a project on the following factors:

(a) population, human health, and biodiversity, with particular attention to species and habitats protected under Council Directive 92/43/EEC(*) and Directive 2009/147/EC of the European Parliament and of the Council(**);

(b) land, soil, water, air and climate change;

(c) material assets, cultural heritage and the landscape;

(d) the interaction between the factors referred to in points (a), (b) and (c);

(e) exposure, vulnerability and resilience of the factors referred to in points (a), (b) and (c), to natural and man-made disaster risks."

_____

(*) OJ L 206, 22.7.1992, p.7.

(**) OJ L 20, 26.1.2010, p.7."

(4) Article 4 is amended as follows:

(a) paragraphs 3 and 4 are replaced by the following:

"3. For projects listed in Annex II, the developer shall provide information on the characteristics of the project, its potential impact on the environment and the measures envisaged in order to avoid and reduce significant effects. The detailed list of information to be provided is specified in Annex II.A."

4. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the competent authority shall take account of selection criteria related to the characteristics and location of the project and its potential impact on the environment. The detailed list of selection criteria to be used is specified in Annex III."

(b) The following paragraphs 5 and 6 are added:

"5. The competent authority shall make its decision pursuant to paragraph 2, on the basis of the information provided by the developer and taking into account, where relevant, the results of studies, preliminary verifications or assessments of the effects on the environment arising from other Union legislation. The decision pursuant to paragraph 2 shall:

(a) state how the criteria in Annex III have been taken into account;

(b) include the reasons for requiring or not requiring an environmental impact assessment pursuant to Articles 5 to 10;

(c) include a description of the measures envisaged to avoid, prevent and reduce any significant effects on the environment, where it is decided that no environmental impact assessment needs to be carried out pursuant to Articles 5 to 10;

(d) be made available to the public.

6. The competent authority shall make its decision pursuant to paragraph 2 within three months from the request for development consent and provided that the developer has submitted all the requisite information. Depending on the nature, complexity, location and size of the proposed project, the competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its determination is expected.

Where the project is made subject to an environmental impact assessment in accordance with Articles 5 to 10, the decision pursuant to paragraph 2 of this Article shall include the information set out in Article 5(2)."

(5) In Article 5, paragraphs 1, 2 and 3 are replaced by the following:

"1. Where an environmental impact assessment must be carried out in accordance with Articles 5 to 10, the developer shall prepare an environmental report. The environmental report shall be based on the determination pursuant to paragraph 2 of this Article and include the information that may reasonably be required for making informed decisions on the environmental impacts of the proposed project, taking into account current knowledge and methods of assessment, the characteristics, technical capacity and location of the project, the characteristics of the potential impact, alternatives to the proposed project and the extent to which certain matters (including the evaluation of alternatives) are more appropriately assessed at different levels including the planning level, or on the basis of other assessment requirements. The detailed list of information to be provided in the environmental report is specified in Annex IV.

2. The competent authority, after having consulted the authorities referred to in Article 6(1) and the developer, shall determine the scope and level of detail of the information to be included by the developer in the environmental report, in accordance with paragraph 1 of this Article. In particular, it shall determine:

(a) the decisions and opinions to be obtained;

(b) the authorities and the public likely to be concerned;

(c) the individual stages of the procedure and their duration;

(d) reasonable alternatives relevant to the proposed project and its specific characteristics;

(e) the environmental features referred to in Article 3 likely to be significantly affected;

(f) the information to be submitted relevant to the specific characteristics of a particular project or type of project;

(g) the information and knowledge available and obtained at other levels of decision-making or through other Union legislation, and the methods of assessment to be used.

The competent authority may also seek assistance from accredited and technically competent experts referred to in paragraph 3 of this Article. Subsequent requests to the developer for additional information may only be made if these are justified by new circumstances and duly explained by the competent authority.

3. To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1):

(a) the developer shall ensure that the environmental report is prepared by accredited and technically competent experts or

(b) the competent authority shall ensure that the environmental report is verified by accredited and technically competent experts and/or committees of national experts.

Where accredited and technically competent experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report.

The detailed arrangements for the use and selection of accredited and technically competent experts (for example qualifications required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States."

(6) Article 6 is amended as follows:

(a) paragraph 6 is replaced by the following:

"6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time:

(a) for informing the authorities referred to in Article 6(1) and the public and

(b) for the authorities referred to in Article 6(1) and the public concerned to prepare and participate effectively in the environmental decision-making subject to the provisions of this Article."

(b) the following paragraph 7 is added:

"7. The time-frames for consulting the public concerned on the environmental report referred to in Article 5(1) shall not be shorter than 30 days or longer than 60 days. In exceptional cases, where the nature, complexity, location or size of the proposed project so require, the competent authority may extend this time-frame by a further 30 days; in that case, the competent authority shall inform the developer of the reasons justifying the extension."

(7) In Article 7, paragraph 5 is replaced by the following:

"5. The detailed arrangements for implementing paragraphs 1 to 4 of this Article, including the establishment of time-frames for consultations, shall be determined by the Member States concerned, on the basis of the arrangements and time-frames referred to in Article 6(5) and (6), and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project."

(8) Article 8 is replaced by the following:

"Article 8

1. The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure. To this end, the decision to grant development consent shall contain the following information:

(a) the environmental assessment of the competent authority referred to in Article 3 and the environmental conditions attached to the decision, including a description of the main measures to avoid, reduce and, if possible, offset significant adverse effects;

(b) the main reasons for choosing the project as adopted, in the light of the other alternatives considered, including the likely evolution of the existing state of the environment without implementation of the project (baseline scenario);

(c) a summary of the comments received pursuant to Articles 6 and 7;

(d) a statement summarising how environmental considerations have been integrated into the development consent and how the results of the consultations and the information gathered pursuant to Articles 5, 6 and 7 have been incorporated or otherwise addressed.

For projects likely to have significant adverse transboundary effects, the competent authority shall provide information for not having taken into account comments received by the affected Member State during the consultations carried out pursuant to Article 7.

2. If the consultations and the information gathered pursuant to Articles 5, 6 and 7 conclude that a project will have significant adverse environmental effects, the competent authority, as early as possible and in close cooperation with the authorities referred to in Article 6(1) and the developer, shall consider whether the environmental report referred to in Article 5(1) should be revised and the project modified to avoid or reduce these adverse effects and whether additional mitigation or compensation measures are needed.

If the competent authority decides to grant development consent, it shall ensure that the development consent includes measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects.

The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the proposed project and the significance of its environmental effects.

Existing monitoring arrangements resulting from other Union legislation may be used if appropriate.

3. When all necessary information gathered pursuant to Articles 5, 6 and 7 has been provided to the competent authority, including, where relevant, specific assessments required under other Union legislation, and the consultations referred to in Articles 6 and 7 have been completed, the competent authority shall conclude its environmental impact assessment of the project within three months.

Depending on the nature, complexity, location and size of the proposed project, the competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its decision is expected.

4. Before a decision to grant or refuse development consent is taken, the competent authority shall verify whether the information in the environmental report referred to in Article 5(1) is up to date, in particular concerning the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects."

(9) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the appropriate procedures, and shall make available to the public the following information:

(a) the content of the decision and any conditions attached thereto;

(b) having examined the environmental report and the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description of the main measures to avoid, reduce and, if possible, offset the significant adverse effects;

(d) a description, where appropriate, of the monitoring measures referred to in Article 8(2)."

(b) the following paragraph 3 is added:

"3. Member States may also decide to make available to the public the information referred to in paragraph 1, when the competent authority concludes its environmental impact assessment of the project."

(10) In Article 12, paragraph 2 is replaced by the following:

"2. In particular, every six years from the date specified in Article 2(1) of Directive XXX [OPOCE please introduce the n° of this Directive] Member States shall inform the Commission of:

(a) the number of projects referred to in Annexes I and II made subject to an assessment in accordance with Articles 5 to 10;

(b) the breakdown of assessments according to the project categories set out in Annexes I and II;

(c) the breakdown of assessments undertaken by type of developer;

(d) the number of projects referred to in Annex II made subject to a determination in accordance with Article 4(2);

(e) the average duration of the environmental impact assessment process;

(f) the average cost of the environmental impact assessments."

(11) The following Articles 12a and12b are inserted:

"Article 12a

The Commission shall be empowered to adopt delegated acts, in accordance with Article 12b, concerning the selection criteria listed in Annex III and the information referred to in Annexes II.A and IV, in order to adapt them to scientific and technical progress.

Article 12b

1. The power to adopt delegated acts is conferred on the Commission subject to the condition laid down in this Article.

2. The delegation of power referred to in Article 12a shall be conferred on the Commission for an indeterminate period of time from the [OPOCE please introduce date of the entry into force of this Directive].

3. The delegation of power referred to in Article 12a may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 12a shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of the notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not

object. That period shall be extended by two months at the initiative of the European Parliament or the Council."

(12) The Annexes to Directive 2011/92/EU are amended as provided in the Annex to this Directive.

*Article 2*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [DATE] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a document explaining the relationship between them and this Directive.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 3*

Projects for which the request for development consent was introduced before the date referred to in the first subparagraph of Article 2(1) and for which the environmental impact assessment has not been concluded before that date shall be subject to the obligations referred to in Articles 3 to 11 of Directive 2011/92/EU as amended by this Directive.

*Article 4*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union.*

*Article 5*

This Directive is addressed to the Member States.

Done at Brussels,

| | |
|---|---|
| *For the European Parliament* | *For the Council* |
| *The President* | *The President* |

## ANNEX

(1) The following Annex II.A is inserted:

"ANNEX II.A – INFORMATION REFERRED TO IN ARTICLE 4(3)

1. A description of the project, including in particular:

(a) a description of the physical characteristics of the whole project, including, where relevant, its subsurface, during the construction and operational phases;

(b) a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected.

2. A description of the aspects of the environment likely to be significantly affected by the proposed project.

3. A description of the likely significant effects of the proposed project on the environment resulting from:

(a) the expected residues and emissions and the production of waste;

(b) the use of natural resources, in particular soil, land, water, and biodiversity, including hydromorphological changes.

4. A description of the measures envisaged to avoid, prevent or reduce any significant adverse effects on the environment."

(2) Annexes III and IV are replaced by the following:

"ANNEX III – SELECTION CRITERIA REFERRED TO IN ARTICLE 4(4)

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered with particular regard to:

(a) the size of the project, including, where relevant, its subsurface;

(b) cumulation with other projects and activities;

(c) the use of natural resources, in particular land, soil, water, and biodiversity, including hydromorphological changes;

(d) the production of waste;

(e) pollution and nuisances;

(f) the natural and man-made disaster risks and risk of accidents, with particular regard to hydromorphological changes, substances, or technologies or living organisms used, to specific surface and subsurface conditions or alternative use, and to the probability of accidents or disasters and the vulnerability of the project to these risks;

(g) impacts of the project on climate change (in terms of greenhouse gas emissions including from land use, land-use change and forestry), contribution of the project to an improved resilience, and the impacts of climate change on the project (e.g. if the project is coherent with a changing climate);

(h) impacts of the project on the environment, in particular on land (increase of settlement areas over time – land take), soil (organic matter, erosion, compaction, sealing), water (quantity and quality), air and biodiversity (population quality and quantity and ecosystem degradation and fragmentation);

(i) the risks to human health (e.g. due to water contamination or air pollution);

(j) impact of the project on cultural heritage and landscape.

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

(a) the existing and planned land use, including land take and fragmentation;

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water, and biodiversity) in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands, riparian areas, river mouths;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks, permanent pastures, agriculture areas with a high nature value;

(v) areas classified or protected under Member States' legislation; Natura 2000 areas designated by Member States pursuant to Directive 2009/147/EEC of the European Parliament or of the Council and Council Directive 92/43/EEC; areas protected by international conventions;

(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or is likely to be such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance.

3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, with particular regard to:

(a) the magnitude and spatial extent of the impact (geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact;

(d) the intensity and complexity of the impact;

(e) the probability of the impact;

(f) the duration, frequency and reversibility of the impact;

(g) the speed of onset of the impact;

(h) the cumulation of impacts with the impacts of other projects (in particular existing and/or approved) by the same or different developers;

(i) the aspects of the environment likely to be significantly affected;

(k) the information and findings on environmental effects obtained from assessments required under other EU legislation.

(l) the possibility of reducing impacts effectively.

ANNEX IV – INFORMATION REFERRED TO IN ARTICLE 5(1)

1. Description of the project, including in particular:

(a) a description of the physical characteristics of the whole project, including, where relevant, its subsurface, and the water use and land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials, energy and natural resources (including water, land, soil and biodiversity) used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. A description, of the technical, locational or other aspects (e.g. in terms of project design, technical capacity, size and scale) of the alternatives considered, including the identification of the least environmentally impacting one, and an indication of the main reasons for the choice made, taking into account the environmental effects.

3. A description of the relevant aspects of the existing state of the environment and the likely evolution thereof without implementation of the project (baseline scenario). This description should cover any existing environmental problems relevant to the project, including, in particular, those relating to any areas of a particular environmental importance and the use of natural resources.

4. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, human health, fauna, flora, biodiversity and the ecosystem services it provides, land (land take), soil (organic matter, erosion, compaction, sealing), water (quantity and quality), air, climatic factors, climate change (greenhouse gas emissions, including from land use, land use change and forestry, mitigation potential, impacts relevant to adaptation, if the project takes into account risks associated with climate change), material assets, cultural heritage, including architectural and archaeological ones, landscape; such a description should include the inter-relationship between the above factors, as well as the exposure, vulnerability and resilience of the above factors to natural and man-made disaster risks.

5. A description of the likely significant effects of the proposed project on the environment resulting from, inter alia:

(a) the existence of the project;

(b) the use of natural resources, in particular land, soil, water, biodiversity and the ecosystem services it provides, considering as far possible the availability of these resources also in the light of changing climatic conditions;

(c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the elimination of waste;

(d) the risks to human health, cultural heritage or the environment (e.g. due to accidents or disasters);

(e) the cumulation of effects with other projects and activities;

(f) the greenhouse gas emissions, including from land use, land use change and forestry;

(g) the technologies and the substances used;

(h) hydromorphological changes.

The description of the likely significant effects should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-, medium- and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at EU or Member State level which are relevant to the project.

6. The description of the forecasting methods used to assess the effects on the environment referred to in point 5, as well as an account of the main uncertainties involved and their influence on the effect estimates and selection of the preferred alternative.

7. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment referred to in point 5 and, where appropriate, of any proposed monitoring arrangements, including the preparation of a post-project analysis of the adverse effects on the environment. This

description should explain the extent to which significant adverse effects are reduced or offset and should cover both the construction and operational phases.

8. An assessment of the natural and man-made disaster risks and risk of accidents to which the project could be vulnerable and, where appropriate, a description of the measures envisaged to prevent such risks, as well as measures regarding preparedness for and response to emergencies (e.g. measures required under Directive 96/82/EC as amended).

9. A non-technical summary of the information provided under the above headings.

10. An indication of any difficulties (technical deficiencies or lack of knowhow) encountered by the developer in compiling the required information and of the sources used for the descriptions and assessments made, as well as an account of the main uncertainties involved and their influence on the effect estimates and selection of the preferred alternative."

I

*(Legislative acts)*

# DIRECTIVES

## DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 13 December 2011

## on the assessment of the effects of certain public and private projects on the environment

**(codification)**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [3] has been substantially amended several times [4]. In the interests of clarity and rationality the said Directive should be codified.

(2) Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

(3) The principles of the assessment of environmental effects should be harmonised, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment. The Member States may lay down stricter rules to protect the environment.

(4) In addition, it is necessary to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life.

(5) The environmental legislation of the Union includes provisions enabling public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.

(6) General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

---

[1] OJ C 248, 25.8.2011, p. 154.

[2] Position of the European Parliament of 13 September 2011 (not yet published in the Official Journal) and decision of the Council of 15 November 2011.

[3] OJ L 175, 5.7.1985, p. 40.

[4] See Annex VI, Part A.

(8) Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.

(9) Projects of other types may not have significant effects on the environment in every case and those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.

(10) Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.

(11) When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.

(12) For projects which are subject to assessment, a certain minimal amount of information should be supplied, concerning the project and its effects.

(13) It is appropriate to lay down a procedure in order to enable the developer to obtain an opinion from the competent authorities on the content and extent of the information to be elaborated and supplied for the assessment. Member States, in the framework of this procedure, may require the developer to provide, inter alia, alternatives for the projects for which it intends to submit an application.

(14) The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

(15) It is desirable to lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level. The European Community signed the Convention on Environmental Impact Assessment in a Transboundary Context on 25 February 1991, and ratified it on 24 June 1997.

(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

(18) The European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 and ratified it on 17 February 2005.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention.

(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

(23) Furthermore, it may be appropriate in exceptional cases to exempt a specific project from the assessment procedures laid down by this Directive, subject to appropriate information being supplied to the Commission and to the public concerned.

(24) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(25) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive, the following definitions shall apply:

(a) 'project' means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

(b) 'developer' means the applicant for authorisation for a private project or the public authority which initiates a project;

(c) 'development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

(d) 'public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) 'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

(f) 'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

3. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on those purposes.

4. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

*Article 2*

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [1].

4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph.

[1] OJ L 24, 29.1.2008, p. 8.

*Article 3*

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage;

(d) the interaction between the factors referred to in points (a), (b) and (c).

*Article 4*

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.

*Article 5*

1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.

2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6(1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information.

Member States may require the competent authorities to give such an opinion, irrespective of whether the developer so requests.

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

(a) a description of the project comprising information on the site, design and size of the project;

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) a non-technical summary of the information referred to in points (a) to (d).

4. Member States shall, if necessary, ensure that any authorities holding relevant information, with particular reference to Article 3, make this information available to the developer.

*Article 6*

1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [1], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

*Article 7*

1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).

3. The Member States concerned, each insofar as it is concerned, shall also:

(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and

[1] OJ L 41, 14.2.2003, p. 26.

(b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

4. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable timeframe for the duration of the consultation period.

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.

*Article 8*

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.

*Article 9*

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision and any conditions attached thereto;

(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.

*Article 10*

The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national laws, regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the receipt of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.

*Article 11*

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

*Article 12*

1. The Member States and the Commission shall exchange information on the experience gained in applying this Directive.

2. In particular, Member States shall inform the Commission of any criteria and/or thresholds adopted for the selection of the projects in question, in accordance with Article 4(2).

3. On the basis of that exchange of information, the Commission shall if necessary submit additional proposals to the European Parliament and to the Council, with a view to ensuring that this Directive is applied in a sufficiently coordinated manner.

*Article 13*

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

*Article 14*

Directive 85/337/EEC, as amended by the Directives listed in Annex V, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VI.

*Article 15*

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

*Article 16*

This Directive is addressed to the Member States.

Done at Strasbourg, 13 December 2011.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| J. BUZEK | M. SZPUNAR |

*ANNEX I*

**PROJECTS REFERRED TO IN ARTICLE 4(1)**

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2. (a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more;

   (b) Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors [1] (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. (a) Installations for the reprocessing of irradiated nuclear fuel;

   (b) Installations designed:

      (i) for the production or enrichment of nuclear fuel;

      (ii) for the processing of irradiated nuclear fuel or high-level radioactive waste;

      (iii) for the final disposal of irradiated nuclear fuel;

      (iv) solely for the final disposal of radioactive waste;

      (v) solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

4. (a) Integrated works for the initial smelting of cast iron and steel;

   (b) Installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20 000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products, and for other uses of asbestos, utilisation of more than 200 tonnes per year.

6. Integrated chemical installations, i.e. those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are:

   (a) for the production of basic organic chemicals;

   (b) for the production of basic inorganic chemicals;

   (c) for the production of phosphorous-, nitrogen- or potassium-based fertilisers (simple or compound fertilisers);

   (d) for the production of basic plant health products and of biocides;

   (e) for the production of basic pharmaceutical products using a chemical or biological process;

   (f) for the production of explosives.

[1] Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

7. (a) Construction of lines for long-distance railway traffic and of airports [1] with a basic runway length of 2 100 m or more;

   (b) Construction of motorways and express roads [2];

   (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length.

8. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes;

   (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tonnes.

9. Waste disposal installations for the incineration, chemical treatment as defined in Annex I to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste [3] under heading D9, or landfill of hazardous waste, as defined in point 2 of Article 3 of that Directive.

10. Waste disposal installations for the incineration or chemical treatment as defined in Annex I to Directive 2008/98/EC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day.

11. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

12. (a) Works for the transfer of water resources between river basins where that transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

    (b) In all other cases, works for the transfer of water resources between river basins where the multi-annual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5 % of that flow.

    In both cases transfers of piped drinking water are excluded.

13. Waste water treatment plants with a capacity exceeding 150 000 population equivalent as defined in point 6 of Article 2 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment [4].

14. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

15. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

16. Pipelines with a diameter of more than 800 mm and a length of more than 40 km:

    (a) for the transport of gas, oil, chemicals;

    (b) for the transport of carbon dioxide ($CO_2$) streams for the purposes of geological storage, including associated booster stations.

17. Installations for the intensive rearing of poultry or pigs with more than:

    (a) 85 000 places for broilers, 60 000 places for hens;

    (b) 3 000 places for production pigs (over 30 kg); or

    (c) 900 places for sows.

---

[1] For the purposes of this Directive, 'airport' means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14).

[2] For the purposes of this Directive, 'express road' means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

[3] OJ L 312, 22.11.2008, p. 3.

[4] OJ L 135, 30.5.1991, p. 40.

18. Industrial plants for the production of:

    (a) pulp from timber or similar fibrous materials;

    (b) paper and board with a production capacity exceeding 200 tonnes per day.

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

20. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

21. Installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tonnes or more.

22. Storage sites pursuant to Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide [1].

23. Installations for the capture of $CO_2$ streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations covered by this Annex, or where the total yearly capture of $CO_2$ is 1,5 megatonnes or more.

24. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.

[1] OJ L 140, 5.6.2009, p. 114.

*ANNEX II*

**PROJECTS REFERRED TO IN ARTICLE 4(2)**

1. AGRICULTURE, SILVICULTURE AND AQUACULTURE

   (a) Projects for the restructuring of rural land holdings;

   (b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

   (c) Water management projects for agriculture, including irrigation and land drainage projects;

   (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;

   (e) Intensive livestock installations (projects not included in Annex I);

   (f) Intensive fish farming;

   (g) Reclamation of land from the sea.

2. EXTRACTIVE INDUSTRY

   (a) Quarries, open-cast mining and peat extraction (projects not included in Annex I);

   (b) Underground mining;

   (c) Extraction of minerals by marine or fluvial dredging;

   (d) Deep drillings, in particular:

      (i) geothermal drilling;

      (ii) drilling for the storage of nuclear waste material;

      (iii) drilling for water supplies;

      with the exception of drillings for investigating the stability of the soil;

   (e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.

3. ENERGY INDUSTRY

   (a) Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I);

   (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I);

   (c) Surface storage of natural gas;

   (d) Underground storage of combustible gases;

   (e) Surface storage of fossil fuels;

   (f) Industrial briquetting of coal and lignite;

   (g) Installations for the processing and storage of radioactive waste (unless included in Annex I);

   (h) Installations for hydroelectric energy production;

   (i) Installations for the harnessing of wind power for energy production (wind farms);

(j) Installations for the capture of $CO_2$ streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations not covered by Annex I to this Directive.

4. PRODUCTION AND PROCESSING OF METALS

(a) Installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting;

(b) Installations for the processing of ferrous metals:

(i) hot-rolling mills;

(ii) smitheries with hammers;

(iii) application of protective fused metal coats;

(c) Ferrous metal foundries;

(d) Installations for the smelting, including the alloyage, of non-ferrous metals, excluding precious metals, including recovered products (refining, foundry casting, etc.);

(e) Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process;

(f) Manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines;

(g) Shipyards;

(h) Installations for the construction and repair of aircraft;

(i) Manufacture of railway equipment;

(j) Swaging by explosives;

(k) Installations for the roasting and sintering of metallic ores.

5. MINERAL INDUSTRY

(a) Coke ovens (dry coal distillation);

(b) Installations for the manufacture of cement;

(c) Installations for the production of asbestos and the manufacture of asbestos products (projects not included in Annex I);

(d) Installations for the manufacture of glass including glass fibre;

(e) Installations for smelting mineral substances including the production of mineral fibres;

(f) Manufacture of ceramic products by burning, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain.

6. CHEMICAL INDUSTRY (PROJECTS NOT INCLUDED IN ANNEX I)

(a) Treatment of intermediate products and production of chemicals;

(b) Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides;

(c) Storage facilities for petroleum, petrochemical and chemical products.

7. FOOD INDUSTRY

(a) Manufacture of vegetable and animal oils and fats;

(b) Packing and canning of animal and vegetable products;

(c) Manufacture of dairy products;

(d) Brewing and malting;

(e) Confectionery and syrup manufacture;

(f) Installations for the slaughter of animals;

(g) Industrial starch manufacturing installations;

(h) Fish-meal and fish-oil factories;

(i) Sugar factories.

8. TEXTILE, LEATHER, WOOD AND PAPER INDUSTRIES

(a) Industrial plants for the production of paper and board (projects not included in Annex I);

(b) Plants for the pre-treatment (operations such as washing, bleaching, mercerisation) or dyeing of fibres or textiles;

(c) Plants for the tanning of hides and skins;

(d) Cellulose-processing and production installations.

9. RUBBER INDUSTRY

Manufacture and treatment of elastomer-based products.

10. INFRASTRUCTURE PROJECTS

(a) Industrial estate development projects;

(b) Urban development projects, including the construction of shopping centres and car parks;

(c) Construction of railways and intermodal transhipment facilities, and of intermodal terminals (projects not included in Annex I);

(d) Construction of airfields (projects not included in Annex I);

(e) Construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I);

(f) Inland-waterway construction not included in Annex I, canalisation and flood-relief works;

(g) Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I);

(h) Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport;

(i) Oil and gas pipeline installations and pipelines for the transport of $CO_2$ streams for the purposes of geological storage (projects not included in Annex I);

(j) Installations of long-distance aqueducts;

(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works;

(l) Groundwater abstraction and artificial groundwater recharge schemes not included in Annex I;

(m) Works for the transfer of water resources between river basins not included in Annex I.

11. OTHER PROJECTS

(a) Permanent racing and test tracks for motorised vehicles;

(b) Installations for the disposal of waste (projects not included in Annex I);

(c) Waste-water treatment plants (projects not included in Annex I);

(d) Sludge-deposition sites;

(e) Storage of scrap iron, including scrap vehicles;

(f) Test benches for engines, turbines or reactors;

(g) Installations for the manufacture of artificial mineral fibres;

(h) Installations for the recovery or destruction of explosive substances;

(i) Knackers' yards.

12. TOURISM AND LEISURE

(a) Ski runs, ski lifts and cable cars and associated developments;

(b) Marinas;

(c) Holiday villages and hotel complexes outside urban areas and associated developments;

(d) Permanent campsites and caravan sites;

(e) Theme parks.

13. (a) Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I);

(b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.

*ANNEX III*

**SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)**

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered having regard, in particular, to:

(a) the size of the project;

(b) the cumulation with other projects;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [1] and to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2];

(vi) areas in which the environmental quality standards laid down in Union legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance.

3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out in points 1 and 2, and having regard in particular to:

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact.

[1] OJ L 20, 26.1.2010, p. 7.
[2] OJ L 206, 22.7.1992, p. 7.

*ANNEX IV*

**INFORMATION REFERRED TO IN ARTICLE 5(1)**

1. A description of the project, including in particular:

   (a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;

   (b) a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;

   (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

4. A description [1] of the likely significant effects of the proposed project on the environment resulting from:

   (a) the existence of the project;

   (b) the use of natural resources;

   (c) the emission of pollutants, the creation of nuisances and the elimination of waste.

5. The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.

6. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

7. A non-technical summary of the information provided under headings 1 to 6.

8. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

[1] This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

*ANNEX V*

PART A

**Repealed Directive with list of its successive amendments**

(referred to in Article 14)

Council Directive 85/337/EEC
(OJ L 175, 5.7.1985, p. 40)

Council Directive 97/11/EC
(OJ L 73, 14.3.1997, p. 5)

Directive 2003/35/EC of the European Parliament and of the Council — Article 3 only
(OJ L 156, 25.6.2003, p. 17)

Directive 2009/31/EC of the European Parliament and of the Council — Article 31 only
(OJ L 140, 5.6.2009, p. 114)

PART B

**List of time limits for transposition into national law**

(referred to in Article 14)

| Directive | Time limit for transposition |
|---|---|
| 85/337/EEC | 3 July 1988 |
| 97/11/EC | 14 March 1999 |
| 2003/35/EC | 25 June 2005 |
| 2009/31/EC | 25 June 2011 |

*ANNEX VI*

**Correlation table**

| Directive 85/337/EEC | This Directive |
|---|---|
| Article 1(1) | Article 1(1) |
| Article 1(2), first subparagraph | Article 1(2), introductory wording |
| Article 1(2), second subparagraph, introductory wording | Article 1(2)(a), introductory wording |
| Article 1(2), second subparagraph, first indent | Article 1(2), point (a), first indent |
| Article 1(2), second subparagraph, second indent | Article 1(2), point (a), second indent |
| Article 1(2), third subparagraph | Article 1(2), point (b) |
| Article 1(2), fourth subparagraph | Article 1(2), point (c) |
| Article 1(2), fifth subparagraph | Article 1(2), point (d) |
| Article 1(2), sixth subparagraph | Article 1(2), point (e) |
| Article 1(3) | Article 1(2), point (f) |
| Article 1(4) | Article 1(3) |
| Article 1(5) | Article 1(4) |
| Article 2(1) | Article 2(1) |
| Article 2(2) | Article 2(2) |
| Article 2(2a) | Article 2(3) |
| Article 2(3) | Article 2(4) |
| Article 3, introductory wording | Article 3, introductory wording |
| Article 3, first indent | Article 3, point (a) |
| Article 3, second indent | Article 3, point (b) |
| Article 3, third indent | Article 3, point (c) |
| Article 3, fourth indent | Article 3, point (d) |
| Article 4 | Article 4 |
| Article 5(1) | Article 5(1) |
| Article 5(2) | Article 5(2) |
| Article 5(3), introductory wording | Article 5(3), introductory wording |
| Article 5(3), first indent | Article 5(3), point (a) |
| Article 5(3), second indent | Article 5(3), point (b) |
| Article 5(3), third indent | Article 5(3), point (c) |
| Article 5(3), fourth indent | Article 5(3), point (d) |
| Article 5(3), fifth indent | Article 5(3), point (e) |
| Article 5(4) | Article 5(4) |
| Article 6 | Article 6 |
| Article 7(1), introductory wording | Article 7(1), first subparagraph, introductory wording |

| Directive 85/337/EEC | This Directive |
|---|---|
| Article 7(1), point (a) | Article 7(1), first subparagraph, point (a) |
| Article 7(1), point (b) | Article 7(1), first subparagraph, point (b) |
| Article 7(1), final wording | Article 7(1), second subparagraph |
| Article 7(2)-7(5) | Article 7(2)-7(5) |
| Article 8 | Article 8 |
| Article 9(1), introductory wording | Article 9, introductory wording |
| Article 9(1), first indent | Article 9(1), point (a) |
| Article 9(1), second indent | Article 9(1), point (b) |
| Article 9(1), third indent | Article 9(1), point (c) |
| Article 9(2) | Article 9(2) |
| Article 10 | Article 10 |
| Article 10a, first paragraph | Article 11(1) |
| Article 10a, second paragraph | Article 11(2) |
| Article 10a, third paragraph | Article 11(3) |
| Article 10a, fourth and fifth paragraphs | Article 11(4), first and second subparagraphs |
| Article 10a, sixth paragraph | Article 11(5) |
| Article 11(1) | Article 12(1) |
| Article 11(2) | Article 12(2) |
| Article 11(3) | — |
| Article 11(4) | Article 12(3) |
| Article 12(1) | — |
| Article 12(2) | Article 13 |
| — | Article 14 |
| — | Article 15 |
| Article 14 | Article 16 |
| Annex I, point 1 | Annex I, point 1 |
| Annex I, point 2, first indent | Annex I, point 2(a) |
| Annex I, point 2, second indent | Annex I, point 2(b) |
| Annex I, point 3(a) | Annex I, point 3(a) |
| Annex I, point 3(b), introductory wording | Annex I, point 3(b), introductory wording |
| Annex I, point 3(b), first indent | Annex I, point 3(b)(i) |
| Annex I, point 3(b), second indent | Annex I, point 3(b)(ii) |
| Annex I, point 3(b), third indent | Annex I, point 3(b)(iii) |
| Annex I, point 3(b), fourth indent | Annex I, point 3(b)(iv) |
| Annex I, point 3(b), fifth indent | Annex I, point 3(b)(v) |
| Annex I, point 4, first indent | Annex I, point 4(a) |

| Directive 85/337/EEC | This Directive |
|---|---|
| Annex I, point 4, second indent | Annex I, point 4(b) |
| Annex I, point 5 | Annex I, point 5 |
| Annex I, point 6, introductory wording | Annex I, point 6, introductory wording |
| Annex I, point 6(i) | Annex I, point 6(a) |
| Annex I, point 6(ii) | Annex I, point 6(b) |
| Annex I, point 6(iii) | Annex I, point 6(c) |
| Annex I, point 6(iv) | Annex I, point 6(d) |
| Annex I, point 6(v) | Annex I, point 6(e) |
| Annex I, point 6(vi) | Annex I, point 6(f) |
| Annex I, points 7-15 | Annex I, points 7-15 |
| Annex I, point 16, introductory wording | Annex I, point 16, introductory wording |
| Annex I, point 16, first indent | Annex I, point 16(a) |
| Annex I, point 16, second indent | Annex I, point 16(b) |
| Annex I, points 17-21 | Annex I, points 17-21 |
| Annex I, point 22 | Annex I, point 24 |
| Annex I, point 23 | Annex I, point 22 |
| Annex I, point 24 | Annex I, point 23 |
| Annex II, point 1 | Annex II, point 1 |
| Annex II, point 2(a), (b) and (c) | Annex II, point 2(a), (b) and (c) |
| Annex II, point 2(d), introductory wording | Annex II, point 2(d), introductory wording |
| Annex II, point 2(d), first indent | Annex II, point 2(d)(i) |
| Annex II, point 2(d), second indent | Annex II, point 2(d)(ii) |
| Annex II, point 2(d), third indent | Annex II, point 2(d)(iii) |
| Annex II, point 2(d), final wording | Annex II, point 2(d), final wording |
| Annex II, point 2(e) | Annex II, point 2(e) |
| Annex II, points 3-12 | Annex II, points 3-12 |
| Annex II, point 13, first indent | Annex II, point 13(a) |
| Annex II, point 13, second indent | Annex II, point 13(b) |
| Annex III, point 1, introductory wording | Annex III, point 1, introductory wording |
| Annex III, point 1, first indent | Annex III, point 1(a) |
| Annex III, point 1, second indent | Annex III, point 1(b) |
| Annex III, point 1, third indent | Annex III, point 1(c) |
| Annex III, point 1, fourth indent | Annex III, point 1(d) |
| Annex III, point 1, fifth indent | Annex III, point 1(e) |
| Annex III, point 1, sixth indent | Annex III, point 1(f) |
| Annex III, point 2, introductory wording | Annex III, point 2, introductory wording |

| Directive 85/337/EEC | This Directive |
|---|---|
| Annex III, point 2, first indent | Annex III, point 2(a) |
| Annex III, point 2, second indent | Annex III, point 2(b) |
| Annex III, point 2, third indent, introductory wording | Annex III, point 2(c), introductory wording |
| Annex III, point 2, third indent, point (a) | Annex III, point 2(c)(i) |
| Annex III, point 2, third indent, point (b) | Annex III, point 2(c)(ii) |
| Annex III, point 2, third indent, point (c) | Annex III, point 2(c)(iii) |
| Annex III, point 2, third indent, point (d) | Annex III, point 2(c)(iv) |
| Annex III, point 2, third indent, point (e) | Annex III, point 2(c)(v) |
| Annex III, point 2, third indent, point (f) | Annex III, point 2(c)(vi) |
| Annex III, point 2, third indent, point (g) | Annex III, point 2(c)(vii) |
| Annex III, point 2, third indent, point (h) | Annex III, point 2(c)(viii) |
| Annex III, point 3, introductory wording | Annex III, point 3, introductory wording |
| Annex III, point 3, first indent | Annex III, point 3(a) |
| Annex III, point 3, second indent | Annex III, point 3(b) |
| Annex III, point 3, third indent | Annex III, point 3(c) |
| Annex III, point 3, fourth indent | Annex III, point 3(d) |
| Annex III, point 3, fifth indent | Annex III, point 3(e) |
| Annex IV, point 1, introductory wording | Annex IV, point 1, introductory wording |
| Annex IV, point 1, first indent | Annex IV, point 1(a) |
| Annex IV, point 1, second indent | Annex IV, point 1(b) |
| Annex IV, point 1, third indent | Annex IV, point 1(c) |
| Annex IV, points 2 and 3 | Annex IV, points 2 and 3 |
| Annex IV, point 4, introductory wording | Annex IV, point 4, first subparagraph, introductory wording |
| Annex IV, point 4, first indent | Annex IV, point 4, first subparagraph, point (a) |
| Annex IV, point 4, second indent | Annex IV, point 4, first subparagraph, point (b) |
| Annex IV, point 4, third indent | Annex IV, point 4, first subparagraph, point (c) |
| Annex IV, point 4, final wording | Annex IV, point 5 |
| Annex IV, point 5 | Annex IV, point 6 |
| Annex IV, point 6 | Annex IV, point 7 |
| Annex IV, point 7 | Annex IV, point 8 |
| — | Annex V |
| — | Annex VI |

**This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents**

# ►B DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 26 May 2003

## providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

(OJ L 156, 25.6.2003, p. 17)

Amended by:

| | | Official Journal | | |
|---|---|---|---|---|
| | | No | page | date |
| ►M1 | Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 | L 26 | 1 | 28.1.2012 |

▼B

# DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**of 26 May 2003**

**providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Economic and Social Committee ([2]),

Having regard to the opinion of the Committee of the Regions ([3]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([4]), in the light of the joint text approved by the Conciliation Committee on 15 January 2003,

Whereas:

(1) Community legislation in the field of the environment aims to contribute to preserving, protecting and improving the quality of the environment and protecting human health.

(2) Community environmental legislation includes provisions for public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.

(3) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

---

([1]) OJ C 154 E, 29.5.2001, p. 123.
([2]) OJ C 221, 7.8.2001, p. 65.
([3]) OJ C 357, 14.12.2001, p. 58.
([4]) Opinion of the European Parliament of 23 October 2001 (OJ C 112, 9.5.2002, p. 125 (E)), Council Common Position of 25 April 2002 (OJ C 170 E, 16.7.2002, p. 22) and Decision of the European Parliament of 5 September 2002 (not yet published in the Official Journal). Decision of the European Parliament of 30 January 2003 and Decision of the Council of 4 March 2003.

▼B

(4) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including ***inter alia*** by promoting environmental education of the public.

(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Århus Convention). Community law should be properly aligned with that Convention with a view to its ratification by the Community.

(6) Among the objectives of the Århus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(7) Article 6 of the Århus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(8) Article 7 of the Århus Convention provides for public participation concerning plans and programmes relating to the environment.

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

(10) Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Århus Convention, in particular Article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Århus Convention will be incorporated into the relevant legislation from the outset.

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [2] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4) thereof.

---

[1] OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).

[2] OJ L 257, 10.10.1996, p. 26.

▼B

(12) Since the objective of the proposed action, namely to contribute to the implementation of the obligations arising under the Århus Convention, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

### *Article 1*

### Objective

The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

### *Article 2*

### Public participation concerning plans and programmes

1. For the purposes of this Article, 'the public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

2. Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.

To that end, Member States shall ensure that:

(a) the public is informed, whether by public notices or other appropriate means such as electronic media where available, about any proposals for such plans or programmes or for their modification or review and that relevant information about such proposals is made available to the public including ***inter alia*** information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted;

(b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made;

(c) in making those decisions, due account shall be taken of the results of the public participation;

▼B

(d) having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

3. Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.

The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate effectively.

Reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation required by this Article.

4. This Article shall not apply to plans and programmes designed for the sole purpose of serving national defence or taken in case of civil emergencies.

5. This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ([1]) or under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ([2]).

▼M1

———————

▼B

***Article 4***

**Amendment of Directive 96/61/EC**

Directive 96/61/EC is hereby amended as follows:

1. Article 2 shall be amended as follows:

(a) the following sentence shall be added to point 10(b):

‘For the purposes of this definition, any change to or extension of an operation shall be deemed to be substantial if the change or extension in itself meets the thresholds, if any, set out in Annex I.’;

(b) the following points shall be added:

‘13. “the public” shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

([1]) OJ L 197, 21.7.2001, p. 30.
([2]) OJ L 327, 22.12.2000, p. 1. Directive as amended by Decision No 2455/2001/EC (OJ L 331, 15.12.2001, p. 1).

▼B

14. “the public concerned” shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;’

2. in Article 6(1), first subparagraph, the following indent shall be added:

‘— the main alternatives, if any, studied by the applicant in outline.’

3. Article 15 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

‘1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

— issuing a permit for new installations,

— issuing a permit for any substantial change in the operation of an installation,

— updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.’;

(b) the following paragraph shall be added:

‘5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and

(b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.’;

4. the following Article shall be inserted:

***‘Article 15a***

**Access to justice**

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

▼B

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.';

5. Article 17 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 12(2) was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex V at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between the two Member States on a reciprocal and equivalent basis.';

(b) the following paragraphs shall be added:

'3. The results of any consultations pursuant to paragraphs 1 and 2 must be taken into consideration when the competent authority reaches a decision on the application.

4. The competent authority shall inform any Member State, which has been consulted pursuant to paragraph 1, of the decision reached on the application and shall forward to it the information referred to in Article 15(5). That Member State shall take the measures necessary to ensure that that information is made available in an appropriate manner to the public concerned in its own territory.';

▼B

6. an Annex V shall be added, as set out in Annex II to this Directive.

*Article 5*

**Reporting and review**

By 25 June 2009, the Commission shall send a report on the application and effectiveness of this Directive to the European Parliament and to the Council. With a view to further integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other plans and programmes relating to the environment.

*Article 6*

**Implementation**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

*Article 7*

**Entry into force**

This Directive shall enter into force on the day of its publication in the ***Official Journal of the European Union***.

*Article 8*

**Addressees**

This Directive is addressed to the Member States.

▼B

*ANNEX I*

**PROVISIONS FOR PLANS AND PROGRAMMES REFERRED TO IN ARTICLE 2**

(a) Article 7(1) of Council Directive 75/442/EEC of 15 July 1975 on waste ([1]).

(b) Article 6 of Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances ([2]).

(c) Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ([3]).

(d) Article 6(1) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ([4]).

(e) Article 14 of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste ([5]).

(f) Article 8(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management ([6]).

([1]) OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC (OJ L 135, 6.6.1996, p. 32).
([2]) OJ L 78, 26.3.1991, p. 38. Directive as last amended by Commission Directive 98/101/EC (OJ L 1, 5.1.1999, p. 1).
([3]) OJ L 375, 31.12.1991, p. 1.
([4]) OJ L 377, 31.12.1991, p. 20. Directive as last amended by Directive 94/31/EC (OJ L 168, 2.7.1994, p. 28).
([5]) OJ L 365, 31.12.1994, p. 10.
([6]) OJ L 296, 21.11.1996, p. 55.

▼B

*ANNEX II*

In Directive 96/61/EC, the following Annex shall be added:

*'ANNEX V*

**Public participation in decision-making**

1. The public shall be informed (by public notices or other appropriate means such as electronic media where available) of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:

   (a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 15(1), including the description of the elements listed in Article 6(1);

   (b) where applicable, the fact that a decision is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 17;

   (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

   (d) the nature of possible decisions or, where there is one, the draft decision;

   (e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;

   (f) an indication of the times and places where, or means by which, the relevant information will be made available;

   (g) details of the arrangements for public participation and consultation made pursuant to point 5.

2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:

   (a) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;

   (b) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (*), information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.

3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Annex.

(*) OJ L 41, 14.2.2003, p. 26.'

# DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
## of 27 June 2001
## on the assessment of the effects of certain plans and programmes on the environment

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4], in the light of the joint text approved by the Conciliation Committee on 21 March 2001,

Whereas:

(1) Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development.

(2) The Fifth Environment Action Programme: Towards sustainability — A European Community programme of policy and action in relation to the environment and sustainable development [5], supplemented by Council Decision No 2179/98/EC [6] on its review, affirms the importance of assessing the likely environmental effects of plans and programmes.

(3) The Convention on Biological Diversity requires Parties to integrate as far as possible and as appropriate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans and programmes.

(4) Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Member States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.

(7) The United Nations/Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, which applies to both Member States and other States, encourages the parties to the Convention to apply its principles to plans and programmes as well; at the second meeting of the Parties to the Convention in Sofia on 26 and 27 February 2001, it was decided to prepare a legally binding protocol on strategic environmental assessment which would supplement the existing provisions on environmental impact assessment in a transboundary context, with a view to its possible adoption on the occasion of the 5th Ministerial Conference 'Environment for Europe' at an extraordinary meeting of the Parties to the Convention, scheduled for May 2003 in Kiev, Ukraine. The systems operating within the Community for environmental assessment of plans and programmes should ensure that there are adequate transboundary consultations where the implementation of a plan or programme being prepared in one Member State is likely to have significant effects on the environment of another Member State. The information on plans and programmes having significant effects on the environment of other States should be forwarded on a reciprocal and equivalent basis within an appropriate legal framework between Member States and these other States.

---

[1] OJ C 129, 25.4.1997, p. 14 and OJ C 83, 25.3.1999, p. 13.
[2] OJ C 287, 22.9.1997, p. 101.
[3] OJ C 64, 27.2.1998, p. 63 and OJ C 374, 23.12.1999, p. 9.
[4] Opinion of the European Parliament of 20 October 1998 (OJ C 341, 9.11.1998, p. 18), confirmed on 16 September 1999 (OJ C 54, 25.2.2000, p. 76), Council Common Position of 30 March 2000 (OJ C 137, 16.5.2000, p. 11) and Decision of the European Parliament of 6 September 2000 (OJ C 135, 7.5.2001, p. 155). Decision of the European Parliament of 31 May 2001 and Decision of the Council of 5 June 2001.
[5] OJ C 138, 17.5.1993, p. 5.
[6] OJ L 275, 10.10.1998, p. 1.

(8) Action is therefore required at Community level to lay down a minimum environmental assessment framework, which would set out the broad principles of the environmental assessment system and leave the details to the Member States, having regard to the principle of subsidiarity. Action by the Community should not go beyond what is necessary to achieve the objectives set out in the Treaty.

(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.

(10) All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1], and all plans and programmes which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna [2], are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When they determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment.

(11) Other plans and programmes which set the framework for future development consent of projects may not have significant effects on the environment in all cases and should be assessed only where Member States determine that they are likely to have such effects.

(12) When Member States make such determinations, they should take into account the relevant criteria set out in this Directive.

(13) Some plans or programmes are not subject to this Directive because of their particular characteristics.

(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme; Member States should communicate to the Commission any measures they take concerning the quality of environmental reports.

(15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion.

(16) Where the implementation of a plan or programme prepared in one Member State is likely to have a significant effect on the environment of other Member States, provision should be made for the Member States concerned to enter into consultations and for the relevant authorities and the public to be informed and enabled to express their opinion.

(17) The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

(18) Member States should ensure that, when a plan or programme is adopted, the relevant authorities and the public are informed and relevant information is made available to them.

(19) Where the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, such as Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [3], Directive 92/43/EEC, or Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [4], in order to avoid duplication of the assessment, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation.

(20) A first report on the application and effectiveness of this Directive should be carried out by the Commission five years after its entry into force, and at seven-year intervals thereafter. With a view to further integrating environmental protection requirements, and taking into account the experience acquired, the first report should, if appropriate, be accompanied by proposals for amendment of this Directive, in particular as regards the possibility of extending its scope to other areas/sectors and other types of plans and programmes,

[1] OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).
[2] OJ L 206, 22.7.1992, p. 7. Directive as last amended by Directive 97/62/EC (OJ L 305, 8.11.1997, p. 42).
[3] OJ L 103, 25.4.1979, p. 1. Directive as last amended by Directive 97/49/EC (OJ L 223, 13.8.1997, p. 9).
[4] OJ L 327, 22.12.2000, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Objectives**

The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

*Article 2*

**Definitions**

For the purposes of this Directive:

(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

— which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

— which are required by legislative, regulatory or administrative provisions;

(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

*Article 3*

**Scope**

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

3. Plans and programmes referred to in paragraph 2 which determine the use of small areas at local level and minor modifications to plans and programmes referred to in paragraph 2 shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects.

4. Member States shall determine whether plans and programmes, other than those referred to in paragraph 2, which set the framework for future development consent of projects, are likely to have significant environmental effects.

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.

8. The following plans and programmes are not subject to this Directive:

— plans and programmes the sole purpose of which is to serve national defence or civil emergency,

— financial or budget plans and programmes.

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods [1] for Council Regulations (EC) No 1260/1999 [2] and (EC) No 1257/1999 [3].

[1] The 2000-2006 programming period for Council Regulation (EC) No 1260/1999 and the 2000-2006 and 2000-2007 programming periods for Council Regulation (EC) No 1257/1999.

[2] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1).

[3] Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations (OJ L 160, 26.6.1999, p. 80).

*Article 4*

**General obligations**

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

2. The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, *inter alia*, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3).

*Article 5*

**Environmental report**

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

*Article 6*

**Consultations**

1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States.

*Article 7*

**Transboundary consultations**

1. Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State.

2. Where a Member State is sent a copy of a draft plan or programme and an environmental report under paragraph 1, it shall indicate to the other Member State whether it wishes to enter into consultations before the adoption of the plan or programme or its submission to the legislative procedure and, if it so indicates, the Member States concerned shall enter into consultations concerning the likely transboundary environmental effects of implementing the plan or programme and the measures envisaged to reduce or eliminate such effects.

Where such consultations take place, the Member States concerned shall agree on detailed arrangements to ensure that the authorities referred to in Article 6(3) and the public referred to in Article 6(4) in the Member State likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable time-frame.

3. Where Member States are required under this Article to enter into consultations, they shall agree, at the beginning of such consultations, on a reasonable timeframe for the duration of the consultations.

*Article 8*

**Decision making**

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

*Article 9*

**Information on the decision**

1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States.

*Article 10*

**Monitoring**

1. Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, *inter alia*, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

2. In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring.

*Article 11*

**Relationship with other Community legislation**

1. An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, *inter alia*, to avoid duplication of assessment.

3. For plans and programmes co-financed by the European Community, the environmental assessment in accordance with this Directive shall be carried out in conformity with the specific provisions in relevant Community legislation.

*Article 12*

**Information, reporting and review**

1. Member States and the Commission shall exchange information on the experience gained in applying this Directive.

2. Member States shall ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive and shall communicate to the Commission any measures they take concerning the quality of these reports.

3. Before 21 July 2006 the Commission shall send a first report on the application and effectiveness of this Directive to the European Parliament and to the Council.

With a view further to integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other areas/sectors and other types of plans and programmes.

A new evaluation report shall follow at seven-year intervals.

4. The Commission shall report on the relationship between this Directive and Regulations (EC) No 1260/1999 and (EC) No 1257/1999 well ahead of the expiry of the programming periods provided for in those Regulations, with a view to ensuring a coherent approach with regard to this Directive and subsequent Community Regulations.

*Article 13*

**Implementation of the Directive**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21 July 2004. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

3. The obligation referred to in Article 4(1) shall apply to the plans and programmes of which the first formal preparatory act is subsequent to the date referred to in paragraph 1. Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision.

4. Before 21 July 2004, Member States shall communicate to the Commission, in addition to the measures referred to in paragraph 1, separate information on the types of plans and programmes which, in accordance with Article 3, would be subject to an environmental assessment pursuant to this Directive. The Commission shall make this information available to the Member States. The information will be updated on a regular basis.

*Article 14*

**Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

*Article 15*

**Addressees**

This Directive is addressed to the Member States.

Done at Luxembourg, 27 June 2001.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| N. FONTAINE | B. ROSENGREN |

*ANNEX I*

**Information referred to in Article 5(1)**

The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects [1] on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;

(j) a non-technical summary of the information provided under the above headings.

[1] These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.

*ANNEX II*

**Criteria for determining the likely significance of effects referred to in Article 3(5)**

1. The characteristics of plans and programmes, having regard, in particular, to
   - the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,
   - the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
   - the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
   - environmental problems relevant to the plan or programme,
   - the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).
2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to
   - the probability, duration, frequency and reversibility of the effects,
   - the cumulative nature of the effects,
   - the transboundary nature of the effects,
   - the risks to human health or the environment (e.g. due to accidents),
   - the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
   - the value and vulnerability of the area likely to be affected due to:
     - special natural characteristics or cultural heritage,
     - exceeded environmental quality standards or limit values,
     - intensive land-use,
   - the effects on areas or landscapes which have a recognised national, Community or international protection status.

# CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

**done at Espoo (Finland), on 25 February 1991**

*The Parties to this Convention,*

*Aware* of the interrelationship between economic activities and their environmental consequences,

*Affirming* the need to ensure environmentally sound and sustainable development,

*Determined* to enhance international co-operation in assessing environmental impact in particular in a transboundary context,

*Mindful* of the need and importance to develop anticipatory policies and of preventing, mitigating and monitoring significant adverse environmental impact in general and more specifically in a transboundary context,

*Recalling* the relevant provisions of the Charter of the United Nations, the Declaration of the Stockholm Conference on the Human Environment, the Final Act of the Conference on Security and Co-operation in Europe (CSCE) and the Concluding Documents of the Madrid and Vienna Meetings of Representatives of the Participating States of the CSCE,

*Commending* the ongoing activities of States to ensure that, through their national legal and administrative provisions and their national policies, environmental impact assessment is carried out,

*Conscious* of the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context,

*Mindful* of the efforts of international organizations to promote the use of environmental impact assessment both at the national and international levels, and taking into account work on environmental impact assessment carried out under the auspices of the United Nations Economic Commission for Europe, in particular results achieved by the Seminar on Environmental Impact Assessment (September 1987, Warsaw, Poland) as well as noting the Goals and Principles on environmental impact assessment adopted by the Governing Council of the United Nations Environment Programme, and the Ministerial Declaration on Sustainable Development (May 1990, Bergen, Norway),

*Have agreed* as follows:

*Article 1*

## DEFINITIONS

For the purposes of this Convention,

(i) "Parties" means, unless the text otherwise indicates, the Contracting Parties to this Convention;

(ii) "Party of origin" means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place;

(iii) "Affected Party" means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity;

(iv) "Concerned Parties" means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention;

(v) "Proposed activity" means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure;

(vi) "Environmental impact assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment;

(vii) "Impact" means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

(viii) "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party;

(ix) "Competent authority" means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity;

(x) "The Public" means one or more natural or legal persons.

*Article 2*

## GENERAL PROVISIONS

1. The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated. General guidance for identifying criteria to determine significant adverse impact is set forth in Appendix III.

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

7. Environmental impact assessments as required by this Convention shall, as a minimum requirement, be undertaken at the project level of the proposed activity. To the extent appropriate, the Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes.

8. The provisions of this Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security.

9. The provisions of this Convention shall not affect the right of particular Parties to implement, by bilateral or multilateral agreement where appropriate, more stringent measures than those of this Convention.

10. The provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact.

*Article 3*

NOTIFICATION

1. For a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact, the Party of origin shall, for the purposes of ensuring adequate and effective consultations under Article 5, notify any Party which it considers may be an affected Party as early as possible and no later than when informing its own public about that proposed activity.

2. This notification shall contain, inter alia:

(a) Information on the proposed activity, including any available information on its possible transboundary impact;

(b) The nature of the possible decision; and

(c) An indication of a reasonable time within which a response under paragraph 3 of this Article is required, taking into account the nature of the proposed activity;

and may include the information set out in paragraph 5 of this Article.

3. The affected Party shall respond to the Party of origin within the time specified in the notification, acknowledging receipt of the notification, and shall indicate whether it intends to participate in the environmental impact assessment procedure.

4. If the affected Party indicates that it does not intend to participate in the environmental impact assessment procedure, or if it does not respond within the time specified in the notification, the provisions in paragraphs 5, 6, 7 and 8 of this Article and in Articles 4 to 7 will not apply. In such circumstances the right of a Party of origin to determine whether to carry out an environmental impact assessment on the basis of its national law and practice is not prejudiced.

5. Upon receipt of a response from the affected Party indicating its desire to participate in the environmental impact assessment procedure, the Party of origin shall, if it has not already done so, provide to the affected Party:

(a) Relevant information regarding the environmental impact assessment procedure, including an indication of the time schedule for transmittal of comments; and

(b) Relevant information on the proposed activity and its possible significant adverse transboundary impact.

6. An affected Party shall, at the request of the Party of origin, provide the latter with reasonably obtainable information relating to the potentially affected environment under the jurisdiction of the affected Party, where such information is necessary for the preparation of the environmental impact assessment documentation. The information shall be furnished promptly and, as appropriate, through a joint body where one exists.

7. When a Party considers that it would be affected by a significant adverse transboundary impact of a proposed activity listed in Appendix I, and when no notification has taken place in accordance with paragraph 1 of this Article, the concerned Parties shall, at the request of the affected Party, exchange sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact. If those Parties agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention shall apply accordingly. If those Parties cannot agree whether there is likely to be a significant adverse transboundary impact, any such Party may submit that question to an inquiry commission in accordance with the provisions of Appendix IV to advise on the likelihood of significant adverse transboundary impact, unless they agree on another method of settling this question.

8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

*Article 4*

PREPARATION OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION

1. The environmental impact assessment documentation to be submitted to the competent authority of the Party of origin shall contain, as a minimum, the information described in Appendix II.

2. The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.

*Article 5*

CONSULTATIONS ON THE BASIS OF THE ENVIRONMENTAL

IMPACT ASSESSMENT DOCUMENTATION

The Party of origin shall, after completion of the environmental impact assessment documentation, without undue delay enter into consultations with the affected Party concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact. Consultations may relate to:

(a) Possible alternatives to the proposed activity, including the no-action alternative and possible measures to mitigate significant adverse transboundary impact and to monitor the effects of such measures at the expense of the Party of origin;

(b) Other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity; and

(c) Any other appropriate matters relating to the proposed activity.

The Parties shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultation period. Any such consultations may be conducted through an appropriate joint body, where one exists.

*Article 6*

FINAL DECISION

1. The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment, including the environmental impact assessment documentation, as well as the comments thereon received pursuant to Article 3, paragraph 8 and Article 4, paragraph 2, and the outcome of the consultations as referred to in Article 5.

2. The Party of origin shall provide to the affected Party the final decision on the proposed activity along with the reasons and considerations on which it was based.

3. If additional information on the significant transboundary impact of a proposed activity, which was not available at the time a decision was made with respect to that activity and which could have materially affected the decision, becomes available to a concerned Party before work on that activity commences, that Party shall immediately inform the other concerned Party or Parties. If one of the concerned Parties so requests, consultations shall be held as to whether the decision needs to be revised.

*Article 7*

POST-PROJECT ANALYSIS

1. The concerned Parties, at the request of any such Party, shall determine whether, and if so to what extent, a post-project analysis shall be carried out, taking into account the likely significant adverse transboundary impact of the activity for which an environmental impact assessment has been undertaken pursuant to this Convention. Any post-project analysis undertaken shall include, in particular, the surveillance of the activity and the determination of any adverse transboundary impact. Such surveillance and determination may be undertaken with a view to achieving the objectives listed in Appendix V.

2. When, as a result of post-project analysis, the Party of origin or the affected Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or factors have been discovered which may result in such an impact, it shall immediately inform the other Party. The concerned Parties shall then consult on necessary measures to reduce or eliminate the impact.

*Article 8*

BILATERAL AND MULTILATERAL CO-OPERATION

The Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under this Convention. Such agreements or other arrangements may be based on the elements listed in Appendix VI.

*Article 9*

RESEARCH PROGRAMMES

The Parties shall give special consideration to the setting up, or intensification of, specific research programmes aimed at:

(a) Improving existing qualitative and quantitative methods for assessing the impacts of proposed activities;

(b) Achieving a better understanding of cause-effect relationships and their role in integrated environmental management;

(c) Analysing and monitoring the efficient implementation of decisions on proposed activities with the intention of minimizing or preventing impacts;

(d) Developing methods to stimulate creative approaches in the search for environmentally sound alternatives to proposed activities, production and consumption patterns;

(e) Developing methodologies for the application of the principles of environmental impact assessment at the macro-economic level.

The results of the programmes listed above shall be exchanged by the Parties.

*Article 10*

STATUS OF THE APPENDICES

The Appendices attached to this Convention form an integral part of the Convention.

*Article 11*

MEETING OF PARTIES

1. The Parties shall meet, so far as possible, in connection with the annual sessions of the Senior Advisers to ECE Governments on Environmental and Water Problems. The first meeting of the Parties shall be convened not later than one year after the date of the entry into force of this Convention. Thereafter, meetings of the Parties shall be held at such other times as may be deemed necessary by a meeting of the Parties, or at the written request of any

Party, provided that, within six months of the request being communicated to them by the secretariat, it is supported by at least one third of the Parties.

2. The Parties shall keep under continuous review the implementation of this Convention, and, with this purpose in mind, shall:

(a) Review the policies and methodological approaches to environmental impact assessment by the Parties with a view to further improving environmental impact assessment procedures in a transboundary context;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements regarding the use of environmental impact assessment in a transboundary context to which one or more of the Parties are party;

(c) Seek, where appropriate, the services of competent international bodies and scientific committees in methodological and technical aspects pertinent to the achievement of the purposes of this Convention;

(d) At their first meeting, consider and by consensus adopt rules of procedure for their meetings;

(e) Consider and, where necessary, adopt proposals for amendments to this Convention;

(f) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention.

*Article 12*

RIGHT TO VOTE

1. Each Party to this Convention shall have one vote.

2. Except as provided for in paragraph 1 of this Article, regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

*Article 13*

SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission of reports and other information received in accordance with the provisions of this Convention to the Parties; and

(c) The performance of other functions as may be provided for in this Convention or as may be determined by the Parties.

*Article 14*

AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. Proposed amendments shall be submitted in writing to the secretariat, which shall communicate them to all Parties. The proposed amendments shall be discussed at the next meeting of the Parties, provided these proposals have been circulated by the secretariat to the Parties at least ninety days in advance.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 of this Article shall be submitted by the Depositary to all Parties for ratification, approval or acceptance. They shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. For the purpose of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

6. The voting procedure set forth in paragraph 3 of this Article is not intended to constitute a precedent for future agreements negotiated within the Economic Commission for Europe.

*Article 15*

SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in Appendix VII.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

*Article 16*

SIGNATURE

This Convention shall be open for signature at Espoo (Finland) from

25 February to 1 March 1991 and thereafter at United Nations Headquarters in New York until 2 September 1991 by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraph 8 of the Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

*Article 17*

RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 3 September 1991 by the States and organizations referred to in Article 16.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations, who shall perform the functions of Depositary.

4. Any organization referred to in Article 16 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in Article 16 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any relevant modification to the extent of their competence.

*Article 18*

ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in Article 16 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

*Article 19*

WITHDRAWAL

At any time after four years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from this Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary. Any such withdrawal shall not affect the application of Articles 3 to 6 of this Convention to a proposed activity in respect of which a notification has been made pursuant to Article`3, paragraph 1, or a request has been made pursuant to Article 3, paragraph 7, before such withdrawal took effect.

*Article 20*

AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Espoo (Finland), this twenty-fifth day of February one thousand nine hundred and ninety-one.

## APPENDICES

### APPENDIX I

### LIST OF ACTIVITIES

1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste.

4. Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilization of more than 200 tonnes per year.

6. Integrated chemical installations.

7. Construction of motorways, express roads */ and lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more.

8. Large-diameter oil and gas pipelines.

9. Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes.

10. Waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes.

11. Large dams and reservoirs.

12. Groundwater abstraction activities in cases where the annual volume of water to be abstracted amounts to 10 million cubic metres or more.

13. Pulp and paper manufacturing of 200 air-dried metric tonnes or more per day.

14. Major mining, on-site extraction and processing of metal ores or coal.

15. Offshore hydrocarbon production.

16. Major storage facilities for petroleum, petrochemical and chemical products.

17. Deforestation of large areas.

*/ For the purposes of this Convention:

- "Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:

(a) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;

(b) Does not cross at level with any road, railway or tramway track, or footpath; and

(c) Is specially sign-posted as a motorway.

- "Express road" means a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).

## APPENDIX II

## CONTENT OF THE ENVIRONMENTAL IMPACT ASSESSMENT DOCUMENTATION

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;

(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;

(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;

(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;

(e) A description of mitigation measures to keep adverse environmental impact to a minimum;

(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;

(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and

(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

## APPENDIX III

## GENERAL CRITERIA TO ASSIST IN THE DETERMINATION OF THE ENVIRONMENTAL SIGNIFICANCE OF ACTIVITIES NOT LISTED IN APPENDIX I

1. In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:

(a) Size: proposed activities which are large for the type of the activity;

(b) Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;

(c) Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.

2. The concerned Parties shall consider for this purpose proposed activities which are located close to an international frontier as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development.

## APPENDIX IV

## INQUIRY PROCEDURE

1. The requesting Party or Parties shall notify the secretariat that it or they submit(s) the question of whether a proposed activity listed in Appendix I is likely to have a significant adverse transboundary impact to an inquiry commission established in accordance with the provisions of this Appendix. This notification shall state the subject-matter of the inquiry. The secretariat shall notify immediately all Parties to this Convention of this submission.

2. The inquiry commission shall consist of three members. Both the requesting party and the other party to the inquiry procedure shall appoint a scientific or technical expert, and the two experts so appointed shall designate by common agreement the third expert, who shall be the president of the inquiry commission. The latter shall not be a national of one of the parties

to the inquiry procedure, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the matter in any other capacity.

3. If the president of the inquiry commission has not been designated within two months of the appointment of the second expert, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party, designate the president within a further two-month period.

4. If one of the parties to the inquiry procedure does not appoint an expert within one month of its receipt of the notification by the secretariat, the other party may inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the inquiry commission within a further two-month period. Upon designation, the president of the inquiry commission shall request the party which has not appointed an expert to do so within one month. After such a period, the president shall inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The inquiry commission shall adopt its own rules of procedure.

6. The inquiry commission may take all appropriate measures in order to carry out its functions.

7. The parties to the inquiry procedure shall facilitate the work of the inquiry commission and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information; and

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

8. The parties and the experts shall protect the confidentiality of any information they receive in confidence during the work of the inquiry commission.

9. If one of the parties to the inquiry procedure does not appear before the inquiry commission or fails to present its case, the other party may request the inquiry commission to continue the proceedings and to complete its work. Absence of a party or failure of a party to present its case shall not constitute a bar to the continuation and completion of the work of the inquiry commission.

10. Unless the inquiry commission determines otherwise because of the particular circumstances of the matter, the expenses of the inquiry commission, including the remuneration of its members, shall be borne by the parties to the inquiry procedure in equal shares. The inquiry commission shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

11. Any Party having an interest of a factual nature in the subject-matter of the inquiry procedure, and which may be affected by an opinion in the matter, may intervene in the proceedings with the consent of the inquiry commission.

12. The decisions of the inquiry commission on matters of procedure shall be taken by majority vote of its members. The final opinion of the inquiry commission shall reflect the view of the majority of its members and shall include any dissenting view.

13. The inquiry commission shall present its final opinion within two months of the date on which it was established unless it finds it necessary to extend this time limit for a period which should not exceed two months.

14. The final opinion of the inquiry commission shall be based on accepted scientific principles. The final opinion shall be transmitted by the inquiry commission to the parties to the inquiry procedure and to the secretariat.

## APPENDIX V

## POST-PROJECT ANALYSIS

Objectives include:

(a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures;

(b) Review of an impact for proper management and in order to cope with uncertainties;

(c) Verification of past predictions in order to transfer experience to future activities of the same type.

## APPENDIX VI

## ELEMENTS FOR BILATERAL AND MULTILATERAL CO-OPERATION

1. Concerned Parties may set up, where appropriate, institutional arrangements or enlarge the mandate of existing institutional arrangements within the framework of bilateral and multilateral agreements in order to give full effect to this Convention.

2. Bilateral and multilateral agreements or other arrangements may include:

(a) Any additional requirements for the implementation of this Convention, taking into account the specific conditions of the subregion concerned;

(b) Institutional, administrative and other arrangements, to be made on a reciprocal and equivalent basis;

(c) Harmonization of their policies and measures for the protection of the environment in order to attain the greatest possible similarity in standards and methods related to the implementation of environmental impact assessment;

(d) Developing, improving, and/or harmonizing methods for the identification, measurement, prediction and assessment of impacts, and for post-project analysis;

(e) Developing and/or improving methods and programmes for the collection, analysis, storage and timely dissemination of comparable data regarding environmental quality in order to provide input into environmental impact assessment;

(f) The establishment of threshold levels and more specified criteria for defining the significance of transboundary impacts related to the location, nature or size of proposed activities, for which environmental impact assessment in accordance with the provisions of this Convention shall be applied; and the establishment of critical loads of transboundary pollution;

(g) Undertaking, where appropriate, joint environmental impact assessment, development of joint monitoring programmes, intercalibration of monitoring devices and harmonization of methodologies with a view to rendering the data and information obtained compatible.

## APPENDIX VII

## ARBITRATION

1. The claimant Party or Parties shall notify the secretariat that the Parties have agreed to submit the dispute to arbitration pursuant to Article 15, paragraph 2, of this Convention. The notification shall state the subject-matter of arbitration and include, in particular, the Articles of this Convention, the interpretation or application of which are at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant Party or Parties and the other Party or Parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. After such a period, the president shall inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and in accordance with the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out herein shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures in order to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information; and

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject-matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention having an interest of a legal nature in the subject-matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made

the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

# CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

**done at Aarhus, Denmark,**
**on 25 June 1998**

The Parties to this Convention,

Recalling principle l of the Stockholm Declaration on the Human Environment,

Recalling also principle 10 of the Rio Declaration on Environment and Development,

Recalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals,

Recalling the European Charter on Environment and Health adopted at the First European Conference on Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989,

Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development,

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself,

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment,

Recognizing the desirability of transparency in all branches of government and inviting legislative bodies to implement the principles of this Convention in their proceedings,

Recognizing also that the public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them,

Recognizing further the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection,

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

Noting, in this context, the importance of making use of the media and of electronic or other, future forms of communication,

Recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to-date environmental information,

Acknowledging that public authorities hold environmental information in the public interest,

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

Noting the importance of adequate product information being provided to consumers to enable them to make informed environmental choices,

Recognizing the concern of the public about the deliberate release of genetically modified organisms into the environment and the need for increased transparency and greater public participation in decision-making in this field,

Convinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE),

Conscious of the role played in this respect by ECE and recalling, inter alia, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making endorsed in the Ministerial Declaration adopted at the Third Ministerial Conference "Environment for Europe" in Sofia, Bulgaria, on 25 October 1995,

Bearing in mind the relevant provisions in the Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, Finland, on 25 February 1991, and the Convention on the Transboundary Effects of Industrial Accidents and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, both done at Helsinki on 17 March 1992, and other regional conventions,

Conscious that the adoption of this Convention will have contributed to the further strengthening of the "Environment for Europe" process and to the results of the Fourth Ministerial Conference in Aarhus, Denmark, in June 1998,

Have agreed as follows:

## Article 1

### OBJECTIVE

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

## Article 2

### DEFINITIONS

For the purposes of this Convention,

1. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;

2. "Public authority" means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

## Article 3

### GENERAL PROVISIONS

1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.

5. The provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.

6. This Convention shall not require any derogation from existing rights of access to information, public participation in decision-making and access to justice in environmental matters.

7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.

9. Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

## Article 4

### ACCESS TO ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

3. A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;

(b) The request is manifestly unreasonable or formulated in too general a manner; or

(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.

4. A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information

requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.

8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

## Article 5

### COLLECTION AND DISSEMINATION OF ENVIRONMENTAL INFORMATION

1. Each Party shall ensure that:

(a) Public authorities possess and update environmental information which is relevant to their functions;

(b) Mandatory systems are established so that there is an adequate flow of information to public authorities about proposed and existing activities which may significantly affect the environment;

(c) In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected.

2. Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:

(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained;

(b) Establishing and maintaining practical arrangements, such as:

(i) Publicly accessible lists, registers or files;

(ii) Requiring officials to support the public in seeking access to information under this Convention; and

(iii) The identification of points of contact; and

(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge.

3. Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks. Information accessible in this form should include:

(a) Reports on the state of the environment, as referred to in paragraph 4 below;

(b) Texts of legislation on or relating to the environment;

(c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and

(d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention,

provided that such information is already available in electronic form.

4. Each Party shall, at regular intervals not exceeding three or four years, publish and disseminate a national report on the state of the environment, including information on the quality of the environment and information on pressures on the environment.

5. Each Party shall take measures within the framework of its legislation for the purpose of disseminating, inter alia:

(a) Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;

(b) International treaties, conventions and agreements on environmental issues; and

(c) Other significant international documents on environmental issues, as appropriate.

6. Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.

7. Each Party shall:

(a) Publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals;

(b) Publish, or otherwise make accessible, available explanatory material on its dealings with the public in matters falling within the scope of this Convention; and

(c) Provide in an appropriate form information on the performance of public functions or the provision of public services relating to the environment by government at all levels.

8. Each Party shall develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices.

9. Each Party shall take steps to establish progressively, taking into account international processes where appropriate, a coherent, nationwide system of pollution inventories or registers on a structured, computerized and publicly accessible database compiled through standardized reporting. Such a system may include inputs, releases and transfers of a specified range of substances and products, including water, energy and resource use, from a specified range of activities to environmental media and to on-site and off-site treatment and disposal sites.

10. Nothing in this article may prejudice the right of Parties to refuse to disclose certain environmental information in accordance with article 4, paragraphs 3 and 4.

## Article 6

## PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES

1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) The proposed activity and the application on which a decision will be taken;

(b) The nature of possible decisions or the draft decision;

(c) The public authority responsible for making the decision;

(d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.

6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:

(a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;

(b) A description of the significant effects of the proposed activity on the environment;

(c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;

(d) A non-technical summary of the above;

(e) An outline of the main alternatives studied by the applicant; and

(f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.

11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.

## Article 7

### PUBLIC PARTICIPATION CONCERNING PLANS, PROGRAMMES AND POLICIES RELATING TO THE ENVIRONMENT

Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

## Article 8

### PUBLIC PARTICIPATION DURING THE PREPARATION OF EXECUTIVE REGULATIONS AND/OR GENERALLY APPLICABLE LEGALLY BINDING NORMATIVE INSTRUMENTS

Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment. To this end, the following steps should be taken:

(a) Time-frames sufficient for effective participation should be

fixed;

(b) Draft rules should be published or otherwise made publicly available; and

(c) The public should be given the opportunity to comment, directly or through representative consultative bodies.

The result of the public participation shall be taken into account as far as possible.

## Article 9

### ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of

a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

## Article 10

### MEETING OF THE PARTIES

1. The first meeting of the Parties shall be convened no later than one year after the date of the entry into force of this Convention. Thereafter, an ordinary meeting of the Parties shall be held at least once every two years, unless otherwise decided by the Parties, or at the written request of any Party, provided that, within six months of the request being communicated to all Parties by the Executive Secretary of the Economic Commission for Europe, the said request is supported by at least one third of the Parties.

2. At their meetings, the Parties shall keep under continuous review the implementation of this Convention on the basis of regular reporting by the Parties, and, with this purpose in mind, shall:

(a) Review the policies for and legal and methodological approaches to access to information, public participation in decision-making and access to justice in environmental matters, with a view to further improving them;

(b) Exchange information regarding experience gained in concluding and implementing bilateral and multilateral agreements or other arrangements having relevance to the purposes of this Convention and to which one or more of the Parties are a party;

(c) Seek, where appropriate, the services of relevant ECE bodies and other competent international bodies and specific committees in all aspects pertinent to the achievement of the purposes of this Convention;

(d) Establish any subsidiary bodies as they deem necessary;

(e) Prepare, where appropriate, protocols to this Convention;

(f) Consider and adopt proposals for amendments to this Convention in accordance with the provisions of article 14;

(g) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention;

(h) At their first meeting, consider and by consensus adopt rules of procedure for their meetings and the meetings of subsidiary bodies;

(i) At their first meeting, review their experience in implementing the provisions of article 5, paragraph 9, and consider what steps are necessary to develop further the system referred to in that paragraph, taking into account international processes and developments, including the elaboration of an appropriate instrument concerning pollution release and transfer registers or inventories which could be annexed to this Convention.

3. The Meeting of the Parties may, as necessary, consider establishing financial arrangements on a consensus basis.

4. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State or regional economic integration organization entitled under article 17 to sign this Convention but which is not a Party to this Convention, and any intergovernmental organization qualified in the fields to which this Convention relates, shall be entitled to participate as observers in the meetings of the Parties.

5. Any non-governmental organization, qualified in the fields to which this Convention relates, which has informed the Executive Secretary of the Economic Commission for Europe of its wish to be represented at a meeting of the Parties shall be entitled to participate as an observer unless at least one third of the Parties present in the meeting raise objections.

6. For the purposes of paragraphs 4 and 5 above, the rules of procedure referred to in paragraph 2 (h) above shall provide for practical arrangements for the admittance procedure and other relevant terms.

## Article 11

### RIGHT TO VOTE

1. Except as provided for in paragraph 2 below, each Party to this Convention shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

## Article 12

### SECRETARIAT

The Executive Secretary of the Economic Commission for Europe shall carry out the following secretariat functions:

(a) The convening and preparing of meetings of the Parties;

(b) The transmission to the Parties of reports and other information received in accordance with the provisions of this Convention; and

(c) Such other functions as may be determined by the Parties.

## Article 13

### ANNEXES

The annexes to this Convention shall constitute an integral part thereof.

## Article 14

### AMENDMENTS TO THE CONVENTION

1. Any Party may propose amendments to this Convention.

2. The text of any proposed amendment to this Convention shall be submitted in writing to the Executive Secretary of the Economic Commission for Europe, who shall communicate it to all Parties at least ninety days before the meeting of the Parties at which it is proposed for adoption.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.

4. Amendments to this Convention adopted in accordance with paragraph 3 above shall be communicated by the Depositary to all Parties for ratification, approval or acceptance. Amendments to this Convention other than those to an annex shall enter into force for Parties having ratified, approved or accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three fourths of these Parties. Thereafter they shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval or acceptance of the amendments.

5. Any Party that is unable to approve an amendment to an annex to this Convention shall so notify the Depositary in writing within twelve months from the date of the communication of the adoption. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time substitute an acceptance for its previous notification and, upon deposit of an instrument of acceptance with the Depositary, the amendments to such an annex shall become effective for that Party.

6. On the expiry of twelve months from the date of its communication by the Depositary as provided for in paragraph 4 above an amendment to an annex shall become effective for those Parties which have not submitted a notification to the Depositary in accordance with the provisions of paragraph 5 above, provided that not more than one third of the Parties have submitted such a notification.

7. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

## Article 15

### REVIEW OF COMPLIANCE

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

## Article 16

### SETTLEMENT OF DISPUTES

1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 above, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure set out in annex II.

3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 above, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

## Article 17

### SIGNATURE

This Convention shall be open for signature at Aarhus (Denmark) on 25 June 1998, and thereafter at United Nations Headquarters in New York until 21 December 1998, by States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to paragraphs 8 and 11 of Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.

## Article 18

### DEPOSITARY

The Secretary-General of the United Nations shall act as the Depositary of this Convention.

## Article 19

### RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. This Convention shall be subject to ratification, acceptance or approval by signatory States and regional economic integration organizations.

2. This Convention shall be open for accession as from 22 December 1998 by the States and regional economic integration organizations referred to in article 17.

3. Any other State, not referred to in paragraph 2 above, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.

4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters

governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

## Article 20

### ENTRY INTO FORCE

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession.

2. For the purposes of paragraph 1 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by States members of such an organization.

3. For each State or organization referred to in article 17 which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the sixteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.

## Article 21

### WITHDRAWAL

At any time after three years from the date on which this Convention has come into force with respect to a Party, that Party may withdraw from the Convention by giving written notification to the Depositary. Any such withdrawal shall take effect on the ninetieth day after the date of its receipt by the Depositary.

## Article 22

## AUTHENTIC TEXTS

The original of this Convention, of which the English, French and Russian texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE at Aarhus (Denmark), this twenty-fifth day of June, one thousand nine hundred and ninety-eight.

## Annex I

**LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a)**

1. Energy sector:

- Mineral oil and gas refineries;
- Installations for gasification and liquefaction;
- Thermal power stations and other combustion installations with a heat input of 50 megawatts (MW)or more;
- Coke ovens;
- Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors 1/ (except research installations for the production and conversion of fissionable and fertile materials whose maximum power does not exceed 1 kW continuous thermal load);
- Installations for the reprocessing of irradiated nuclear fuel;
- Installations designed:
  - For the production or enrichment of nuclear fuel;
  - For the processing of irradiated nuclear fuel or high-level radioactive waste;
  - For the final disposal of irradiated nuclear fuel;
  - Solely for the final disposal of radioactive waste;
  - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

2. Production and processing of metals:

- Metal ore (including sulphide ore) roasting or sintering installations;
- Installations for the production of pig-iron or steel (primary or secondary fusion) including continuous casting, with a capacity exceeding 2.5 tons per hour;
- Installations for the processing of ferrous metals:
  (i) Hot-rolling mills with a capacity exceeding 20 tons of crude steel per hour;
  (ii) Smitheries with hammers the energy of which exceeds 50 kilojoules per hammer, where the calorific power used exceeds 20 MW;
  (iii) Application of protective fused metal coats with an input exceeding 2 tons of crude steel per hour;
- Ferrous metal foundries with a production capacity exceeding 20 tons per day;
- Installations:
  (i) For the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes;
  (ii) For the smelting, including the alloying, of non-ferrous metals, including recovered products (refining, foundry casting, etc.), with a melting capacity exceeding 4 tons per day for lead and cadmium or 20 tons per day for all other metals;
- Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process where the volume of the treatment vats exceeds 30 $m^3$.

3. Mineral industry:

- Installations for the production of cement clinker in rotary kilns with a production capacity exceeding 500 tons per day or lime in rotary kilns with a production capacity exceeding 50 tons per day or in other furnaces with a production capacity exceeding 50 tons per day;
- Installations for the production of asbestos and the manufacture of asbestos-based products;
- Installations for the manufacture of glass including glass fibre with a melting capacity exceeding 20 tons per day;
- Installations for melting mineral substances including the production of mineral fibres with a melting capacity exceeding 20 tons per day;
- Installations for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain, with a production capacity exceeding 75 tons per day, and/or with a kiln capacity exceeding 4 $m^3$ and with a setting density per kiln exceeding 300 $kg/m^3$.

4. Chemical industry: Production within the meaning of the categories of activities contained in this paragraph means the production on an industrial scale by chemical processing of substances or groups of substances listed in subparagraphs (a) to (g):

(a) Chemical installations for the production of basic organic chemicals, such as:

(i) Simple hydrocarbons (linear or cyclic, saturated or unsaturated, aliphatic or aromatic);
(ii) Oxygen-containing hydrocarbons such as alcohols, aldehydes, ketones, carboxylic acids, esters, acetates, ethers, peroxides, epoxy resins;
(iii) Sulphurous hydrocarbons;
(iv) Nitrogenous hydrocarbons such as amines, amides, nitrous compounds, nitro compounds or nitrate compounds, nitriles, cyanates, isocyanates;
(v) Phosphorus-containing hydrocarbons;
(vi) Halogenic hydrocarbons;
(vii) Organometallic compounds;
(viii) Basic plastic materials (polymers, synthetic fibres and cellulose-based fibres);
(ix) Synthetic rubbers;
(x) Dyes and pigments;
(xi) Surface-active agents and surfactants;

(b) Chemical installations for the production of basic inorganic chemicals, such as:

(i) Gases, such as ammonia, chlorine or hydrogen chloride, fluorine or hydrogen fluoride, carbon oxides, sulphur compounds, nitrogen oxides, hydrogen, sulphur dioxide, carbonyl chloride;
(ii) Acids, such as chromic acid, hydrofluoric acid, phosphoric acid, nitric acid, hydrochloric acid, sulphuric acid, oleum, sulphurous acids;
(iii) Bases, such as ammonium hydroxide, potassium hydroxide, sodium hydroxide;
(iv) Salts, such as ammonium chloride, potassium chlorate, potassium carbonate, sodium carbonate, perborate, silver nitrate;

(v) Non-metals, metal oxides or other inorganic compounds such as calcium carbide, silicon, silicon carbide;

(c) Chemical installations for the production of phosphorous-, nitrogen- or potassium-based fertilizers (simple or compound fertilizers);

(d) Chemical installations for the production of basic plant health products and of biocides;

(e) Installations using a chemical or biological process for the production of basic pharmaceutical products;

(f) Chemical installations for the production of explosives;

(g) Chemical installations in which chemical or biological processing is used for the production of protein feed additives, ferments and other protein substances.

5. Waste management:

- Installations for the incineration, recovery, chemical treatment or landfill of hazardous waste;
- Installations for the incineration of municipal waste with a capacity exceeding 3 tons per hour;
- Installations for the disposal of non-hazardous waste with a capacity exceeding 50 tons per day;
- Landfills receiving more than 10 tons per day or with a total capacity exceeding 25 000 tons, excluding landfills of inert waste.

6. Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.

7. Industrial plants for the:

(a) Production of pulp from timber or similar fibrous materials;

(b) Production of paper and board with a production capacity exceeding 20 tons per day.

8. (a) Construction of lines for long-distance railway traffic and of airports 2/ with a basic runway length of 2 100 m or more;

(b) Construction of motorways and express roads; 3/

(c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road, would be 10 km or more in a continuous length.

9. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tons;

(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tons.

10. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

11. (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

(b) In all other cases, works for the transfer of water resources between river basins where the multiannual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5% of this flow.

In both cases transfers of piped drinking water are excluded.

12. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

13. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

14. Pipelines for the transport of gas, oil or chemicals with a diameter of more than 800 mm and a length of more than 40 km.

15. Installations for the intensive rearing of poultry or pigs with more than:

(a) 40 000 places for poultry;

(b) 2 000 places for production pigs (over 30 kg); or

(c) 750 places for sows.

16. Quarries and opencast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

17. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

18. Installations for the storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tons or more.

19. Other activities:

- Plants for the pretreatment (operations such as washing, bleaching, mercerization) or dyeing of fibres or textiles where the treatment capacity exceeds 10 tons per day;
- Plants for the tanning of hides and skins where the treatment capacity exceeds 12 tons of finished products per day;
- (a) Slaughterhouses with a carcass production capacity greater than 50 tons per day;

  (b) Treatment and processing intended for the production of food products from:

    (i) Animal raw materials (other than milk) with a finished product production capacity greater than 75 tons per day;

    (ii) Vegetable raw materials with a finished product production capacity greater than 300 tons per day (average value on a quarterly basis);

(c) Treatment and processing of milk, the quantity of milk received being greater than 200 tons per day (average value on an annual basis);

- Installations for the disposal or recycling of animal carcasses and animal waste with a treatment capacity exceeding 10 tons per day;
- Installations for the surface treatment of substances, objects or products using organic solvents, in particular for dressing, printing, coating, degreasing, waterproofing, sizing, painting, cleaning or impregnating, with a consumption capacity of more than 150 kg per hour or more than 200 tons per year;
- Installations for the production of carbon (hard-burnt coal) or electrographite by means of incineration or graphitization.

20. Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.

21. The provision of article 6, paragraph 1 (a) of this Convention, does not apply to any of the above projects undertaken exclusively or mainly for research, development and testing of new methods or products for less than two years unless they would be likely to cause a significant adverse effect on environment or health.

22. Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1 (a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1 (b) of this Convention.

Notes

1/ Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

2/ For the purposes of this Convention, "airport" means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organization (Annex 14).

3/ For the purposes of this Convention, "express road" means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

## Annex II

### ARBITRATION

1. In the event of a dispute being submitted for arbitration pursuant to article 16, paragraph 2, of this Convention, a party or parties shall notify the secretariat of the subject matter of arbitration and indicate, in particular, the articles of this Convention whose interpretation or application is at issue. The secretariat shall forward the information received to all Parties to this Convention.

2. The arbitral tribunal shall consist of three members. Both the claimant party or parties and the other party or parties to the dispute shall appoint an arbitrator, and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the president of the arbitral tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

3. If the president of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Executive Secretary of the Economic Commission for Europe shall, at the request of either party to the dispute, designate the president within a further two-month period.

4. If one of the parties to the dispute does not appoint an arbitrator within two months of the receipt of the request, the other party may so inform the Executive Secretary of the Economic Commission for Europe, who shall designate the president of the arbitral tribunal within a further two-month period. Upon designation, the president of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. If it fails to do so within that period, the president shall so inform the Executive Secretary of the Economic Commission for Europe, who shall make this appointment within a further two-month period.

5. The arbitral tribunal shall render its decision in accordance with international law and the provisions of this Convention.

6. Any arbitral tribunal constituted under the provisions set out in this annex shall draw up its own rules of procedure.

7. The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority vote of its members.

8. The tribunal may take all appropriate measures to establish the facts.

9. The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, facilities and information;

(b) Enable it, where necessary, to call witnesses or experts and receive their evidence.

10. The parties and the arbitrators shall protect the confidentiality of any information that they receive in confidence during the proceedings of the arbitral tribunal.

11. The arbitral tribunal may, at the request of one of the parties, recommend interim measures of protection.

12. If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to render its final decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

13. The arbitral tribunal may hear and determine counter-claims arising directly out of the subject matter of the dispute.

14. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

15. Any Party to this Convention which has an interest of a legal nature in the subject matter of the dispute, and which may be affected by a decision in the case, may intervene in the proceedings with the consent of the tribunal.

16. The arbitral tribunal shall render its award within five months of the date on which it is established, unless it finds it necessary to extend the time limit for a period which should not exceed five months.

17. The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon all parties to the dispute. The award will be transmitted by the arbitral tribunal to the parties to the dispute and to the secretariat. The secretariat will forward the information received to all Parties to this Convention.

18. Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another tribunal constituted for this purpose in the same manner as the first.

# European Convention on Human Rights



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



COUNCIL OF EUROPE CONSEIL DE L'EUROPE



# European Convention on Human Rights

as amended by Protocols Nos. 11 and 14

supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

Only the English and French versions of the Convention are authentic.

European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
www.echr.coe.int

## CONTENTS

Convention for the Protection of Human Rights and Fundamental Freedoms ..... 5

Protocol ..... 31

Protocol No. 4 ..... 34

Protocol No. 6 ..... 38

Protocol No. 7 ..... 42

Protocol No. 12 ..... 48

Protocol No. 13 ..... 52

# Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

## ARTICLE 1

### Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

# SECTION I
# RIGHTS AND FREEDOMS

## ARTICLE 2

### Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

## ARTICLE 3

### Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.



## ARTICLE 4

### Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;

(d) any work or service which forms part of normal civic obligations.

## ARTICLE 5

### Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.



## ARTICLE 6

### Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

## ARTICLE 7

### No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

## ARTICLE 8

### Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## ARTICLE 9

### Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## ARTICLE 10

### Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

## ARTICLE 11

### Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

## ARTICLE 12

### Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

## ARTICLE 13

### Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## ARTICLE 14

### Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.



## ARTICLE 15

### Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

## ARTICLE 16

### Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

## ARTICLE 17

### Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and

freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

### ARTICLE 18

**Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## SECTION II
## EUROPEAN COURT OF HUMAN RIGHTS

### ARTICLE 19

**Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

### ARTICLE 20

**Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.



### ARTICLE 21

**Criteria for office**

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.

2. The judges shall sit on the Court in their individual capacity.

3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a fulltime office; all questions arising from the application of this paragraph shall be decided by the Court.

### ARTICLE 22

**Election of judges**

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

### ARTICLE 23

**Terms of office and dismissal**

1. The judges shall be elected for a period of nine years. They may not be reelected.

2. The terms of office of judges shall expire when they reach the age of 70.

3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4. No judge may be dismissed from office unless the other judges decide by a majority of twothirds that that judge has ceased to fulfil the required conditions.

## ARTICLE 24

### Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.

2. When sitting in a singlejudge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

## ARTICLE 25

### Plenary Court

The plenary Court shall

(a) elect its President and one or two VicePresidents for a period of three years; they may be reelected;

(b) set up Chambers, constituted for a fixed period of time;

(c) elect the Presidents of the Chambers of the Court; they may be reelected;

(d) adopt the rules of the Court;

(e) elect the Registrar and one or more Deputy Registrars;

(f) make any request under Article 26, paragraph 2.

## ARTICLE 26

### Singlejudge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a singlejudge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4. There shall sit as an *exofficio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the VicePresidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

## ARTICLE 27

### Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

2. The decision shall be final.

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

## ARTICLE 28

### Competence of Committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of wellestablished caselaw of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.

## ARTICLE 29

### Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.



2. A Chamber shall decide on the admissibility and merits of interState applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

## ARTICLE 30

### Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

## ARTICLE 31

### Powers of the Grand Chamber

The Grand Chamber shall

(a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;

(b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and

(c) consider requests for advisory opinions submitted under Article 47.

## ARTICLE 32

### Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

## ARTICLE 33

### InterState cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

## ARTICLE 34

### Individual applications

The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

## ARTICLE 35

### Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.



2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly illfounded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

## ARTICLE 36

### Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who

is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

## ARTICLE 37

### Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

## ARTICLE 38

### Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.



## ARTICLE 39

### Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

## ARTICLE 40

### Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

## ARTICLE 41

### Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

## ARTICLE 42

### Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

## ARTICLE 43

### Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

## ARTICLE 44

### Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
   (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
   (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
   (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.



## ARTICLE 45

### Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

## ARTICLE 46

### Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.

4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1.

5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of

paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

### ARTICLE 47

**Advisory opinions**

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

### ARTICLE 48

**Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

### ARTICLE 49

**Reasons for advisory opinions**

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.



3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

### ARTICLE 50

**Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.

### ARTICLE 51

**Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

## SECTION III
## MISCELLANEOUS PROVISIONS

### ARTICLE 52

**Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

### ARTICLE 53

**Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental

freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

## ARTICLE 54

### Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

## ARTICLE 55

### Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

## ARTICLE 56

### Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.



3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided by Article 34 of the Convention.

## ARTICLE 57

### Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

## ARTICLE 58

### Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been

performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

### ARTICLE 59

#### Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4TH DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.



# Protocol

## to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

### ARTICLE 1

#### Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

## ARTICLE 2

### Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

## ARTICLE 3

### Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

## ARTICLE 4

### Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.



A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

## ARTICLE 5

### Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

## ARTICLE 6

### Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

DONE AT PARIS ON THE 20TH DAY OF MARCH 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

# Protocol No. 4

## to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto

Strasbourg, 16.IX.1963

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

### ARTICLE 1

**Prohibition of imprisonment for debt**

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.



### ARTICLE 2

**Freedom of movement**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

### ARTICLE 3

**Prohibition of expulsion of nationals**

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

### ARTICLE 4

**Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.

## ARTICLE 5

### Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.



## ARTICLE 6

### Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 7

### Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 16TH DAY OF SEPTEMBER 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

# Protocol No. 6

## to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Strasbourg, 28.IV.1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

### ARTICLE 1

**Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.



### ARTICLE 2

**Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

### ARTICLE 3

**Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

### ARTICLE 4

**Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

### ARTICLE 5

**Territorial application**

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into

force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

## ARTICLE 6

### Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

## ARTICLE 7

### Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 8

### Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

## ARTICLE 9

### Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 28TH DAY OF APRIL 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

# Protocol No. 7

## to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

### ARTICLE 1

**Procedural safeguards relating to expulsion of aliens**

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.



2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

### ARTICLE 2

**Right of appeal in criminal matters**

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

### ARTICLE 3

**Compensation for wrongful conviction**

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

## ARTICLE 4

### Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

## ARTICLE 5

### Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

## ARTICLE 6

### Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.



2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

## ARTICLE 7

### Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 8

### Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 9

### Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.



## ARTICLE 10

### Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;

(d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 22ND DAY OF NOVEMBER 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

# Protocol No. 12

## to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of nondiscrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

### ARTICLE 1

**General prohibition of discrimination**

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

### ARTICLE 2

**Territorial application**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive

applications from individuals, nongovernmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

## ARTICLE 3

### Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 4

### Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 5

### Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.



## ARTICLE 6

### Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 2 and 5;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT ROME, THIS 4TH DAY OF NOVEMBER 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

# Protocol No. 13

## to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances

Vilnius, 3.5.2002

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:



### ARTICLE 1

**Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

### ARTICLE 2

**Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

### ARTICLE 3

**Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

### ARTICLE 4

**Territorial application**

1. Any state may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration,

be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

## ARTICLE 5

### Relationship to the Convention

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

## ARTICLE 6

### Signature and ratification

This Protocol shall be open for signature by member states of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member state of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

## ARTICLE 7

### Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.



2. In respect of any member state which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

## ARTICLE 8

### Depositary functions

The Secretary General of the Council of Europe shall notify all the member states of the Council of Europe of:

(a) any signature;

(b) the deposit of any instrument of ratification, acceptance or approval;

(c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;

(d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT VILNIUS, THIS 3RD DAY OF MAY 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

# European Convention
## on Human Rights



European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex

www.echr.coe.int

Design: © ECHR · Photo: © Shutterstock

ENG

# CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

(2000/C 364/01)

**PROCLAMACIÓN SOLEMNE**

**HØJTIDELIG PROKLAMATION**

**FEIERLICHE PROKLAMATION**

**ΠΑΝΗΓΥΡΙΚΗ ΔΙΑΚΗΡΥΞΗ**

**SOLEMN PROCLAMATION**

**PROCLAMATION SOLENNELLE**

**FORÓGRA SOLLÚNTA**

**PROCLAMAZIONE SOLENNE**

**PLECHTIGE AFKONDIGING**

**PROCLAMAÇÃO SOLENE**

**JUHLALLINEN JULISTUS**

**HÖGTIDLIG PROKLAMATION**

El Parlamento Europeo, el Consejo y la Comisión proclaman solemnemente en tanto que Carta de los Derechos Fundamentales de la Unión Europea el texto que figura a continuación.

Europa-Parlamentet, Rådet og Kommissionen proklamerer højtideligt den tekst, der følger nedenfor, som Den Europæiske Unions charter om grundlæggende rettigheder.

Das Europäische Parlament, der Rat und die Kommission proklamieren feierlich den nachstehenden Text als Charta der Grundrechte der Europäischen Union.

Το Ευρωπαϊκό Κοινοβούλιο, το Συμβούλιο και η Επιτροπή διακηρύσσουν πανηγυρικά, ως Χάρτη Θεμελιωδών Δικαιωμάτων της Ευρωπαϊκής Ένωσης, το κείμενο που ακολουθεί.

The European Parliament, the Council and the Commission solemnly proclaim the text below as the Charter of fundamental rights of the European Union.

Le Parlement européen, le Conseil et la Commission proclament solennellement en tant que Charte des droits fondamentaux de l'Union européenne le texte repris ci-après.

Forógraíonn Parlaimint na hEorpa, an Chomhairle agus an Coimisiún go sollúnta an téacs thíos mar an Chairt um Chearta Bunúsacha den Aontas Eorpach.

Il Parlamento europeo, il Consiglio e la Commissione proclamano solennemente quale Carta dei diritti fondamentali dell'Unione europea il testo riportato in appresso.

Het Europees Parlement, de Raad en de Commissie kondigen plechtig als Handvest van de grondrechten van de Europese Unie de hierna opgenomen tekst af.

O Parlamento Europeu, o Conselho e a Comissão proclamam solenemente, enquanto Carta dos Direitos Fundamentais da União Europeia, o texto a seguir transcrito.

Euroopan parlamentti, neuvosto ja komissio juhlallisesti julistavat jäljempänä esitetyn tekstin Euroopan unionin perusoikeuskirjaksi.

Europaparlamentet, rådet och kommissionen tillkännager högtidligt denna text såsom stadga om de grundläggande rättigheterna i Europeiska unionen.

Hecho en Niza, el siete de diciembre del año dos mil.

Udfærdiget i Nice den syvende december to tusind.

Geschehen zu Nizza am siebten Dezember zweitausend.

Έγινε στη Νίκαια, στις επτά Δεκεμβρίου δύο χιλιάδες.

Done at Nice on the seventh day of December in the year two thousand.

Fait à Nice, le sept décembre deux mille.

Arna dhéanamh i Nice, an seachtú lá de Nollaig sa bhliain dhá mhíle.

Fatto a Nizza, addì sette dicembre duemila.

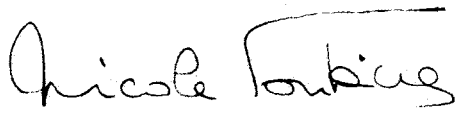
Gedaan te Nice, de zevende december tweeduizend.

Feito em Nice, em sete de Dezembro de dois mil.

Tehty Nizzassa seitsemäntenä päivänä joulukuuta vuonna kaksituhatta.

Som skedde i Nice den sjunde december tjugohundra.

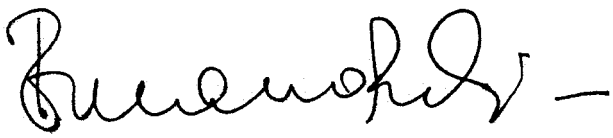
Por el Parlamento Europeo
For Europa-Parlamentet
Für das Europäische Parlament
Για το Ευρωπαϊκό Κοινοβούλιο
For the European Parliament
Pour le Parlement européen
Thar ceann Pharlaimint na hEorpa
Per il Parlamento europeo
Voor het Europees Parlement
Pelo Parlamento Europeu
Euroopan parlamentin puolesta
För Europaparlamentet



Por el Consejo de la Unión Europea
For Rådet for Den Europæiske Union
Für den Rat der Europäischen Union
Για το Συμβούλιο της Ευρωπαϊκής Ένωσης
For the Council of the European Union
Pour le Conseil de l'Union européenne
Thar ceann Chomhairle an Aontais Eorpaigh
Per il Consiglio dell'Unione europea
Voor de Raad van de Europese Unie
Pelo Conselho da União Europeia
Euroopan unionin neuvoston puolesta
För Europeiska unionens råd



Por la Comisión Europea
For Europa-kommissionen
Für die Europäische Kommission
Για την Ευρωπαϊκή Επιτροπή
For the European Commission
Pour la Commission européenne
Thar ceann an Choimisiúin Eorpaigh
Per la Commissione europea
Voor de Europese Commissie
Pela Comissão Europeia
Euroopan komission puolesta
För Europeiska kommissionen



## PREAMBLE

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

CHAPTER I

## DIGNITY

*Article 1*

### Human dignity

Human dignity is inviolable. It must be respected and protected.

*Article 2*

### Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

*Article 3*

### Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

— the free and informed consent of the person concerned, according to the procedures laid down by law,

— the prohibition of eugenic practices, in particular those aiming at the selection of persons,

— the prohibition on making the human body and its parts as such a source of financial gain,

— the prohibition of the reproductive cloning of human beings.

*Article 4*

### Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

*Article 5*

### Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. Trafficking in human beings is prohibited.

CHAPTER II

## FREEDOMS

*Article 6*

### Right to liberty and security

Everyone has the right to liberty and security of person.

*Article 7*

### Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

*Article 8*

### Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.

*Article 9*

### Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

*Article 10*

### Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

*Article 11*

**Freedom of expression and information**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

*Article 12*

**Freedom of assembly and of association**

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

*Article 13*

**Freedom of the arts and sciences**

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

*Article 14*

**Right to education**

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

*Article 15*

**Freedom to choose an occupation and right to engage in work**

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

*Article 16*

**Freedom to conduct a business**

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

*Article 17*

**Right to property**

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

*Article 18*

**Right to asylum**

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

*Article 19*

**Protection in the event of removal, expulsion or extradition**

1. Collective expulsions are prohibited.

2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III

# EQUALITY

*Article 20*

## Equality before the law

Everyone is equal before the law.

*Article 21*

## Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

*Article 22*

## Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

*Article 23*

## Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

*Article 24*

## The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

*Article 25*

**The rights of the elderly**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

*Article 26*

**Integration of persons with disabilities**

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV

## SOLIDARITY

*Article 27*

### Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

*Article 28*

### Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

*Article 29*

### Right of access to placement services

Everyone has the right of access to a free placement service.

*Article 30*

### Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

*Article 31*

### Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

*Article 32*

**Prohibition of child labour and protection of young people at work**

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

*Article 33*

**Family and professional life**

1. The family shall enjoy legal, economic and social protection.

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

*Article 34*

**Social security and social assistance**

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.

2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.

3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

*Article 35*

**Health care**

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

*Article 36*

**Access to services of general economic interest**

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

*Article 37*

**Environmental protection**

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

*Article 38*

**Consumer protection**

Union policies shall ensure a high level of consumer protection.

## CHAPTER V

## CITIZENS' RIGHTS

### *Article 39*

### Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.

2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

### *Article 40*

### Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

### *Article 41*

### Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes:

— the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

— the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

— the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

*Article 42*

**Right of access to documents**

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

*Article 43*

**Ombudsman**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

*Article 44*

**Right to petition**

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

*Article 45*

**Freedom of movement and of residence**

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

*Article 46*

**Diplomatic and consular protection**

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI

# JUSTICE

*Article 47*

## Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

*Article 48*

## Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

*Article 49*

## Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

*Article 50*

## Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII

## GENERAL PROVISIONS

*Article 51*

### Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

*Article 52*

### Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

*Article 53*

### Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

*Article 54*

## Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

*of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before either the courts of the Member State in which the trade mark is registered or the courts of the Member State of the place of establishment of the advertiser.*

---

([1]) OJ C 30, 29.1.2011.

---

**Judgment of the Court (Third Chamber) of 19 April 2012 — Tomra Systems ASA, Tomra Europe AS, Tomra Systems GmbH, Tomra Systems BV, Tomra Leergutsysteme GmbH, Tomra Systems AB, Tomra Butikksystemer AS v European Commission**

**(Case C-549/10 P)** ([1])

***(Appeal — Competition — Dominant position — Abuse — Market for machines for the collection of used beverage containers — Decision finding an infringement of Article 82 EC and Article 54 of the EEA Agreement — Exclusivity agreements, quantity commitments and loyalty rebates)***

(2012/C 165/09)

*Language of the case: English*

**Parties**

*Appellants:* Tomra Systems ASA, Tomra Europe AS, Tomra Systems GmbH, Tomra Systems BV, Tomra Leergutsysteme GmbH, Tomra Systems AB, Tomra Butikksystemer AS (represented by: O. W. Brouwer, advocaat, J. Midthjell, advokat and A. J. Ryan, solicitor)

*Other party to the proceedings:* European Commission (represented by: E. Gippini Fournier and N. Khan, acting as Agents)

**Re:**

Appeal against the judgment of the General Court (Fifth Chamber) delivered on 9 September 2010 in Case T-155/06 *Tomra Systems ASA and Others* v *European Commission* dismissing an action for annulment of the Commission's decision of 29 March 2006 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/E-1/38.113 — Prokent/Tomra) imposing a fine of EUR 24 million on the appellants for abusing their dominant position by engaging in practices involving exclusivity agreements, quantity commitments and loyalty rebates in order to prevent or delay the entry of other manufacturers on the market for machines for the collection of used beverage containers in Austria, Germany, the Netherlands, Norway and Sweden, and, in the alternative, an application for annulment or substantial reduction of the fine.

**Operative part of the judgment**

*The Court:*

1. *Dismisses the appeal;*

2. *Orders Tomra Systems ASA, Tomra Europe AS, Tomra Systems GmbH, Tomra Systems BV, Tomra Leergutsysteme GmbH, Tomra Systems AB and Tomra Butikksystemer AS to pay the costs.*

---

([1]) OJ C 63, 26.2.2011.

---

**Judgment of the Court (Third Chamber) of 19 April 2012 (reference for a preliminary ruling from the Conseil d'État (Belgium)) — Pro-Braine ASBL and Others v The Commune of Braine-le-Château**

**(Case C-121/11)** ([1])

***(Directive 1999/31/EC — Landfill of waste — Directive 85/337/EEC — Assessment of the effects of certain public and private projects on the environment — Decision relating to the carrying on of operations at an authorised landfill site, in the absence of an Environmental Impact Assessment — Concept of 'consent')***

(2012/C 165/10)

*Language of the case: French*

**Referring court**

Conseil d'État

**Parties to the main proceedings**

*Applicants:* Pro-Braine ASBL, Michel Bernard, Charlotte de Lantsheere

*Defendant:* The Commune of Braine-le-Château

*Intervener:* Veolia es treatment SA

**Re:**

Reference for a preliminary ruling — Conseil d'État (Belgium) — Interpretation of Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (OJ 1999 L 182, p. 1) and of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) — Decision relating to the carrying on of operations at an authorised landfill site, in the absence of an Environmental Impact Assessment — Concept of 'consent' — Scope

**Operative part of the judgment**

*The definitive decision relating to the carrying on of operations at an existing landfill site, taken on the basis of a conditioning plan, pursuant to Article 14(b) of Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, does not constitute a 'consent' within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, unless that decision authorises a change to or extension of*

*that installation or site, through works or interventions involving alterations to its physical aspect, which may have significant adverse effects on the environment within the meaning of point 13 of Annex II to Directive 85/337, and thus constitute a 'project' within the meaning of Article 1(2) of that Directive.*

---

([1]) OJ C 152, 21.5.2011.

---

**Judgment of the Court (Sixth Chamber) of 19 April 2012 — European Commission v Hellenic Republic**

**(Case C-297/11)** ([1])

***(Failure of a Member State to fulfil obligations — Directive 2000/60/EC — European Union water policy — River basin management plan — Publication — Public information and consultation — Failure to notify the Commission)***

(2012/C 165/11)

*Language of the case: Greek*

**Parties**

*Applicant:* European Commission (represented by: A. Marghelis and I. Hadjiyiannis, acting as Agents)

*Defendant:* Hellenic Republic (represented by: G. Karipsiadis, acting as Agent)

**Re:**

Failure of Member State to fulfil its obligations — Infringement of Articles 13(1), (2), (3) and (6), 14(1)(c) and 15(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1) — River basin management plans — Publication — Information and consultation of public — Failure to send copies of management plans to the Commission

**Operative part of the judgment**

*The Court:*

1. *Declares that, by having failed to draw up, by 22 December 2009, the river basin management plans for both river basins located entirely within its own territory and international river basins, and by having failed to send copies of those plans, by 22 March 2010, to the European Commission, the Hellenic Republic has failed to fulfil its obligations under Articles 13(1) to (3) and (6) and 15(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy and, in addition, by having failed to institute, by 22 December 2008, the public information and consultation procedure regarding the draft river basin management plans, the Hellenic Republic has failed to fulfil its obligations under Article 14(1)(c) of that directive;*

2. *Orders the Hellenic Republic to pay the costs.*

---

([1]) OJ C 238, 13.8.2011.

---

**Reference for a preliminary ruling from the Sąd Rejonowy w Zakopanem (Poland), lodged on 23 January 2012 — Criminal proceedings against Wojciech Ziemski and Andrzej Kozak**

**(Case C-31/12)**

(2012/C 165/12)

*Language of the case: Polish*

**Referring court**

Sąd Rejonowy w Zakopanem

**Parties to the main proceedings**

Wojciech Ziemski, Andrzej Kozak

**Question referred**

Must Article 1.11 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services ([1]) be interpreted as meaning that the technical regulations, the draft of which must be communicated to the Commission pursuant to Article 8(1) of that directive, also include a legislative provision which defines the statutory concepts and prohibitions which are described and set out in Article 29 of the Ustawa z dnia 19 listopada 2009 roku o grach hazardowych (Polish Law of 19 November 2009 on games of chance) (Dz. U. No 201, position 1540, as amended)?

---

([1]) OJ 1998 L 204, p. 37.

---

**Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovak Republic), lodged on 10 February 2012 — Slovenská sporiteľňa, a.s. v Protimonopolný úrad Slovenskej republiky**

**(Case C-68/12)**

(2012/C 165/13)

*Language of the case: Slovak*

**Referring court**

Najvyšší súd Slovenskej republiky

V

*(Announcements)*

# COURT PROCEEDINGS

# COURT OF JUSTICE

**Judgment of the Court (Grand Chamber) of 15 January 2013 (request for a preliminary ruling from the Najvyšší súd Slovenskej republiky — Slovakia) — Jozef Križan and Others v Slovenská inšpekcia životného prostredia**

**(Case C-416/10)** [1]

***(Article 267 TFEU — Annulment of a judicial decision — Referral back to the court concerned — Obligation to comply with the annulment decision — Request for a preliminary ruling — Whether possible — Environment — Aarhus Convention — Directive 85/337/EEC — Directive 96/61/EC — Public participation in the decision-making process — Construction of a landfill site — Application for a permit — Trade secrets — Non-communication of a document to the public — Effect on the validity of the decision authorising the landfill site — Rectification — Assessment of the environmental impact of the project — Final opinion prior to accession of the Member State to the European Union — Application in time of Directive 85/337 — Effective legal remedy — Interim measures — Suspension of implementation — Annulment of the contested decision — Right to property — Interference)***

(2013/C 63/02)

*Language of the case: Slovak*

**Referring court**

Najvyšší súd Slovenskej republiky

**Parties to the main proceedings**

*Appellants:* Jozef Križan, Katarína Aksamitová, Gabriela Kokošková, Jozef Kokoška, Martina Strezenická, Jozef Strezenický, Peter Šidlo, Lenka Šidlová, Drahoslava Šidlová, Milan Šimovič, Elena Šimovičová, Stanislav Aksamit, Tomáš Pitoňák, Petra Pitoňáková, Mária Križanová, Vladimír Mizerák, Ľubomír Pevný, Darina Brunovská, Mária Fišerová, Lenka Fišerová, Peter Zvolenský, Katarína Zvolenská, Kamila Mizeráková, Anna Konfráterová, Milan Konfráter, Michaela Konfráterová, Tomáš Pavlovič, Jozef Krivošík, Ema Krivošíková, Eva Pavlovičová, Jaroslav Pavlovič, Pavol Šipoš, Martina Šipošová, Jozefína Šipošová, Zuzana Šipošová, Ivan Čaputa, Zuzana Čaputová, Štefan Strapák, Katarína Strapáková, František Slezák, Agnesa Slezáková, Vincent Zimka, Elena Zimková, Marián Šipoš, Mesto Pezinok

*Respondent:* Slovenská inšpekcia životného prostredia

*Intervener:* Ekologická skládka as

**Re:**

Request for a preliminary ruling — Najvyšší súd Slovenskej republiky — Interpretation of Articles 191(1) and (2) TFEU and 267 TFEU, Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), in particular Articles 1, 6, 15 and 15a, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), in particular Articles 2 and 10a, and Articles 6 and 9 of the (Aarhus) Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on behalf of the European Community by Council Decision of 17 February 2005 (OJ 2005 L 124, p. 1) — Establishment of a landfill site — Assessment of the environmental effects of the project — Public participation in the decision-making process — Possibility for a court of a Member State to make a reference to the Court of Justice for a preliminary ruling on the application, of its own motion, of European Union law on the protection of the environment, even if the Constitutional Court of that State has excluded such application by a decision binding on the referring court

**Operative part of the judgment**

1. *Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice of the European Union even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.*

2. *Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006, must be interpreted as meaning that it:*

— *requires that the public concerned have access to an urban planning decision, such as that at issue in the main proceedings, from the beginning of the authorisation procedure for the installation concerned,*

— *does not allow the competent national authorities to refuse the public concerned access to such a decision by relying on the protection of the confidentiality of commercial or industrial information where such confidentiality is provided for by national or European Union law to protect a legitimate economic interest, and*

— *does not preclude the possibility of rectifying, during the administrative procedure at second instance, an unjustified refusal to make available to the public concerned an urban planning decision, such as that at issue in the main proceedings, during the administrative procedure at first instance, provided that all options and solutions remain possible and that regularisation at that stage of the procedure still allows that public effectively to influence the outcome of the decision-making process, this being a matter for the national court to determine.*

3. *Article 15a of Directive 96/61, as amended by Regulation No 166/2006, must be interpreted as meaning that members of the public concerned must be able, in the context of the action provided for by that provision, to ask the court or competent independent and impartial body established by law to order interim measures such as temporarily to suspend the application of a permit, within the meaning of Article 4 of that directive, pending the final decision.*

4. *A decision of a national court, taken in the context of national proceedings implementing the obligations resulting from Article 15a of Directive 96/61, as amended by Regulation No 166/2006, and from Article 9(2) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, which annuls a permit granted in infringement of the provisions of that directive is not capable, in itself, of constituting an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union.*

(1) OJ C 301, 6.11.2010.

## Judgment of the Court (First Chamber) of 17 January 2013 (request for a preliminary ruling from the Oberster Gerichtshof — Austria) — Georg Köck v Schutzverband gegen unlauteren Wettbewerb

**(Case C-206/11)** (1)

***(Consumer protection — Unfair business-to-consumer commercial practices in the internal market — Legislation of a Member State providing for prior authorisation of announcements of sales)***

(2013/C 63/03)

*Language of the case: German*

### Referring court

Oberster Gerichtshof

### Parties to the main proceedings

*Applicant:* Georg Köck

*Defendant:* Schutzverband gegen unlauteren Wettbewerb

### Re:

Request for a preliminary ruling — Oberster Gerichtshof — Interpretation of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22), in particular Articles 3(1) and 5(5) — Legislation of a Member State prescribing prior authorisation for the announcement of a clearance sale

### Operative part of the judgment

*Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as precluding a national court from ordering the cessation of a commercial practice not covered by Annex I to that directive on the sole ground that the practice has not been the subject of prior authorisation by the competent administrative authority, without itself carrying out an assessment of the unfairness of the practice in question against the criteria set out in Articles 5 to 9 of that directive.*

(1) OJ C 226, 30.7.2011.

plant for pulp — Incorrect assessment of the conditions for the admissibility of an action for annulment of a Commission decision based on Article 88(3) EC, brought by a party concerned within the meaning of Article 88(2) EC

**Operative part of the judgment**

*The Court:*

1. *Dismisses the appeal;*

2. *Orders the European Commission and Zellstoff Stendal GmbH to bear their own costs.*

---

(1) OJ C 102, 1.5.2009.

---

**Judgment of the Court (Fourth Chamber) of 12 May 2011 (reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein Westfalen — Germany) — Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e.V. v Bezirksregierung Amsberg**

**(Case C-115/09)** (1)

***(Directive 85/337/EEC — Environmental impact assessment — Århus Convention — Directive 2003/35/EC — Access to justice — Non-governmental organisations for the protection of the environment)***

(2011/C 204/10)

*Language of the case: German*

**Referring court**

Oberverwaltungsgericht für das Land Nordrhein Westfalen

**Parties to the main proceedings**

*Applicant:* Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen e.V.

*Defendant:* Bezirksregierung Arnsberg

*Intervening party:* Trianel Kohlekraftwerk Lünen GmbH &Co. KG

**Re:**

Reference for a preliminary ruling — Oberverwaltungsgericht für das Land Nordrhein-Westfalen — Interpretation of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17) — Right of non-governmental organisations to appeal against decisions authorising projects which may have significant effects on the environment — Extent of that right — Possibility of relying on all relevant rules or only on rules based directly on Community law, including rules which protect only the public interest and not the rights of individuals — Substantive requirements if only rules based on Community law may be relied on

**Operative part of the judgment**

1. *Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, precludes legislation which does not permit a non-governmental organisation promoting environmental protection, referred to in Article 1(2) of Directive 85/337, to challenge before the courts, in the context of an action brought against a decision authorising projects 'likely to have significant effects on the environment' within the meaning of Article 1(1) of Directive 85/337, as amended by Directive 2003/35, the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.*

2. *Such an non-governmental organisation can derive, from the final sentence of the third paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, the right to challenge before the courts, in the context of an action brought against a decision authorising projects 'likely to have significant effects on the environment' within the meaning of Article 1(1) of Directive 85/337, as amended, the infringement of the national rules flowing from Article 6 of Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, although national procedural law does not permit such a challenge, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals.*

---

(1) OJ C 141, 20.6.2009.

---

**Judgment of the Court (Third Chamber) of 12 May 2011 — Grand Duchy of Luxembourg v European Parliament and Council of the European Union**

**(Case C-176/09)** (1)

***(Action for annulment — Directive 2009/12/EC — Airport charges — Scope — Airports whose annual traffic is over 5 million passenger movements per year and those with the highest passenger movements in each Member State — Validity — Principles of equal treatment, proportionality and subsidiarity)***

(2011/C 204/11)

*Language of the case: French*

**Parties**

*Applicant:* Grand Duchy of Luxembourg (represented by: C. Schiltz, acting as Agent, and by P. Kinsch, avocat)

# JUDGMENT OF THE COURT (First Chamber)

17 March 2011 *

In Case C-275/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Raad van State (Belgium), made by decision of 14 July 2009, received at the Court on 21 July 2009, in the proceedings

**Brussels Hoofdstedelijk Gewest,**

**Pieter De Donder,**

**Fernande De Becker,**

**Katrien Colenbie,**

**Philippe Hutsenbaut,**

**Bea Kockaert,**

* Language of the case: Dutch.

**VZW Boreas,**

**Frédéric Petit,**

**Stéphane de Burbure de Wezembeek,**

**Lodewijk Van Dessel,**

v

**Vlaams Gewest,**

intervening party:

**The Brussels Airport Company NV,**

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2010,

after considering the observations submitted on behalf of:

— Brussels Hoofdstedelijk Gewest, by F. Tulkens and J. Mosselmans, advocaten,

— Mrs De Becker, Mrs Colenbie, Mr Hutsenbaut, Mrs Kockaert and VZW Boreas, by I. Larmuseau and H. Schoukens, advocaten,

— Mr. Petit, by J. Verstraeten and S. Vanthienen, advocaten,

— Mr de Burbure de Wezembeek, by M. Denys, advocaat,

— Mr Van Dessel, by P. Flamey and P.-J.Vervoort, advocaten,

— Vlaams Gewest, by J. Vanpraet and S. Ronse, avocats,

— The Brussels Airport Company NV, by D. Ryckbost and A. Lippens, advocaten,

— the Italian Government, by G. Palmieri, acting as Agent, and G. Fiengo, avvocato dello Stato,

— the Austrian Government, by E. Riedl, acting as Agent,

— the European Commission, by P. Oliver, J.-B. Laignelot and B. Burggraaf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2010,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of point 7(a) of Annex I to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337').

2 The reference was made in proceedings between the Brussels Hoofdstedelijk Gewest (Brussels Capital Region) together with a number of other applicants and the Vlaams Gewest (Flemish Region) concerning a decision relating to the operation of Bruxelles-National Airport.

## Legal context

*European Union law*

3 Article 1(2) of Directive 85/337 provides as follows:

‘For the purposes of this Directive:

“project” means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

4 The first subparagraph of Article 2(1) of Directive 85/337 provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects'.

5 The projects concerned are defined in Article 4 of Directive 85/337. That provision distinguishes between the projects listed in Annex I, which must be made subject to an environmental impact assessment, and the projects listed in Annex II, for which the Member States must determine, on the basis of a case-by-case examination or thresholds or criteria set by the Member State, whether they are to be made subject to such an assessment.

6 Point 7(a) of Annex I to Directive 85/337 refers to the 'construction … of airports with a basic runway length of 2 100 m or more'.

7 The first indent of point 13 of Annex II to Directive 85/337 covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

*National law*

8 The legislation applicable in the Flemish Region distinguishes between a 'planning permit', which authorises the execution of certain works, and an 'environmental permit', which authorises the operation of an establishment that is classified as causing environmental nuisance.

9 The grant of an environmental permit, which is valid for a limited period of time, is governed by the Decree of the Flemish Parliament of 28 June 1985 on Environmental Permits, which was supplemented by an implementing order of the Flemish Government of 6 February 1991.

10 Since the entry into force on 1 May 1999 of a new Classification List, as amended by an order of the Flemish Government of 12 January 1999, 'sites for airports with a runway length … of at least 1 900 metres' are classified in the category of establishments causing environmental nuisance, for which an environmental permit is required.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

11 Bruxelles-National Airport, situated in the Flemish Region, has three take-off and landing runways over 2 100 metres in length. It has existed for decades but its operation has been subject to the grant of an environmental permit only since 1999.

12 The first environmental permit was granted on 1 February 2000 for a period of five years. That permit, which laid down, inter alia, noise emission standards, was amended on three occasions with a view to a greater reduction in overall noise load. The Raad van State states that it does not appear from the documents submitted to it that an environmental impact assessment was carried out in connection with that permit or the subsequent amendments to it.

13 On 5 January 2004, The Brussels Airport Company NV submitted an environmental permit application for the continued operation of and alterations to the airport, involving the addition of parcels of land.

14 On 8 July 2004, the Permanent Delegation of the Provincial Council of Vlaams-Brabant granted the permit sought as regards the continued operation of the airport but rejected the application to extend it. The Permanent Delegation considered that an environmental impact assessment was unnecessary.

15 An administrative appeal was lodged against that decision. The applicants submitted inter alia that an environmental impact assessment report should have been annexed to the environmental permit application.

16 On 30 December 2004, the Flemish Minister for Public Works, Energy, the Environment and Nature confirmed the decision of the Permanent Delegation of the Provincial Council of Vlaams-Brabant. He considered that an environmental impact assessment was unnecessary under both Flemish legislation and Directive 85/337.

17 The Brussels Hoofdstedelijk Gewest and several other applicants brought an action before the Raad van State against that confirmatory decision. They submit that the decision is vitiated by an irregularity because the grant of the environmental permit was conditional upon an environmental impact assessment being carried out and that requirement was not met.

18 It was in those circumstances that the Raad van State decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) When separate development consents are required for, on the one hand, the infrastructure works for an airport with a basic runway length of 2 100 metres or more and, on the other hand, for the operation of that airport, and the latter development consent – the environmental permit – is granted only for a fixed period, should the term "construction", referred to in point 7(a) of Annex I to [Directive 85/337], be interpreted as meaning that an environmental impact report should be compiled not only for the execution of the infrastructure works but also for the operation of the airport?

(2) Is that mandatory environmental impact assessment also required for the renewal of the environmental permit for the airport, both in the case where that renewal is not accompanied by any change or extension to the operation, and in the case where such a change or extension is indeed intended?

(3) Does it make a difference to the obligation to produce an environmental impact report, in the context of the renewal of an environmental permit for an airport, whether an environmental impact report was compiled earlier, in relation to a previous operational consent, and whether the airport was already in operation at

the time when the requirement to produce an environmental impact report was introduced by the European or the national legislator?'

**Consideration of the questions referred**

19 In order to answer those questions, which it is appropriate to consider together, it is necessary to ascertain whether the operation of an airport may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337 and, if so, whether such a project falls within those listed in Annexes I and II to the directive.

20 As the Court observed at paragraph 23 of its judgment in Case C-2/07 *Abraham and Others* [2008] ECR I-1197, it is apparent from the very wording of Article 1(2) of Directive 85/337 that the term 'project' refers to works or physical interventions.

21 It is expressly stated in the order for reference that the measure at issue in the main proceedings is limited to the renewal of the existing consent to operate Bruxelles-National Airport and does not entail works or interventions which alter the physical aspect of the site.

22 However, some of the applicants in the main proceedings have argued that the concept of physical intervention must be broadly construed as encompassing any intervention in the natural surroundings. They rely on paragraphs 24 and 25 of the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004]

ECR I-7405, in which the Court held that an activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337.

23 That argument cannot be accepted. As the Advocate General points out at point 22 of his Opinion, the activity at issue in the case which gave rise to that judgment was comparable with the extraction of mineral resources, an activity which is specifically referred to in the second indent of Article 1(2) of Directive 85/337 and entails genuine physical changes to the sea bed.

24 It follows that the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337.

25 It should be added that Article 2(1) of Directive 85/337 does not, in any event, require that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive (order in Case C-156/07 *Aiello and Others* [2008] ECR I-5215, paragraph 34).

26 It should be noted in that connection, as pointed out by the Advocate General at point 26 of his Opinion, that the term 'construction' used at point 7(a) of Annex I to Directive 85/337 is not in any way ambiguous and is to be understood as having its normal meaning, namely as referring to the carrying out of works not previously existing or of physical alterations to existing installations.

27 It is true that, in its case-law, the Court has given a broad interpretation of the concept of 'construction', accepting that works for the refurbishment of an existing road may be equivalent, due to their size and the manner in which they are carried out, to the construction of a new road (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 36). Similarly, the Court has interpreted point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337 as also encompassing works to alter the infrastructure of an existing airport, without extension of the runway, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others*, paragraph 40).

28 However, it is clear from reading those judgments that each of the cases which gave rise to them involved physical works, which is not the case in the main proceedings according to the information provided by the Raad van State.

29 As the Advocate General points out at point 28 of his Opinion, while it is established case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, inter alia, *Abraham and Others*, paragraph 32, and *Ecologistas en Acción-CODA*, paragraph 28), a purposive interpretation of the directive cannot, in any event, disregard the clearly expressed intention of the legislature of the European Union.

30 It follows that, in any event, the renewal of an existing consent to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'construction' within the meaning of point 7(a) of Annex I to Directive 85/377.

31 It should nevertheless be pointed out that in the proceedings before the Court, in particular at the hearing, some of the applicants in the main proceedings submitted that, since the expiry of the period for transposition of Directive 85/337, the infrastructure of Bruxelles-National Airport has undergone alteration works without an environmental impact assessment being carried out.

32 In that context, it should be noted that, according to the established case-law of the Court, in a case involving a permit, such as that at issue in the main proceedings, which does not formally concern an activity subject to an environmental impact assessment for the purposes of Annexes I and II to Directive 85/337, it may nevertheless be necessary for such an assessment to be carried out where that measure constitutes a stage in a procedure the ultimate purpose of which is to grant the right to proceed with an activity which constitutes a project within the meaning of Article 2(1) of the directive (see, to that effect, *Abraham and Others*, paragraph 25).

33 According to that same line of authority, where national law provides that the consent procedure is to be carried out in several stages, the environmental impact assessment in respect of a project must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 53, and *Abraham and Others*, paragraph 26). It has also been held that a national measure which provides that an environmental impact assessment may be carried out only at the initial stage of the consent procedure, and not at a later stage in the procedure, would be incompatible with Directive 85/337 (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraphs 105 and 106).

34 In the present case, it is therefore necessary to point out to the Raad van State that it is for it to determine, in the light of the case-law cited at paragraphs 27, 32 and 33 above and on the basis of the national legislation applicable, whether a decision such as that at issue in the main proceedings can be regarded as a stage in a consent procedure

carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the relevant provisions of Directive 85/337 to be carried out.

35 For the purposes of examining the facts, it is appropriate to remind the national court that the Court has already held that works to alter the infrastructure of an existing airport, without extension of the runway, are covered by point 13 of Annex II, read in conjunction with point 7 of Annex I, to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (*Abraham and Others,* paragraph 40).

36 The Court has also stated that the objective of the European Union legislation cannot be circumvented by the splitting of projects and that failure to take account of their cumulative effect must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of Directive 85/377 (*Abraham and Others*, paragraph 27).

37 If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure.

38 The answer to the questions referred is, therefore, that the second indent of Article 1(2) of Directive 85/337 and point 7 of Annex I to the directive are to be interpreted as meaning that:

— the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;

— however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage of the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.

**Costs**

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**The second indent of Article 1(2) of, and point 7 of Annex 1 to, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, are to be interpreted as meaning that:**

— **the renewal of an existing permit to operate an airport cannot, in the absence of any works or interventions involving alterations to the physical aspect of the site, be classified as a 'project' or 'construction', respectively, within the meaning of those provisions;**

— **however, it is for the national court to determine, on the basis of the national legislation applicable and taking account, where appropriate, of the cumulative effect of a number of works or interventions carried out since the entry into force of the directive, whether that permit forms part of a consent procedure carried out in several stages, the ultimate purpose of which is to enable activities which constitute a project within the meaning of the first indent of point 13 of Annex II, read in conjunction with point 7 of Annex I, to the directive to be carried out. If no assessment of the environmental effects of such works or interventions was carried out at the earlier stage in the consent procedure, it would be for the national court to ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at the stage at which the operating permit was to be granted.**

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

3 March 2011 *

In Case C-50/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 February 2009,

**European Commission,** represented by P. Oliver, C. Clyne and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland,** represented by D. O'Hagan, acting as Agent, assisted by G. Simons SC and D. McGrath BL, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 24 June 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its action, the Commission of the European Communities requested the Court to declare that:

— by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of

3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17; 'Directive 85/337');

— by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency ('the Agency') both have decision-making powers on a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and

— by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

**Legal context**

*European Union legislation*

2 Article 1(2) and (3) of Directive 85/337 provide:

'(2) For the purposes of this Directive:

"project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

(3) The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

3 Under Article 2(1) to (2a) of Directive 85/337:

'(1) Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.

(2) The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

(2a) Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control …'

4 Article 3 of Directive 85/337 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— material assets and the cultural heritage,

— the interaction between the factors mentioned in the first, second and third indents.'

5 Article 4(1) and (2) of Directive 85/337 are worded as follows:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).'

6 Articles 5 to 7 of Directive 85/337 concern the information which must be gathered and the consultations which must be undertaken for the purposes of the assessment procedure. Article 5 deals with the information which the developer must supply, Article 6 deals with the obligation to consult, on the one hand, authorities with specific environmental responsibilities and the public, on the other, and Article 7 covers the obligation, in the case of a cross-border project, to inform the other Member State concerned. Article 8 of the directive states that the results of those consultations and

the information gathered must be taken into consideration in the development consent procedure.

7 Articles 9 to 11 of Directive 85/337, relating to the decision taken at the conclusion of the consent procedure, cover, respectively, informing the public and the Member States concerned, respect for commercial and industrial confidentiality, the right of members of the public to bring proceedings before a court and the exchange of information between Member States and the Commission.

8 Under Article 12(1) of Directive 85/337, in its original version, the Member States were obliged to comply with that directive's provisions by 3 July 1988 at the latest. With regard to the amendments made to it by Directives 97/11 and 2003/35, the Member States were obliged to bring them into force at the latest by 14 March 1999 and 25 June 2005 respectively.

*National legislation*

The Planning and Development Act 2000

9 The Planning and Development Act 2000, as amended by the Strategic Infrastructure Act 2006 ('the PDA'), lays down the legal framework for issuing development consent for most of the project categories listed in Annexes I and II to Directive 85/337. For some projects, development consent under the PDA, which is termed 'planning

permission' and granted, as a rule, by a local authority, is the only form of consent required for a project to proceed. In such cases, the PDA provides that the decisions taken by local authorities may be appealed against to An Bord Pleanála (The Planning Appeals Board; 'the Board').

10 Part X of the PDA, comprising sections 172 to 177, is devoted to environmental impact assessments. Section 176 provides for ministerial regulations to identify projects requiring such an assessment. Section 172 provides that, for projects covered by regulations made under section 176, applications for planning permission are to be accompanied by an environmental impact statement. Under section 173, where a planning authority receives an application for planning permission accompanied by an environmental impact statement, that authority and, on appeal, the Board must have regard to that statement. Section 177 provides that the information to be included in such a statement is to be prescribed by ministerial regulation.

11 Detailed measures for the implementation of the PDA are set out in the Planning and Development Regulations 2001, as amended by the Planning and Development Regulations 2008 ('the PDR'), which were adopted pursuant to, among others, sections 176 and 177 of the PDA.

12 Part 2 of the PDR concerns projects which are exempt from an environmental impact assessment. Article 6 thereof refers in that regard to Part 1 of Schedule 2 to the PDR, which, in Category 50, refers to 'the demolition of a building or other structure'.

Articles 9 and 10 of the PDR lay down the conditions under which a project as a rule exempted must none the less be made subject to a consent procedure.

13 Part 10 of the PDR is devoted to environmental impact assessments. Article 93 thereof, in combination with Schedule 5 thereto, defines the categories of projects for which such an assessment is required. Article 94 of the PDR, which lists the information that should be found in an environmental impact statement, is worded as follows:

'An environmental impact statement shall contain:

(a) the information specified in paragraph 1 of Schedule 6,

(b) the information specified in paragraph 2 of Schedule 6 to the extent that

(i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and

(ii) the person or persons preparing the statement may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and,

(c) a summary in non-technical language of the information required under paragraphs (a) and (b).'

14 Schedule 6 to the PDR specifies the information to be contained in an environmental impact statement. Paragraph 2(b) of Schedule 6 stipulates that it must contain:

'A description of the aspects of the environment likely to be significantly affected by the proposed development, including in particular:

— human beings, fauna and flora,

— soil, water, air, climatic factors and the landscape,

— material assets, including the architectural and archaeological heritage, and the cultural heritage,

— the inter-relationship between the above factors.'

15 Under Article 108 of the PDR, the competent planning authority is obliged to establish whether the information contained in an environmental impact statement complies with the requirements laid down in the PDR.

## The Environmental Protection Agency Act 1992

16 The Environmental Protection Agency Act 1992 ('the EPAA') introduced, among other things, a new system of integrated pollution control under which many industrial activities require a licence granted by the Agency. Where the activity is new and/or involves new construction, it must also obtain planning permission as provided for by the PDA.

17 Section 98 of the EPAA, which precluded planning authorities from taking into consideration aspects connected with pollution risks in considering an application for planning permission, was amended by section 256 of the PDA to the effect that, whilst it precluded planning authorities from including any pollution control conditions in planning permissions for activities also requiring a licence from the Agency, they could nevertheless, where appropriate, refuse to grant planning permission on environmental grounds. Section 98 of the EPAA, as amended, provides that planning authorities may ask the Agency for an opinion, in particular on an environmental impact statement. However, the Agency is not required to respond to such a request.

18 Under the Environmental Protection Agency (Licensing) Regulations 1994 ('the EPAR'), the Agency may notify a planning authority of a licence application. There is, however, no obligation on the planning authority to respond to such a notification.

## The National Monuments Act 1930

19 The National Monuments Act 1930 ('the NMA') governs the protection of Ireland's most culturally significant archaeological remains, which are classed as 'national monuments'. It was amended by the National Monuments (Amendment) Act 2004, to relax the constraints imposed under earlier legislation concerning proposals to alter or remove national monuments.

20 Section 14 of the NMA confers on the Irish Minister for the Environment, Heritage and Local Government ('the Minister') discretion to consent to the destruction of a national monument. Where a national monument is discovered during the carrying out of a road development which has been subject to an environmental impact assessment, section 14A of the NMA provides that it is, in principle, prohibited to carry out any works on the monument pending directions by the Minister. Those directions can relate to 'the doing to the monument of [various] matters', including its demolition. There is no provision for any assessment to be made, for the adoption of such directions, of the effects on the environment. However, section 14B of the NMA provides that the Minister's directions must be notified to the Board. If those directions envisage an alteration to the approved road development, the Board must consider whether or not that alteration is likely to have significant adverse effects on the environment. If it is of that opinion, it must require the submission of an environmental impact statement.

**Pre-litigation procedure**

21 Following the examination of a complaint regarding Ireland's transposition of Directive 85/337, the Commission took the view that Ireland had failed to ensure its full and correct transposition and, by letter of 19 November 1998, gave Ireland formal notice, to submit its observations, in accordance with the procedure for failure to fulfil Treaty obligations. A further letter of formal notice was sent to Ireland on 9 February 2001.

22 After examining the observations received in response to those letters, the Commission, on 6 August 2001, sent the Irish authorities a reasoned opinion in which it claimed that Ireland had not correctly transposed Articles 2 to 6, 8 and 9 of Directive 85/337. In reply, Ireland stated that the legislative amendments necessary to bring about the transposition were being adopted and requested that the proceedings be stayed.

23 Following further complaints, the Commission, on 2 May 2006, sent an additional letter of formal notice to Ireland.

24 As the Commission was not satisfied with the replies received, on 29 June 2007 it addressed an additional reasoned opinion to Ireland in which it claimed that Ireland had not correctly transposed Directive 85/337, in particular Articles 2 to 4 thereof, and called upon it to comply with that reasoned opinion within a period of two months from the date of its receipt. In reply, Ireland maintained its position that the Irish legislation in force now constitutes adequate transposition of that directive.

25 The Commission then brought the present action.

## The action

*The first complaint, alleging failure to transpose Article 3 of Directive 85/337*

Arguments of the parties

26 According to the Commission, Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must therefore be transposed explicitly. The provisions relied upon by Ireland as adequate transposition of Article 3 of the directive are insufficient.

27 Thus, section 173 of the PDA, which requires planning authorities to have regard to the information contained in an environmental impact statement submitted by a developer, relates to the obligation, under Article 8 of Directive 85/337, to take into consideration the information gathered pursuant to Articles 5 to 7 thereof. By contrast, section 173 does not correspond to the wider obligation, imposed by Article 3 of Directive 85/337 on the competent authority, to ensure that there is carried out an environmental impact assessment which identifies, describes and assesses all the matters referred to in that article.

28 As for Articles 94, 108 and 111 of, and Schedule 6 to, the PDR, the Commission observes that they are confined, first, to setting out the matters on which the developer must supply information in its environmental impact statement and, second, to specifying the obligation on the competent authorities to establish that the information

is complete. The obligations laid down by those provisions are different from that, imposed by Article 3 of Directive 85/337 on the competent authority, of carrying out a full environmental impact assessment

29 With regard to the relevance of the Irish courts' case-law on the application of the provisions of national law at issue, the Commission points out that while those courts may interpret ambiguous provisions so as to ensure their compatibility with a directive; they cannot plug legal gaps in the national legislation. Moreover, the extracts from the decisions cited by Ireland concern, in the Commission's submission, not the interpretation of that legislation but the interpretation of Directive 85/337 itself.

30 Ireland disputes the significance which the Commission attaches to Article 3 of that directive. It submits that that provision, drafted in general terms, is confined to stating that an environmental impact assessment must be made in accordance with Articles 4 to 11 of the directive. By transposing Articles 4 to 11 into national law, a Member State thereby, in Ireland's submission, ensures the transposition of Article 3.

31 Ireland maintains that Article 3 of Directive 85/337 is fully transposed by sections 172(1) and 173 of the PDA and Articles 94 and 108 of, and Schedule 6 to, the PDR. It points out that the Supreme Court (Ireland) has confirmed, in two separate judgments of 2003 and 2007, namely *O'Connell* v *Environmental Protection Agency* and *Martin* v *An Bord Pleanála*, that Irish law requires planning authorities and the Agency to assess the factors referred to in Article 3 and the interaction between them. Those judgments, which, Ireland submits, should be taken into account when assessing the scope of the national provisions at issue, do not fill a legal gap but are confined to holding that the applicable national legislation imposes an obligation on the

competent authorities to carry out an environmental impact assessment of a development in the light of the criteria laid down in Article 3 of Directive 85/337.

32 In the alternative, Ireland refers to the concept of 'proper planning and sustainable development' referred to in section 34 of the PDA. It is, in Ireland's submission, the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission. That concept is in addition to all the criteria referred to in section 34 of the PDA, as well as in other provisions of that Act, including section 173, the application of which it reinforces.

33 Finally, Ireland submits that the Commission does not respect the discretion which a Member State enjoys under Article 249 EC as to the form and methods for transposing a directive. By requiring the literal transposition of Article 3 of Directive 85/337, the Commission is disregarding the body of legislation and case-law built up in Ireland over 45 years surrounding the concepts of 'proper planning' and 'sustainable development'.

Findings of the Court

34 At the outset, it is to be noted that the Commission and Ireland give a different reading to Article 3 of Directive 85/337 and a different analysis of its relationship with Articles 4 to 11 thereof. The Commission maintains that Article 3 lays down obligations which go beyond those required by Articles 4 to 11, whereas Ireland submits that it

is merely a provision drafted in general terms and that the details of the process of environmental impact assessment are specified in Articles 4 to 11.

35 In that regard, whilst Article 3 of Directive 85/337 provides that the environmental impact assessment is to take place 'in accordance with Articles 4 to 11' thereof, the obligations referred to by those articles differ from that under Article 3 itself.

36 Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment which must include a description of a project's direct and indirect effects on the factors set out in the first three indents of that article and the interaction between those factors (judgment of 16 March 2006 in Case C-332/04 *Commission* v *Spain*, paragraph 33). As stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.

37 In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.

38 That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive.

39 Admittedly, Article 8 of Directive 85/337 provides that the results of the consultations and the information gathered pursuant to Articles 5 to 7 must be taken into consideration in the development consent procedure.

40 However, that obligation to take into consideration, at the conclusion of the decision-making process, information gathered by the competent environmental authority must not be confused with the assessment obligation laid down in Article 3 of Directive 85/337. Indeed, that assessment, which must be carried out before the decision-making process (Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 103), involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data. That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.

41 It follows therefore both from the wording of the provisions at issue of Directive 85/337 and from its general scheme that Article 3 is a fundamental provision. The transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.

42 It is in the light of those considerations that the Court must consider whether the national provisions upon which Ireland relies constitute proper transposition of Article 3 of Directive 85/337.

43 It can be seen from the wording of section 172 of the PDA and of Article 94 of, and Schedule 6 to, the PDR that those provisions relate to the developer's obligation to supply an environmental impact statement, which corresponds, as the Commission correctly claims, to the obligation imposed upon the developer by Article 5 of

Directive 85/337. Article 108 of the PDR imposes no obligation on the planning authority other than that of establishing the completeness of that information.

44 As regards section 173 of the PDA, according to which the planning authority, where it receives an application for planning permission accompanied by an environmental impact statement, must take that statement into account as well as any additional information provided to it, it is clear from the very wording of that article that it is confined to laying down an obligation similar to that provided for in Article 8 of Directive 85/337, namely that of taking the results of the consultations and the information gathered for the purposes of the consent procedure into consideration. That obligation does not correspond to the broader one, imposed by Article 3 of Directive 85/337 on the competent environmental authority, to carry out itself an environmental impact assessment in the light of the factors set out in that provision.

45 In those circumstances, it must be held that the national provisions invoked by Ireland cannot attain the result pursued by Article 3 of Directive 85/337.

46 Whilst it is true that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, in particular, Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraph 54 and the case-law cited), the fact remains that, according to equally settled case-law, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which

requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, in particular, *Commission* v *Ireland*, paragraph 55 and the case-law cited).

47 In that regard, the judgment of the Supreme Court in *O'Connell* v *Environmental Protection Agency* gives, admittedly, in the passage upon which Ireland relies, an interpretation of the provisions of domestic law consistent with Directive 85/337. However, according to the Court's settled case-law, such a consistent interpretation of the provisions of domestic law cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, in particular, Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 79 and the case-law cited). The passage in the judgment of the same court in *Martin* v *An Bord Pleanála*, to which Ireland also refers, concerns the question of whether all the factors referred to in Article 3 of Directive 85/337 are mentioned in the consent procedures put in place by the Irish legislation. By contrast, it has no bearing on the question, which is decisive for the purposes of determining the first complaint, of what the examination of those factors by the competent national authorities should comprise.

48 As regards the concepts of 'proper planning' and 'sustainable development' to which Ireland also refers, it must be held that, even if those concepts encompass the criteria referred to in Article 3 of Directive 85/337, it is not established that they require that those criteria be taken into account in all cases for which an environmental impact assessment is required.

49 It follows that neither the national case-law nor the concepts of 'proper planning' and 'sustainable development' can be invoked to remedy the failure to transpose into the Irish legal order Article 3 of Directive 85/337.

50 The Commission's first complaint in support of its action must therefore be held to be well founded.

*The second complaint, alleging failure to ensure full compliance with Articles 2 to 4 of Directive 85/337 where several authorities are involved in the decision-making process*

Arguments of the parties

51 For the Commission, it is of the essence that the environmental impact assessment be carried out as part of a holistic process. In Ireland, following the Agency's creation, certain projects requiring such an assessment are subject to two separate decision-making processes: one process involves decision-making on land-use aspects by planning authorities, while the other involves decision-making by the Agency on pollution aspects. The Commission accepts that planning permission and an Agency licence may be regarded, as has been held in Irish case-law (*Martin* v *An Bord Pleanála*), as together constituting 'development consent' within the meaning of Article 1(2) of Directive 85/337 and it does not object to such consent being given in two successive stages. However, the Commission criticises the fact that the Irish legislation fails to impose any obligation on planning authorities and the Agency to coordinate their activities. In the Commission's submission, that situation is contrary to Articles 2 to 4 of Directive 85/337.

52 As regards Article 2 of Directive 85/337, the Commission notes that it requires an environmental impact assessment to be undertaken for a project covered by Article 4 'before consent is given'. The Commission submits that there is a possibility under the

Irish legislation that part of the decision-making process will take place in disregard of that requirement. First, the Irish legislation does not require that an application for planning permission be lodged with the planning authorities before a licence application is submitted to the Agency, which is not empowered to undertake an environmental impact assessment. Second, the planning authorities are not obliged to take into account, in their assessment, the impact of pollution, which might not be assessed at all.

53 Referring to the Court's case-law (see, in particular, judgment of 20 November 2008 in Case C-66/06 *Commission* v *Ireland*, paragraph 59), the Commission states that it is not obliged to wait until the application of the transposing legislation produces harmful effects or to establish that it does so, where the wording of the legislation itself is insufficient or defective.

54 As regards Article 3 of Directive 85/337, the Commission submits that where there is more than one competent body, the procedures followed by each of them must, when taken together, ensure that the assessment required by Article 3 is fully carried out. The strict demarcation of the separate roles of the planning authorities on the one hand and the Agency on the other, as laid down by the Irish legislation, fails to take formally into account the concept of 'environment' in the decision-making. None of the bodies involved in the consent process is responsible for assessing and taking into consideration the interaction between the factors referred to in the first to third indents of Article 3, which fall respectively within the separate spheres of the powers of each of those authorities.

55 In that regard, the Commission, referring to section 98 of the EPAA, as amended, and to the EPAR, observes that there is no formal link, in the form of an obligation, for the competent authorities, to consult each other between the process of planning permission followed by the planning authority and the licensing process followed by the Agency.

56 In order to illustrate its analysis, the Commission refers to the projects relating to the installation of an incinerator at Duleek, in County Meath, and to the wood-processing factory at Leap, in County Offaly.

57 Referring to Case C-98/04 *Commission* v *United Kingdom* [2006] ECR I-4003, Ireland contests the admissibility of the Commission's second complaint in support of its action, on the ground that, in Ireland's submission, the Commission has failed to indicate precisely the reason why Ireland's designation of two competent authorities infringes the requirements of Directive 85/337. Ireland submits that the failure has interfered with the preparation of its defence.

58 On the substance, Ireland contends that the consequence of involving a number of different competent authorities in the decision-making process, which is permitted by Articles 1(3) and 2(2) of Directive 85/337, is that their involvement and their obligations will be different and will occur at different stages prior to 'development consent' being given. Relying on *Martin* v *An Bord Pleanála*, Ireland contends that nowhere in that directive is it in any sense suggested that a single competent body must carry out a 'global assessment' of the impact on the environment.

59 Ireland denies that there is a strict demarcation between the powers of the two decision-making bodies and submits that there is, rather, overlap between them. The concept of 'proper planning and sustainable development', to which the PDA refers,

is a very broad one, which includes, in particular, environmental pollution. Planning authorities are required to assess environmental pollution in the context of a decision relating to planning permission. They are moreover empowered under various provisions to refuse planning permission on environmental grounds.

60 Replying to the Commission's argument that it is possible for a licence application to be made to the Agency before an application for planning permission has been made to the planning authority, and thus before an environmental impact assessment has been carried out, Ireland contends that under Irish law 'development consent' requires both planning permission from the competent planning authority and a licence from the Agency. In those circumstances, there is no practical benefit in the developer applying for a licence from the Agency without making a contemporaneous application to the planning authority; such separate applications do not therefore occur in practice.

61 In addition, Ireland argues that, contrary to the Commission's assertion that the Agency cannot undertake an environmental impact assessment, there is in several instances an obligation, particularly for waste recovery or waste disposal licence applications and for applications for integrated pollution control and prevention licences, to submit an environmental impact statement to the Agency independently of any earlier application for planning permission lodged with a planning authority. In addition, in such cases the Agency is expressly empowered to request further information from an applicant and may therefore request information which is substantially similar to that contained in an environmental impact statement.

62 Ireland submits that an obligation on the planning authority and the Agency to consult in every case would be inappropriate. It would be more appropriate to allow such consultation whilst affording a discretion to the relevant decision-makers as to whether, in each particular case, to undertake such consultation.

63 Finally, the judgment in Case C-66/06 *Commission* v *Ireland*, to which the Commission refers in order to avoid having to adduce proof of its allegations, is not relevant to the present case. In Ireland's submission, the alleged infringement, in that case, concerned the manner in which Directive 85/337 had been transposed into Irish domestic law, whereas the present case concerns the application of the legislation transposing that directive. Whilst a comprehensive scheme has been put in place by the Irish legislation on the environmental impact assessment, the Commission claims that that legislation may not always be applied properly in practice. In that regard, the onus of proof lies with the Commission, which has failed to discharge it. The references to the projects at Duleek and Leap offer no support whatsoever for the Commission's allegations.

Findings of the Court

— Admissibility of the second complaint

64 It is settled case-law that, in the context of an action brought on the basis of Article 226 EC, the reasoned opinion and the action must set out the Commission's

complaints coherently and precisely in order that the Member State and the Court may appreciate exactly the scope of the infringement of European Union law complained of, a condition which is necessary in order to enable the Member State to avail itself of its right to defend itself and the Court to determine whether there is a breach of obligations as alleged (see, in particular, *Commission* v *United Kingdom*, paragraph 18, and Case C-66/06 *Commission* v *Ireland*, paragraph 31).

65 In this case, it is apparent from the documents in the court file that, in the pre-litigation procedure, both paragraphs 3.2.2 to 3.2.5 of the reasoned opinion of 6 August 2001 and paragraphs 2.17 and 2.18 of the additional reasoned opinion of 29 June 2007 set forth the reason for which the strict demarcation between the separate roles assigned to the planning authorities, on the one hand, and the Agency, on the other, does not satisfy, in the Commission's submission, the requirements of Directive 85/337. It is there explained that such sharing of powers is incompatible with the fact that the concept of 'environment', as it must be taken into account in the decision-making process laid down by that directive, involves taking into consideration the interaction between the factors falling within the separate spheres of responsibility of each of those decision-making authorities.

66 That complaint is set out in identical or similar terms in paragraphs 55 et seq. of the application in this action which, in addition, contains, in its paragraphs 9 to 20, a summary of the relevant provisions of the Irish legislation.

67 It follows from those findings that the Commission's allegations in the course of the pre-litigation procedure and the proceedings before the Court were sufficiently clear to enable Ireland properly to defend itself.

68 Accordingly, Ireland's plea of inadmissibility in respect of the Commission's second complaint must be rejected.

— Substance

69 At the outset, it is to be noted that, by its second complaint, the Commission is criticising the transposition by the Irish legislation at issue of Articles 2 to 4 of Directive 85/337, on the ground that the procedures put in place by that legislation do not ensure full compliance with those articles where several national authorities take part in the decision-making process.

70 Consequently, Ireland's line of argument that the Commission has not adequately established the factual basis for its action must immediately be rejected. As the Commission claimed, since its action for failure to fulfil obligations is concerned with the way in which Directive 85/337 has been transposed, and not with the actual result of the application of the national legislation relating to that transposition, it must be determined whether that legislation itself harbours the insufficiencies or defects in the transposition of the directive which the Commission alleges, without any need to establish the actual effects of the national legislation effecting that transposition with regard to specific projects (see Case C-66/06 *Commission* v *Ireland*, paragraph 59).

71 Article 1(2) of Directive 85/337 defines the term 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Article 1(3) states that the competent authorities are to be that or those which the Member States designate as responsible for performing the duties arising from that directive.

72 For the purposes of the freedom thus left to them to determine the competent authorities for giving development consent, for the purposes of that directive, the Member States may decide to entrust that task to several entities, as the Commission has moreover expressly accepted.

73 Article 2(2) of Directive 85/337 adds that the environmental impact statement may be integrated into the existing procedures for consent to projects or failing that, into other procedures or into procedures to be established to comply with the aims of that directive.

74 That provision means that the liberty left to the Member States extends to the determination of the rules of procedure and requirements for the grant of the development consent in question.

75 However, that freedom may be exercised only within the limits imposed by that directive and provided that the choices made by the Member States ensure full compliance with its aims.

76 Article 2(1) of Directive 85/337 thus states that the environmental impact assessment must take place 'before the giving of consent'. That entails that the examination of a project's direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.

77 In those circumstances, while nothing precludes Ireland's choice to entrust the attainment of that directive's aims to two different authorities, namely planning authorities on the one hand and the Agency on the other, that is subject to those authorities' respective powers and the rules governing their implementation ensuring that an

environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that directive.

78 In that regard, the Commission maintains that it has identified, in the Irish legislation, a gap arising from the combination of two factors. The first is the lack of any right on the part of the Agency, where it receives an application for a licence for a project as regards pollution aspects, to require an environmental impact assessment. The second is the possibility that the Agency might receive an application and decide on questions of pollution before an application is made to the planning authority, which alone can require the developer to make an environmental impact statement.

79 In its defence, Ireland, which does not deny that, generally, the Agency is not empowered to require a developer to produce such a statement, contends that there is no practical benefit for a developer in seeking a licence from the Agency without simultaneously making an application for planning permission to the planning authority, since he needs a consent from both those authorities. However, Ireland has neither established, nor even alleged, that it is legally impossible for a developer to obtain a decision from the Agency where he has not applied to the planning authority for permission.

80 Admittedly, the EPAR give the Agency the right to notify a licence application to the planning authority. However, it is common ground between the parties that it is not an obligation and, moreover, an authority which has received such notification is not bound to reply to it.

81 It is therefore not inconceivable that the Agency, as the authority responsible for licensing a project as regards pollution aspects, may make its decision without an environmental impact assessment being carried out in accordance with Articles 2 to 4 of Directive 85/337.

82 Ireland contends that, in certain cases, relating particularly to licences for the recovery or disposal of waste and integrated pollution control and prevention licences, the Agency is empowered to require an environmental impact statement, which it must take into account. However, such specific rules cannot fill the gap in the Irish legislation identified in the preceding paragraph.

83 Ireland submits also that planning authorities are empowered, since the amendment of the EPAA by section 256 of the PDA, to refuse, where appropriate, planning permission on environmental grounds and that the concepts of 'proper planning' and 'sustainable development' confer on those authorities, generally, such power.

84 Such an extension of the planning authority's powers may, as Ireland argues, create in certain cases an overlap of the respective powers of the authorities responsible for environmental matters. None the less, it must be held that such an overlap cannot fill the gap pointed out in paragraph 81 of the present judgment, which leaves open the possibility that the Agency will alone decide, without an environmental impact assessment complying with Articles 2 to 4 of Directive 85/337, on a project as regards pollution aspects.

85 In those circumstances, it must be held that the Commission's second complaint in support of its action for failure to fulfil obligations is well founded.

*The third complaint, alleging failure to apply Directive 85/337 to demolition works*

Arguments of the parties

86 In the Commission's submission, demolition works may constitute a 'project' within the meaning of Article 1(2) of Directive 85/337, since they fall within the concept of 'other interventions in the natural surroundings and landscape'. However, in the PDR, Ireland purported to exempt nearly all demolition works from the obligation to carry out an environmental impact assessment. After the end of the two-month period laid down in the additional reasoned opinion of 29 June 2007, Ireland admittedly notified the Commission of new legislation, which amended the PDR by significantly narrowing the scope of the exemption for demolition works. However, that legislation cannot, the Commission submits, be taken into account in the present infringement action.

87 The Commission claims that Ireland's interpretation that demolition works fall outside the scope of the directive is reflected in the NMA, and refers in that regard to sections 14, 14A and 14B of that Act which relate to the demolition of a national monument.

88 By way of illustration of how, in contravention of Directive 85/337, the exclusion of demolition works allowed, by virtue of section 14A of the NMA, a national monument to be demolished without an environmental impact assessment being undertaken, the Commission cites the ministerial decision of 13 June 2007 ordering the destruction of a national monument in order to permit the M3 motorway project to proceed.

89 As a preliminary point, Ireland objects that the Commission's third complaint is, in so far as it concerns section 14 of the NMA, inadmissible, since that provision was not mentioned in the additional reasoned opinion of 29 June 2007.

90 In Ireland's submission, demolition works do not fall within the scope of Directive 85/337, since they are not mentioned in Annex I or II thereto. In addition, Ireland submits that section 10 of the PDA and Article 9 of the PDR, when read together, make clear that the exemption from the obligation to obtain planning permission in respect of demolition works can apply only if the project is unlikely to have significant effects on the environment.

91 As regards the obligation to carry out further assessments, Ireland argues that the essence of Directive 85/337 is that the environmental impact assessment be carried out at the earliest possible stage, before the development starts. The only occasion when it is ever necessary to carry out a fresh assessment is, in accordance with the first indent of point 13 in Annex II to the directive, where the development project has been changed or extended.

92 With regard to the scope of ministerial directions issued under section 14A of the NMA, Ireland states that that provision applies only in the context of a road development previously approved by the Board, on the basis of an environmental impact assessment. Only the Board may authorise an alteration to a road development and

it must in such a case assess whether that alteration is likely to have adverse environmental consequences. In those circumstances, the Minister's power to issue ministerial directions cannot be equated with the giving of consent for the motorway project. Those directions are issued only, if at all, following the commencement of the development works and the discovery of a new national monument and are designed only to regulate how the newly discovered national monument is to be dealt with. Also, Ireland denies that a ministerial decision was taken ordering the destruction of a national monument in order to allow the M3 motorway project to proceed.

Findings of the Court

— Admissibility of the third complaint

93 According to the Court's settled case-law, the subject-matter of proceedings brought under Article 226 EC is delimited by the administrative pre-litigation procedure governed by that article and the application must be founded on the same grounds and pleas as those stated in the reasoned opinion (see, in particular, Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraph 26 and the case-law cited).

94 In this case, it is clear from the wording of the additional reasoned opinion of 29 June 2007 that the Commission, in paragraphs 2.34 to 2.38 thereof, complained that Ireland had excluded demolition works from the scope of the national legislation transposing Directive 85/337. In paragraphs 2.39 and 2.40 of the same opinion, the Commission

stated that Ireland's interpretation of that directive was reflected not only in the PDA, but also in other more specific legislative provisions, such as the NMA, and it took as an example the carrying-out of the M3 motorway project.

95 It follows that, while the Commission did not expressly refer to section 14 of the NMA in that reasoned opinion, it none the less referred clearly to the decision-making mechanism laid down by that section as part of its analysis of the deficiencies which, in its submission, that Act entails.

96 In those circumstances, Ireland's plea of inadmissibility against the Commission's third complaint must be rejected.

— Substance

97 As regards the question whether demolition works come within the scope of Directive 85/337, as the Commission maintains in its pleadings, or whether, as Ireland contends, they are excluded, it is appropriate to note, at the outset, that the definition of the word 'project' in Article 1(2) of that directive cannot lead to the conclusion that demolition works could not satisfy the criteria of that definition. Such works can, indeed, be described as 'other interventions in the natural surroundings and landscape'.

98 That interpretation is supported by the fact that, if demolition works were excluded from the scope of that directive, the references to 'the cultural heritage' in

Article 3 thereof, to 'landscapes of historical, cultural or archaeological significance' in point 2(h) of Annex III to that directive and to 'the architectural and archaeological heritage' in point 3 of Annex IV thereto would have no purpose.

99 It is true that, under Article 4 of Directive 85/337, for a project to require an environmental impact assessment, it must come within one of the categories in Annexes I and II to that directive. However, as Ireland contends, they make no express reference to demolition works except, irrelevantly for the purposes of the present action, the dismantling of nuclear power stations and other nuclear reactors, referred to in point 2 of Annex I.

100 However, it must be borne in mind that those annexes refer rather to sectoral categories of projects, without describing the precise nature of the works provided for. As an illustration it may be noted, as did the Commission, that 'urban development projects' referred to in point 10(b) of Annex II often involve the demolition of existing structures.

101 It follows that demolition works come within the scope of Directive 85/337 and, in that respect, may constitute a 'project' within the meaning of Article 1(2) thereof.

102 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, in particular, Case C-427/07 *Commission* v *Ireland*, paragraph 64 and the case-law cited).

103 Ireland does not deny that, under the national legislation in force at the date of the additional reasoned opinion, demolition works were not subject, as a general rule, to an environmental impact assessment but, on the contrary, were entitled to an exemption in principle.

104 It is clear from the rules laid down in sections 14 to 14B of the NMA as regards the demolition of a national monument that, as the Commission claims, they take no account of the possibility that such demolition works might constitute, in themselves, a 'project' within the meaning of Articles 1 and 4 of Directive 85/337 and, in that respect, require a prior environmental impact assessment. However, since the insufficiency of that directive's transposition into the Irish legal order has been established, there is no need to consider what that legislation's actual effects are in the light of the carrying-out of specific projects, such as that of the M3 motorway.

105 As regards the legislative changes subsequent to the action for failure to fulfil obligations being brought, they cannot be taken into consideration by the Court (see, in particular, Case C-427/07 *Commission* v *Ireland*, paragraph 65 and the case-law cited).

106 In those circumstances, the Commission's third complaint in support of its action must be held to be well founded.

107 Accordingly, it must be declared that:

— by failing to transpose Article 3 of Directive 85/337;

— by failing to ensure that, where planning authorities and the Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of that directive; and

— by excluding demolition works from the scope of its legislation transposing that directive,

Ireland has failed to fulfil its obligations under that directive.

**Costs**

108 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful partys pleadings. Since the Commission has applied for costs and Ireland has been unsuccessful the latter must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

**1. Declares that:**

**— by failing to transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and pri-**

**vate projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003;**

— **by failing to ensure that, where Irish planning authorities and the Environmental Protection Agency both have decision-making powers concerning a project, there will be complete fulfilment of the requirements of Articles 2 to 4 of Directive 85/337, as amended by Directive 2003/35; and**

— **by excluding demolition works from the scope of its legislation transposing Directive 85/337, as amended by Directive 2003/35,**

**Ireland has failed to fulfil its obligations under that directive;**

**2. Orders Ireland to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

30 April 2009 (*)

(Directive 85/337/EEC – Assessment of the effects of projects on the environment – Obligation to make public the reasons for a determination not to make a project subject to an assessment)

In Case C-75/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 8 February 2008, received at the Court on 21 February 2008, in the proceedings

**The Queen,** on the application of

**Christopher Mellor**

v

**Secretary of State for Communities and Local Government,**

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr C. Mellor, by R. Harwood, Barrister and R. Buxton, Solicitor,

– the United Kingdom Government, by L. Seeboruth, acting as Agent,

– the Commission of the European Communities, by P. Oliver and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2009,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain

public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The reference has been made in the course of proceedings between Mr Mellor and the Secretary of State for Communities and Local Government ('the Secretary of State'), relating to whether or not it is necessary to give reasons for the determination made by the competent national authority not to proceed to an environmental impact assessment ('EIA') when evaluating a request for development consent to build a hospital, a project falling within Annex II to Directive 85/337.

## Legal context

*Community legislation*

3 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

4 Article 4 of Directive 85/337 states:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

5 Article 6 of Directive 85/337 provides:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure …;

…

(d) the nature of possible decisions or, where there is one, the draft decision;

…

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information …, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

6 Article 9 of Directive 85/337 states:

'1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

7 Article 10a of Directive 85/337 provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

…’

*National legislation*

8 The rules governing EIA, laid down by Directive 85/337, were originally implemented by The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988/1199).

9 Following the amendments to Directive 85/337 made by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), those regulations were replaced by The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999/293), as amended by The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2006 (S.I. 2006/3295), (‘the EIA Regulations’).

10 Schedules 1 to 3 to the EIA Regulations correspond to Annexes I to III to Directive 85/337.

11 Regulation 2(1) of the EIA Regulations provides that an ‘“EIA application” means an application for planning permission for EIA development’, that is to say a development for which an EIA is necessary.

12 Under that same provision, ‘EIA development’ means:

‘(a) Schedule 1 development;

or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.’

13 It is apparent from Regulation 2(1) of the EIA Regulations that a development is a ‘Schedule 2 Development’ when it is a:

‘… development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where –

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development’.

14 Section 10(b) of Schedule 2 to the EIA Regulations concerns ‘urban development projects’ (column one) the area of which exceeds 0.5 hectares (column two).

15 Under Regulation 2(1)(h) of the EIA Regulations, areas of outstanding natural beauty are ‘sensitive areas’.

16 It is apparent from Regulation 4(2) of the EIA Regulations that a Schedule 2 development is regarded as EIA development, that is to say, a development for which an EIA

is necessary, where the applicant voluntarily submits an 'environmental statement' for the purposes of the EIA Regulations, or upon the adoption by the relevant planning authority, on an application or of its own motion, of a screening opinion to the effect that the development is EIA development.

17 Where a request for Schedule 2 Development consent is not accompanied by an environmental statement, determinations concerning the need for an EIA are made by the relevant planning authority in the form of screening opinion and by the Secretary of State in the form of a screening direction.

18 Under Regulation 2(1) of the EIA Regulations:

– a 'screening opinion' means 'a written statement of the opinion of the relevant planning authority as to whether development is EIA development'; and

– a 'screening direction' means 'a direction made by the Secretary of State as to whether development is EIA development'.

19 Under Regulation 4(3) of the EIA Regulations, a screening direction issued by the Secretary of State overrides environmental statements and screening opinions adopted by the local planning authority.

20 In accordance with Regulation 5(4) of the EIA Regulations, a screening opinion must be adopted within three weeks, or such longer period as may be agreed in writing with the person making the request.

21 Pursuant to Regulation 5(6) of the EIA Regulations, where an authority fails to adopt a screening opinion within the relevant period, or adopts an opinion to the effect that the development is EIA development, the person who requested the opinion may request the Secretary of State to make a screening direction.

22 According to Regulation 4(6) of the EIA Regulations, where a screening opinion or a screening direction to the effect that development is EIA development is adopted, 'that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion'.

23 In accordance with Regulation 4(5) of the EIA Regulations, a screening opinion or screening direction must take into account the criteria set out in Schedule 3 to the EIA Regulations.

24 Among the criteria set out in Schedule 3 to the EIA Regulations are:

– 'Characteristics of development';

– 'Location of development', and

– 'Characteristics of the potential impact'.

25 The EIA Regulations do not, however, provide for communication of the reasons for a screening opinion or screening direction which does not classify the development in question as EIA development.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

26 It is apparent from the order for reference that, in October 2004, Partnerships in Care ('PiC') lodged an application with the competent local planning authority, Harrogate Borough Council ('the Council'), for planning permission to construct a medium secure hospital unit at HMS Forest Moor on a site in the open countryside of the Nidderdale Area of Outstanding Natural Beauty ('Nidderdale AONB') on which a former naval base had been located. Planning permission was granted in August 2005.

27 Following proceedings brought by a local resident, the planning permission was quashed by the High Court of Justice (England & Wales), Queen's Bench Division, on 5 April 2006, on the ground, inter alia, that the Council had failed to adopt an EIA screening opinion.

28 On 7 July 2006, PiC's planning consultants applied to the Council for a screening opinion under Regulation 5 of the EIA Regulations.

29 On 24 July 2006, Residents for the Protection of Nidderdale then wrote to the Council arguing that an EIA was required for the project.

30 On 25 August 2006, the Council issued its screening opinion which concluded that the proposed development would not have a significant effect on the environment such as to warrant an EIA.

31 On 4 September 2006, Mr Mellor wrote to the Council on behalf of the Residents for the Protection of Nidderdale arguing that the screening opinion ought to have insisted on an EIA.

32 On 3 October 2006, PiC, relying on the Council's opinion of 25 August 2006, submitted the planning application at issue in the main proceedings.

33 On 20 October 2006, PiC's planning consultants, having been informed that the Council was changing its position on the need for an EIA, wrote to the Government Office for Yorkshire and the Humber to ask the Secretary of State for a screening direction.

34 On 23 October 2006, the Council did in fact alter its position in a fresh screening opinion and, on the basis of information provided by Mr Mellor and having sought further advice, decided that an EIA was required.

35 On 4 December 2006, the Secretary of State, to whom the matter had been referred by the PiC, issued a screening direction which was contrary to the latest opinion issued by the Council.

36 Considering that the development at issue was a 'Schedule 2 Development' within the meaning of the EIA Regulations, the Secretary of State decided as follows:

'… in the opinion of the Secretary of State and having taken into account the selection criteria in Schedule 3 to the 1999 Regulations and the representations made by Mr C. Mellor on behalf of Residents for the Protection of Nidderdale, the proposal would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Accordingly, in exercise of the powers conferred on him by regulation 6(4) of the 1999 Regulations the Secretary of State hereby directs that the proposed development described in your request and the documents submitted with it, is not "EIA development" within the meaning of the 1999 Regulations. Any permitted development rights which your proposal may enjoy under the Town and Country Planning (General Permitted Development) Order 1995 are therefore unaffected.

Having regard to the above direction the planning application mentioned may proceed without submission of an environmental statement.'

37 On 20 February 2007, Mr Mellor applied to the High Court of Justice (England & Wales), Queen's Bench Division, for judicial review of the Secretary of State's decision, seeking to have that screening direction quashed.

38 The High Court refused leave to apply for judicial review on the basis that the Court of Appeal (England & Wales) (Civil Division) had decided in *R v Secretary of State for The Environment, Transport and The Regions ex p Marson (1998)*, ENV LR 761, that, first, reasons did not have to be given for refusing to direct that an EIA was required and, second, if reasons were required, then the reasons normally provided by the Secretary of State were adequate.

39 In those circumstances, the Court of Appeal (England & Wales) (Civil Division), hearing the appeal, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Whether under Article 4 of [Directive 85/337] Member States must make available to the public reasons for a determination that in respect of an Annex II [to that directive] project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of [that] directive?

2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?'

**The questions referred for a preliminary ruling**

*The first question*

40 By its first question, the referring court seeks to ascertain whether Article 4 of Directive 85/337 must be interpreted as meaning that Member States are obliged to communicate to the public the reasons for a determination not to subject an Annex II project to an EIA.

Observations submitted to the Court

41 The appellant in the main proceedings takes the view that a determination that an EIA is not required must be sufficiently reasoned in order to guarantee effective judicial protection of the environment and the rights of citizens.

42 He points out that that issue has already been considered by the Court in Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 49, in which the Court found that the Italian Republic had failed to fulfil its obligations on account of its failure to provide reasons for a decree deciding that the project at issue in that case did not require to be subjected to an EIA.

43 He claims, in addition, that the merits of his view are underlined by the amendments made to Directive 85/337 in 1997. Since those amendments, that directive requires the competent authority, as is apparent from Article 4(3), to take account of the relevant selection criteria set out in Annex III to that directive when deciding whether a project falling under Annex II to that directive must be subject to an EIA and requires, pursuant to Article 4(4), that the determination on whether or not to have recourse to an EIA be made available to the public. The public cannot, however, assess the lawfulness of such a determination if the reasons for that determination are not given.

44 The United Kingdom Government contends, first, that, in contrast to other provisions of secondary Community law on the environment, Article 4 of Directive 85/337 does not require reasons to be given for a determination as to whether an EIA must be carried out. It concludes that the Community legislature chose not to impose a duty to state reasons in respect of that determination.

45 The United Kingdom of Great Britain and Northern Ireland contends, secondly, that the line of reasoning based on the Court's decision in *Commission* v *Italy*, cited above, cannot be applied in the dispute in the main proceedings since, in the case that gave rise to that judgment, the failure to fulfil obligations was based on the failure to indicate that the competent authority had carried out any screening at all of the need to subject the project at issue to an EIA or not, such screening being provided for under national law in accordance with Article 4(2) of Directive 85/337. The failure to fulfil obligations complained of did not concern the failure to give reasons for the determination not to subject the project to such an assessment.

46 The Commission of the European Communities disputes the United Kingdom's interpretation of the *Commission* v *Italy* judgment, cited above, pointing out, inter alia, that despite the absence of the word 'reasoning' in paragraph 49 of that judgment, it is obvious from that paragraph that the competent authority must make reference, in one way or the other, to all the information showing that it applied the correct criteria and took the relevant factors into account. That requirement is equivalent to a duty to state reasons.

47 The Commission submits, furthermore, that the amendments made by Directive 97/11, in particular the obligation on Member States to make public their determinations on whether or not to carry out an EIA under Article 4(4) of Directive 85/337, make the duty to state reasons for such determinations all the more necessary. In the Commission's view, that obligation would be devoid of purpose if there were no adequate statement of reasons for the determinations in question.

The Court's reply

48 An objective of Directive 85/337 is – as recital 5 in its preamble states – inter alia, to introduce general principles for EIAs governing public and private projects likely to have a major effect on the environment, with a view to supplementing and coordinating development consent procedures.

49 Directive 85/337 provides that certain projects listed in Annex I are required to be made subject to such assessment.

50 On the other hand, projects which appear in Annex II must only be subject to such an assessment if they are likely to have significant effects on the environment and, in that regard, Directive 85/337 allows the Member States some discretion. Nevertheless, the limits of that discretion are to be found in the obligation on the Member States, set out in Article 2(1) of Directive 85/337, to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an assessment (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53).

51 It is thus clear from the objectives of Directive 85/337 that the competent national authorities, when they receive a request for development consent for an Annex II project, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an EIA should be carried out.

52 Thus the Court, in its judgment of 10 June 2004 in *Commission* v *Italy*, cited above, found that the Italian Republic had failed to fulfil its obligations under Directive 85/337, since it was clear from all the evidence which had been submitted to the Court that the competent authorities had not carried out 'screening' of the need for an assessment, provided for in Italian legislation to ensure application of Article 4(2) and (3) of Directive 85/337.

53 In that judgment, the obligation arising from Article 4(2) of Directive 85/337 to ensure that a project does not require an assessment before deciding to dispense with such an assessment was at issue.

54 As there was nothing in the evidence in the case-file submitted to the Court to indicate that such an evaluation had taken place in the course of the administrative consent procedure for a bypass project, the Court held that a failure to fulfil obligations resulting from Directive 85/337, as alleged by the Commission, was established.

55 The Court pointed out, moreover, in paragraph 49 of that judgment, that the determination by which the competent authority takes the view that a project's characteristics do not require it to be subjected to an EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

56 It does not follow, however, from Directive 85/337, or from the case-law of the Court, in particular, from that judgment, that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.

57 It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually

determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58 Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59 In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60 That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

61 In the light of the foregoing, the answer to the first question is that Article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

*Second and third questions*

62 By its second and third questions, the referring court asks the Court of Justice on the one hand whether, in the event of an affirmative reply to Question 1, the content of a determination such as that at issue in the main proceedings will satisfy the duty to state reasons incumbent on the competent authorities and, on the other hand, if need be, to define the form that the statement of reasons should take.

63 While, as is clear from the reply to the first question, the reasons need not necessarily be contained in the determination not to carry out an EIA itself, the competent administrative authority can, under the applicable national legislation or of its own motion, indicate in the determination the reasons on which it is based.

64 In that case, the determination must be such as to enable interested parties to decide whether to appeal against the determination in question, taking into account any factors which might subsequently be brought to their attention.

65 It cannot, in those circumstances, be ruled out that in the case in the main proceedings the Secretary of State's reasons might be considered sufficient, taking into account, in

particular, factors which have already been brought to the attention of interested parties, provided that the latter can ask for and obtain from the competent authorities, subject to judicial review, the necessary supplementary information to fill any gaps in that reasoning.

66 The answer to the second and third questions is therefore that, if a determination of a Member State not to subject a project falling within Annex II to Directive 85/337 to an EIA in accordance with Articles 5 to 10 of that directive states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

**Costs**

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.**

2. **If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.**

[Signatures]

JUDGMENT OF THE COURT (Third Chamber)

25 July 2008 (*)

(Directives 85/337/EEC and 97/11/EC – Assessment of the effects of projects on the environment – Refurbishment and improvement works on urban roads – Whether subject to assessment)

In Case C-142/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Contencioso-Administrativo No 22 de Madrid (Spain), made by decision of 23 January 2007, received at the Court on 12 March 2007, in the proceedings

**Ecologistas en Acción-CODA**

v

**Ayuntamiento de Madrid**,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2008,

after considering the observations submitted on behalf of:

– Ecologistas en Acción-CODA, by J. Doreste Hernández, abogado,

– the Ayuntamiento de Madrid, by I. Madroñero Peloche, acting as Agent, and A. Sánchez Cordero, abogada,

– the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the Commission of the European Communities, by A. Alcover San Pedro and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2008,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('the amended directive').

2 The reference was made in the course of proceedings between Ecologistas en Acción-CODA ('CODA') and the Ayuntamiento de Madrid (Municipality of Madrid) concerning an administrative act approving various projects forming part of the refurbishment and improvement of virtually the whole of the Madrid urban ring road.

## Legal background

*Community legislation*

3 Directive 85/337 was adopted with the aim of harmonising the principles for the assessment of the environmental effects of certain private and public projects, the main obligations of the developers and the content of the assessment of those effects. Annex I to the directive sets out the projects subject to such an assessment, while Annex II sets out the projects that, in accordance with Article 4(2) of the directive, the Member States could make subject to that assessment where they considered that the characteristics of the projects concerned so required.

4 The amendments that Directive 97/11 made to Directive 85/337 principally concern making projects likely to have effects on the environment subject to a requirement for development consent and an assessment of those effects, and the harmonisation of the criteria that the Member States must use in order to determine whether or not a project falling into one of the categories covered by Annex II must be made subject to such an assessment. Those criteria are henceforth listed in Annex III to the amended directive.

5 Article 1(2) of the amended directive contains the following definitions:

'"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape …

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

6 Article 2(1) of the amended directive provides:

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. …’

7 Article 3 of the amended directive provides:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.’

8 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an assessment, subject to the exceptional cases exempted under Article 2(3) of that directive.

9 In accordance with Article 4(2) and (3) of the amended directive, each Member State is to determine, through a case-by-case examination or on the basis of thresholds or criteria which it sets, by taking account of the selection criteria set out in Annex III to the directive, whether the projects referred to in Annex II are to be made subject to an assessment.

10 Point 7 of Annex I to the amended directive mentions, under heading (b), projects for ‘[c]onstruction of motorways and express roads’ and, under heading (c), projects for ‘construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length’.

11 Point 7(b) refers, for the definition of ‘express roads’, to that in the European Agreement on Main International Traffic Arteries of 15 November 1975 (‘the agreement’).

12 In point 10 of Annex II to the amended directive, entitled ‘Infrastructure projects’, subheading (b) mentions ‘[u]rban development projects’ and subheading (e) projects for ‘[c]onstruction of roads … (projects not included in Annex I)’.

13 The first indent of point 13 of Annex II covers ‘[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment’.

*The agreement*

14 The agreement was ratified by all the Member States except seven. The Kingdom of Spain did not ratify it.

15 Under Title II thereof, entitled 'Classification of International Roads', Annex II to the agreement contains inter alia the following definitions:

'II.2 Motorways

"Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:

(i) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;

(ii) Does not cross at level with any road, railway or tramway track, or footpath; and

(iii) Is specially sign-posted as a motorway.

II.3 Express roads

An express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

16 By decision of 17 January 2005, the Concejala del Área de Gobierno de Urbanismo, Vivienda e Infraestructuras del Ayuntamiento de Madrid (Councillor for Planning, Housing and Infrastructure of the Municipality of Madrid) approved various projects for refurbishment and improvement of the Madrid urban ring road, identified under number M-30.

17 Those projects concern specifically the re-routing underground, first, of the M-30 between Marquès de Monistrol and Puente de Segovia, between Puente de Segovia and Puente de San Isidro, between Puente de San Isidro and Puente de Praga and between Puente de Praga and Nudo Sur and, second, of the Avenida de Portugal as far as the San Vicente roundabout. According to CODA's observations, which are not contradicted in that respect, the M-30 is a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks.

18 The projects are part of a complex civil engineering scheme which consists in improving and refurbishing virtually the whole of the Madrid urban ring road. That scheme, also called 'Madrid calle 30', aims, according to the observations of the Ayuntamiento de Madrid, to reduce congestion on the roads and the risk of accidents, and not to increase the traffic capacity on that road.

19 After its administrative appeal against the abovementioned decision of 17 January 2005 had been rejected by decision of 23 May 2005, CODA brought an action before the referring court for annulment of the latter decision. Like the administrative appeal, the action for annulment is based, inter alia, on a plea alleging infringement of the national rules on environmental impact assessment applicable to such projects and which derive in part from the amended directive.

20 It is apparent from the order for reference that the Madrid City Council has split the larger 'Madrid calle 30' project into 15 independent sub-projects, treated separately, only one of which concerns alteration or rehabilitation work on any existing road on a section exceeding five kilometres, the threshold at which the regional rules applicable make a project subject to an environmental impact assessment, while the larger project taken as a whole substantially exceeds that threshold. It is also clear from the referring court's explanations that, according to certain estimates, the execution of the overall scheme will lead to an increase in traffic of nearly 25% and will involve different kinds of works in the urban area surrounding the M-30.

21 Having regard to the scale and the implications of the scheme, the referring court wonders whether, in accordance with the amended directive, it should not be made subject to an environmental impact assessment.

22 Before the referring court, the Ayuntamiento de Madrid, while asserting that it had never had the intention of preventing the application of the amended directive, pointed out that the dispute arose from an interpretation common to all the national authorities which have reviewed the legality of the relevant projects. It also submitted that to extend, in this case, the judgment in Case C-332/04 *Commission* v *Spain* of 16 March 2006 to situations other than that at issue in the case which gave rise to that judgment would require detailed reasoning by the Court of Justice.

23 The referring court also set out the observations submitted by the Communidad autónoma de Madrid (Autonomous Community of Madrid), according to which there is confusion between preliminary ruling proceedings and actions for failure to fulfil obligations, because the hearing mainly concerned possible infringements of Community law.

24 In those circumstances the national court decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to urban road projects, having regard to their nature, size and effect on densely populated areas or on landscapes of historical, cultural or archaeological significance?

(2) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to the projects which form the subject-matter of these administrative appeal proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, density of population, budget and the possible splitting up of a larger project which contemplates similar works on the same road?

(3) Are the criteria set out in [*Commission* v *Spain*, paragraphs 69 to 88] applicable to the projects which are the subject-matter of these proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, budget and the possible splitting up of a larger project which contemplates similar works on the same road, such that there was a requirement to submit them to the prescribed environmental impact assessment procedure?

(4) Do the relevant administrative records and, specifically, the studies and reports contained therein, demonstrate that the Spanish authorities have, in practice, complied with the obligations arising from [the amended directive] relating to the environmental assessment of the projects which are the subject-matter of these proceedings, even if the project was not formally made subject to the prescribed environmental assessment procedure set out in the directive?'

**The questions referred for a preliminary ruling**

*The first three questions*

25 By the first three questions, which it is appropriate to examine together, the referring court asks essentially whether the amended directive must be interpreted as meaning that projects for the refurbishment and improvement of virtually the whole of an urban ring road must be made subject to an environmental impact assessment taking account, inter alia, of the nature of those projects, the type of road in question, the characteristics and size of the projects, their effect on densely populated areas or landscapes having a historical, cultural or archaeological significance, and the fact that they are the result of the splitting up of a larger project concerning the execution of a series of similar works on the same road.

26 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an environmental impact assessment. According to Article 4(2), the Member States are to determine, by taking account of the conditions set out in that provision, which projects listed in Annex II to the directive must be made subject to such an assessment.

27 According to the Ayuntamiento de Madrid, the ring road concerned in the main proceedings is an urban road. The amended directive does not refer to that type of road in Annexes I and II, which mention only motorways, express roads and roads. Furthermore, those terms are not defined, except, with respect to the notion of express road, by reference to the definition given by the agreement. According to the defendant in the main proceedings, in the absence of clarification as to those terms, the Spanish law transposing the amended directive repeated its exact words. Since urban roads are not mentioned there, it was entitled to take the view that projects for the alteration of such a road were not covered by the amended directive and, consequently, did not have to be made subject to an environmental impact assessment.

28 That argument cannot be accepted. The Court has stated on numerous occasions that the scope of Directive 85/337 and that of the amended directive is very wide (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40; and Case C-2/07 *Abraham and Others* [2008] ECR I-0000, paragraph 32). It would, therefore, be contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road.

29 Point 7(b) and (c) of Annex I to the amended directive mentions among the projects which must be made subject to an environmental impact assessment 'motorways', 'express roads' and '[c]onstruction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a

continuous length'. As to Annex II, it mentions in point 10(e) and the first indent of point 13 respectively '[c]onstruction of roads' and '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment' among the projects for which the Member States may require an environmental impact assessment to be carried out in accordance with Article 4(2) of that directive. In that regard it must be stated, first, as the Commission of the European Communities rightly submits, that the concepts in those annexes are Community law concepts which must be interpreted independently and, second, that it is conceivable that the types of road which are mentioned therein are sited both in and outside built-up areas.

30 The amended directive does not define the concepts mentioned above with the exception of 'express roads', for which it refers to the agreement thereby including the definition of 'express road' contained therein. Since not all the Member States are parties to that agreement, this reference concerns the version of the agreement in force when Directive 85/337 was adopted, that is the agreement of 15 November 1975

31 According to Annex II to the agreement, an express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which stopping and parking are prohibited on the running carriageway(s). It does not follow from that definition that roads sited in urban areas would a priori be excluded. On the contrary, unless roads in built-up areas are expressly excluded, the words 'express roads' cover urban roads which have the characteristics set out in that annex.

32 The same agreement defines the concept of 'motorway' as inter alia a road specially designed and built for motor traffic, which does not serve properties bordering on it, does not cross at level with any road, railway or tramway track, or footpath, and is specially sign-posted as a motorway. Even though the amended directive does not make express reference to that definition, the agreement may be a useful tool for understanding the similar concept in Annex I to the directive.

33 It follows from case-law which is now well established that the Member States must implement the amended directive, in the same way as Directive 85/337, in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 36).

34 Accordingly, urban road projects must be regarded as falling within the scope of the amended directive.

35 As is clear from CODA's observations, which are not contradicted in that respect, the projects at issue in the main proceedings concern a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks. It is for the referring court to make the findings of fact from which it may verify those aspects in order to determine, taking account of the guidance set out in paragraphs 30 to 33 of this judgment, whether those projects are covered by one of the concepts in Annex I to

the amended directive and must therefore be made subject to an environmental impact assessment.

36 For that purpose, the fact that point 7(b) and (c) of Annex I to the amended directive refers to projects for the 'construction' of the types of road mentioned, whereas the case in the main proceedings concerns projects for refurbishment and improvement of an existing road, does not mean that the latter are excluded from the scope of the amended directive. A project for refurbishment of a road which would be equivalent, by its size and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of that annex (see, to that effect, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 46, and *Abraham and Others*, paragraph 32).

37 If it appeared that the projects at issue in the main proceedings do not concern motorways or express roads within the meaning of point 7(b) of Annex I to the amended directive or projects referred to in point 7(c) thereof, the referring court would still be required to examine whether the projects at issue in the main proceedings are covered by Annex II to the amended directive, either under point 10(e), inasmuch as they concern construction of a road, or under the first indent of point 13 read together with point 10(e) of Annex II, in so far as they concern a change to a road construction project.

38 In that respect, it must be recalled that if, like Article 4(2) of Directive 85/337, the same provision of the amended directive confers on Member States a measure of discretion in order to determine whether a project falling in the categories listed in Annex II thereto must be made subject to an environmental impact assessment, the limits of that discretion are to be found in the obligation set out in Article 2(1) of the amended directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see, regarding Directive 85/337, *Kraaijeveld and Others*, paragraph 50, and *Abraham and Others*, paragraph 37). In applying their discretion, the Member States must take account of each of those criteria in order to determine whether projects are likely to have an effect on the environment (Case C-332/04 *Commission* v *Spain*, paragraph 77).

39 In that regard, in the same way as Directive 85/337, the amended directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works (see, as regards Directive 85/337, *Abraham and Others*, paragraphs 42 and 43).

40 As far as concerns the location of projects, point 2(g) and (h) of Annex III to the amended directive mentions densely populated areas and landscapes of historical, cultural or archaeological significance as selection criteria which the Member States must take into account, in accordance with Article 4(3) of the directive, for the case-by-case examination or the setting of the thresholds or criteria provided for in Article 4(2), in order to determine whether a project must be made subject to an assessment. Those selection criteria may also concern urban road projects (see, to that effect, Case C-332/04 *Commission* v *Spain*, paragraph 79).

41 However, the fact relied on by the Ayuntamiento de Madrid that the projects at issue in the main proceedings should have beneficial effects on the environment is not relevant in determining whether it is necessary to make those projects subject to an assessment of their environmental impact.

42 Moreover, like that in Article 3 of Directive 85/337, the list in Article 3 of the amended directive of the factors to be taken into consideration, such as the effects of a project on, inter alia, human beings, fauna and flora, soil, water, air or cultural heritage, shows, in itself, that the environmental impact whose assessment the amended directive is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out (see, to that effect, *Abraham and Others*, paragraph 44).

43 As the Advocate General rightly stated, in point 28 of her Opinion, projects concerning roads may have many environmental effects both within and outside urban areas, since those areas are particularly sensitive because of population density, existing pollution, but also given the presence of any places of historical, cultural or archaeological importance (see, to that effect, Case C-332/04 *Commission* v *Spain*, paragraph 81).

44 Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76, and *Abraham and Others*, paragraph 27).

45 As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project 'Madrid calle 30'. It is for the referring court to verify whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.

46 Therefore, the answer to the first three questions must be that the amended directive must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.

*The fourth question*

47 By its fourth question, the referring court asks essentially whether the studies undertaken and reports compiled on the projects at issue in the main proceedings satisfy the requirement of an environmental impact assessment as prescribed by the amended directive.

48 Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered only to rule on the interpretation or validity of Community provisions on the basis of the facts which the national court puts before it (see, in particular, Case C-235/95 *Dumon and Froment* [1998]

ECR I-4531, paragraph 25, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 41).

49 This question invites the Court to express a view on certain factual elements on which the dispute in the main proceedings is based, that is to determine whether the inquiries, hearings and analyses carried out by the national authorities constitute, with respect to the projects concerned, an environmental impact assessment within the meaning of the amended directive.

50 It is for the national court to undertake such an examination, in the knowledge that a formal assessment may be replaced by equivalent measures where they satisfy the minimum requirements set out in Article 3 and Articles 5 to 10 of the amended directive.

51 Therefore there is no need to answer the fourth question.

**Costs**

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

**Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.**

[Signatures]

ORDER OF THE COURT (Sixth Chamber)

10 July 2008 (*)

(Preliminary ruling – Directive 85/337/EEC – Assessment of the impact of certain public and private projects on the environment – Construction of a road in Milan)

In Case C-156/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 24 October 2006, received at the Court on 21 March 2007, in the proceedings

**Salvatore Aiello and Others**

v

**Comune di Milano and Others,**

intervening parties:

**Euromilano SpA,**

**Metropolitana milanese SpA,**

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, J.-C. Bonichot, (Rapporteur) and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having informed the referring court that the Court proposes to give its decision by reasoned order in accordance with the second subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

**Order**

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the impact of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5; 'Directive 85/337').

2 The reference was made in the course of proceedings between Salvatore Aiello and Others and the Comune di Milano (Municipality of Milan) and Others concerning the construction of a road linking certain districts in the north of Milan.

**Legal context**

3 Article 1(2) of Directive 85/337 states:

'For the purposes of this Directive:

…

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

4 Article 1(4) of Directive 85/337 provides:

'Projects serving national defence purposes are not covered by this Directive.'

5 Article 1(5) of Directive 85/337 states:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

6 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

7 Article 2(3) of Directive 85/337 provides:

'Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

8 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

9 Paragraph 7(c) of Annex I to Directive 85/337 refers to:

'Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length.'

10 Paragraph 10(e) of Annex II to Directive 85/337 refers to:

'Construction of roads, ...'

11 Annex III to Directive 85/337 states:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

– ...

– the cumulation with other projects,

...'

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 By a decree of 15 November 2001, the Prime Minister of the Italian Republic declared a state of emergency in the city of Milan on account of the pollution resulting from car traffic and the inadequacy of the existing road network. By order of 28 December 2001, the Minister of the Interior appointed the Mayor of Milan as the Commissioner responsible for the implementation of the necessary measures to deal with that situation.

13 In his capacity as Commissioner for traffic and mobility issues in Milan, the Mayor of that city approved a programme of works, which included the construction project for a road linking certain districts in the north of Milan, of a length of 1 600m. On 29 October 2002, he approved the final project for that road.

14 Mr Aiello and other residents in the area affected challenged that decision before the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court). They claimed, inter alia, that the procedure followed did not comply with Community law because no environmental impact assessment of the project had been carried out.

15 That court dismissed the action as unfounded, and Mr Aiello and Others lodged an appeal against that judgment before the Consiglio di Stato (Council of State).

16 The Consiglio di Stato ordered measures of inquiry from which it is apparent that, although the 1953 General Regulatory Plan for the municipality of Milan envisaged the construction of a road permitting a rapid connection between districts of the city more than 10 kilometres apart, that objective had finally been abandoned in favour of a different project, concerning the construction of a number of separate roads. Two roads are planned, the first of which is at the origin of the main proceedings and the second of which is a different road of a length of 1 300m.

17 The Consiglio di Stato considers, therefore, that the project at issue in the main proceedings does not fall within the context of the construction of a single road of more than 10 kilometres for the purposes of Annex I to Directive 85/337, which lists the projects for which an environmental impact assessment is obligatory, but within that of Annex II to that legislation, which refers merely to the construction of roads.

18 However, the Consiglio di Stato enquires whether the project being challenged should not be subject to such an assessment in accordance with, inter alia, Article 4 of Annex II read in conjunction with Annex III to Directive 85/337, on the ground that that project forms part of a larger operation for the restructuring of all the roads of the districts concerned, so that the competent authority should have taken into consideration the 'cumulation' of the separate projects, a factor expressly set out by Annex III. Accordingly, it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Article 2 of Council Directive [85/337], in so far as it states that projects likely to have significant effects on the environment are to be made subject to an environmental impact assessment, and that such projects are defined in Article 4 [thereof], be interpreted as meaning:

– that any project with a significant effect on the environment must, even if it is not listed in Annexes I or II to the Directive, be made subject to an environmental impact assessment;

– or, conversely, that only projects of a kind listed in Annexes I and II to the Directive must be made subject to an environmental impact assessment?

2. Does Article 4 of Council Directive [85/337], in so far as it gives Member States the possibility of providing for environmental impact assessments to be carried out for projects in the classes listed in Annex II [thereto] on the basis of case-by-case assessments or predetermined criteria – account also being taken of the criteria set out in Annex III [thereto] – create a specific obligation or merely an option for the Member States to take account of all the criteria listed in Annex III ?

3. Does Article 1 of the Presidential Decree of 12 April 1996 constitute due transposition into national law of Article 4 of Directive [85/337] and Annex III thereto by the Italian

legislature, given that it does not provide, as a criterion for making projects in the classes listed in Annex II to the Directive subject to an environmental impact assessment, for the criterion of cumulation with other projects, as referred to in Annex III to the Directive?'

**The questions referred**

19 Under Article 104(3) of the Rules of Procedure, inter alia, where the answer to a question referred may be clearly deduced from its existing case-law or where the answer to that question leaves no scope for any reasonable doubt, the Court may, after hearing the Advocate General, give its decision by reasoned order.

*Admissibility*

20 The Comune di Milano (Municipality of Milan) submits that the questions raised by the Consiglio di Stato are inadmissible because the two projects for the construction of roads to which the latter refers in the order for reference are distinct projects and are not, moreover, such as to have a cumulative impact on the environment.

21 In accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, inter alia, Joined Cases C-223/99 and C-260/99 *AgoràandExcelsior* [2001] ECR I-3605, paragraph 18).

22 In the present case, the referring court has clearly stated that it requires the interpretation of several of the provisions of Directive 85/337 in order to ascertain whether the road construction project at issue in the main proceedings should be subject to an environmental impact assessment.

23 In addition, the Court may not decline to give a ruling on a question referred to it by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Agorà and Excelsior*, paragraph 20).

24 In the present case, none of those conditions are met.

25 Accordingly, the reference for a preliminary ruling is admissible.

*Substance*

26 Taking the view that the answer to the three questions referred leaves no scope for any reasonable doubt, the Court, pursuant to the second paragraph of Article 104(3) of its Rules of Procedure, informed the referring court that it proposed to give its decision by reasoned order

and called on the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations they might have in that regard.

27 Aeillo and Others and the Commission of the European Communities replied to the Court's request. The Commission in its reply stated that it had no objection to the Court giving its decision by way of reasoned order. Aiello and Others submitted arguments similar to those raised in their written observations and requested that a hearing be held. However, those factors have not persuaded the Court to depart from the procedural approach envisaged.

– The first question

28 By its first question, the referring court is essentially asking whether Article 2(1) of Directive 85/337 must be interpreted as meaning that projects likely to have significant effects on the environment, but which are not referred to in Annexes I and II to that directive, must nevertheless be subject to an environmental impact assessment which complies with the assessment set out in that directive.

29 Article 2(1) of Directive 85/337 provides that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location and which must, therefore, be subject to an assessment with regard to those effects, are defined in Article 4 of that directive.

30 Article 4 provides, in paragraph 1 thereof, that the projects listed in Annex I shall be made subject to an environmental impact assessment and, in paragraph 2 thereof, that, with regard to projects listed in Annex II to that directive, it is for the Member States to determine whether they should be subject to such an assessment on the basis of certain thresholds or certain criteria.

31 It must also be noted that that article renders both situations referred to in the preceding paragraph subject to the application of Article 2(3) of Directive 85/337, which allows Member States, in exceptional cases, to exempt a specific project in whole or in part from the requirement to make an assessment.

32 Furthermore, Article 1 of Directive 85/337 provides, in paragraph 4 thereof, that the directive does not cover projects serving national defence purposes and, in paragraph 5 thereof, that it does not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of that directive are deemed to be achieved through the legislative process.

33 In any event, it must also be pointed out that the scope of Directive 85/337 is wide and its purpose very broad (see Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31, and Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 46), and it must be implemented in that spirit.

34 Consequently, having regard to paragraphs 29 to 32 of this order, the answer to the first question referred must be that Article 2(1) of Directive 85/337 must be interpreted as not requiring that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive, under the conditions set out in Article 4 thereof and subject to Articles 1(4) and (5) and 2(3) thereof.

– The second question

35 By its second question, the referring court essentially asks whether Member States are required to take account of the selection criteria listed in Annex III to Directive 85/337 when they determine, pursuant to Article 4(2) of that directive, in respect of the projects in the classes listed in Annex II thereto and on the basis of case-by-case assessments, or thresholds or criteria fixed by the Member State, whether those projects must be subject to the environmental impact assessment procedure.

36 In this connection, the Court has already held that, although Member States may establish the criteria and/or thresholds necessary to determine which of the projects in the classes listed in Annex II to Directive 85/337, in its original version, are to be subject to an assessment, their discretion is limited by the obligation, set out in Article 2(1) of that directive, to subject projects likely to have significant effects on the environment, particularly by virtue of their nature, size or location, to an assessment with regard to their impact (see, inter alia, Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53).

37 Under Article 4(2) of Directive 85/337, it is for the Member States to determine themselves in which cases the projects in the classes listed in Annex II to that directive must be made subject to an environmental impact assessment, whereas the projects in Annex I thereto must always be subject to such a procedure.

38 That provision leaves the Member States two options. The first is to decide on a case-by-case basis whether a project covered by Annex II must be made subject to the assessment. The second is to determine, in a general and abstract manner and according to thresholds or criteria, the projects in that annex which must be made subject to the assessment.

39 It stems from the actual wording of Article 4(3) of Directive 85/337 that that Directive requires Member States, in both cases, to take into account the relevant selection criteria set out in Annex III to that directive, that is to say, those of the criteria which must be applied in the light of the characteristics of the project concerned.

40 Therefore, the answer to the second question referred is that Directive 85/337 does require the Member States to take account of the relevant selection criteria listed in Annex III to Directive 85/337 when they determine, in respect of the projects in the classes listed in Annex II thereto, either on the basis of case-by-case assessments, or on the basis of thresholds or criteria fixed by the Member State, whether the projects concerned must be subject to the environmental impact assessment procedure.

– The third question

41 By its third question, the referring court is essentially requesting the Court to specify whether the Italian legislation at issue in the main proceedings constitutes due transposition into national law of Article 4 of Directive 85/337, given that that secondary legislation does not set out the criterion of cumulation with other projects, which is none the less referred to in Annex III to that directive, as a selection criterion to be taken into account when the competent national authority determines whether projects in the classes listed in Annex II to that directive must be made subject to an environmental impact assessment.

42 It is settled case-law that the Court has no jurisdiction, in proceedings brought on the basis of Article 234 EC, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36 and the case-law cited).

43 In the present case, it is apparent from the order for reference that the national court wishes to establish whether the Member States, in the transposition of the Directive into their domestic legal order, are required to adopt a provision drawing attention to the obligation to apply the criteria of the cumulation of the project concerned with other projects, referred to in Annex III to that directive, when an assessment is made of whether a project in the classes listed in Annex II thereto must be made subject to the environmental impact assessment provided for in that directive.

44 First of all, it should be observed that each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 32).

45 The Court has also held that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26).

46 In the present case, Article 4 of Directive 85/337 must be interpreted as requiring the competent authority to take into account the relevant selection criteria set out in Annex III to that directive when an assessment is made of whether a project in the classes listed in Annex II thereto must be subject to an environmental impact assessment, both when that assessment is made on the basis of a case-by-case examination and when the Member State concerned has opted for general rules.

47 Where a Member State chooses to determine in a general and abstract manner, as it is permitted to do by Directive 85/337, the projects in the classes listed in Annex II to that directive which must be made subject to an environmental impact assessment, it bears responsibility for drawing up the list of those projects by applying one or more of the relevant criteria in Annex III, as appropriate. The criterion of cumulation can therefore, where relevant, be used to make one type of project subject to such an assessment, having regard to the completion of that project with other projects and if necessary taking into consideration the completion of all those projects during a specific period of time.

48 Where a Member State opts, on the contrary, wholly or partially, to determine on a case-by-case basis the projects in the classes listed in Annex II to Directive 85/337 which must be made subject to an environmental impact assessment, it bears responsibility for ensuring that the competent national authorities have regard to the various criteria listed in Annex III to that directive in so far as those criteria are relevant having regard to the characteristics of the project concerned.

49 For that purpose, the Member State may refer, in its national legislation, to the criteria in Annex III. It can also integrate those criteria into its legislation, by expressly providing that the competent authorities must refer to them for the purpose of determining, on a case-by-case basis, whether a project in the classes listed in Annex II to Directive 85/337 must be made subject to an environmental impact assessment.

50 In any event, where a Member State chooses to proceed by that route it cannot, without failing to fulfil its Community obligations, exclude expressly or impliedly one or more of the criteria in Annex III to Directive 85/337, in so far as any of those criteria may, depending on which project in the classes listed in Annex II is concerned, be relevant for the purposes of ascertaining whether an environmental impact procedure must be organised. Depending on the characteristics of the national legal order in question, such an exclusion might dissuade or even prevent the competent national authority from taking into account the criterion or criteria in question.

51 The answer to the third question referred is therefore that, where a Member State opts for determining on a case-by-case basis those of the projects in the classes listed in Annex II to Directive 85/337 which must be made subject to an environmental impact assessment, it must, either by referring in its national rules to Annex III to that directive or by reproducing in its national rules the criteria listed there, ensure that all of those criteria can in fact be taken into account where one or more of them is relevant for the purposes of the project concerned, and cannot expressly or impliedly exclude them.

**Costs**

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, must be interpreted as not requiring that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive, under the conditions set out in Article 4 thereof and subject to Articles 1(4) and (5) and 2(3) of that directive.**

2. **Member States are required to take into account the relevant selection criteria listed in Annex III to Directive 85/337, as amended by Directive 97/11, when they determine, in respect of the projects in the classes listed in Annex II thereto, either on the basis of case-by-case assessments or on the basis of thresholds or criteria fixed by the Member State, whether those projects must be subject to the environmental impact assessment procedure.**

3. **Where a Member State opts for determining on a case-by-case basis those of the projects in the classes listed in Annex II to Directive 85/337, as amended by Directive 97/11, which must be made subject to an environmental impact assessment, it must,**

**either by referring in its national rules to Annex III to that directive or by reproducing in its national rules the criteria listed there, ensure that all of those criteria can in fact be taken into account where one or more of them is relevant for the purposes of the project concerned, and cannot expressly or impliedly exclude them.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

3 July 2008 (*)

(Failure of a Member State to fulfil obligations – No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC – Regularisation after the event)

In Case C-215/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 May 2006,

**Commission of the European Communities,** represented by D. Recchia and D. Lawunmi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland,** represented by D. O'Hagan, acting as Agent, J. Connolly SC and G. Simons BL, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk (Rapporteur), P. Kūris and J.-C. Bonichot, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1 By its action the Commission of the European Communities seeks a declaration from the Court that:

– by failing to adopt all measures necessary to ensure that projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) either before or after amendment by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have

significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

– by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of Directive 85/337,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

**Legal context**

*Community legislation*

2 By its action the Commission seeks a declaration that Ireland has failed to fulfil its obligations under Directive 85/337 both in its original version and in the version as amended by Directive 97/11.

Directive 85/337

3 The wording of Article 1(2) and (3) of Directive 85/337 is as follows:

'2. For the purposes of this Directive:

"project" means

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.'

4 Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 provide:

‘1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.’

5 Article 3 of Directive 85/337 provides:

‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– the inter-action between the factors mentioned in the first and second indents,

– material assets and the cultural heritage.’

6 Article 4 of that directive is worded as follows:

‘1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.’

7 Article 5 of Directive 85/337 states:

‘1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

8 Article 6 of Directive 85/337 is worded as follows:

'1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

– any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

– the public concerned is given the opportunity to express an opinion before the project is initiated.

…'

9 Article 7 of Directive 85/337 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at

the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

10 Article 8 of Directive 85/337 states:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11 Article 9 of that directive is worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

– the content of the decision and any conditions attached thereto,

– the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

12 Article 10 of that directive provides:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

13 Annex II to Directive 85/337 lists projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment is necessary only where the Member States consider that their characteristics so require. Projects referred to in that annex include, in point 2(a), extraction of peat, and in point 2(c), extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

14 Projects listed in point 10(d) of Annex II include the construction of roads.

Directive 97/11

15 Article 3 of Directive 97/11 is worded as follows:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999 at the latest. They shall forthwith inform the Commission thereof.

…

2. If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.’

Directive 85/337 as amended by Directive 97/11 (‘Directive 85/337 as amended’)

16 In the interests of clarity, reference will be made only to the amendments to Directive 85/337 which have direct relevance to the alleged failure by Ireland to fulfil its obligations. Accordingly, reference will not be made to amendments introduced by Directive 97/11 to Articles 5 to 10 of Directive 85/337, since those have no bearing on the determination of this action which the Court is called upon to make.

17 Under Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 as amended:

‘1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.’

18 Article 3 of Directive 85/337 as amended provides:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.’

19 Article 4 of Directive 85/337 as amended provides:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.’

20 Point 3(i) of Annex II to Directive 85/337 as amended specifies installations for the harnessing of wind power for energy production (wind farms).

21 By virtue of point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (being a change or extension not listed in Annex I) must be regarded as a project within the scope of Article 4(2) of Directive 85/337 as amended.

22 Annex III to Directive 85/337 as amended, relating to the selection criteria referred to in Article 4(3) of that directive, provides that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also indicates that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

*National legislation*

23 The requirements of Directive 85/337 as amended have been transposed into national law by, in particular, the Planning and Development Act, 2000, as amended (‘the PDA’), and the Planning and Development Regulations, 2001.

24 Section 32(1)(a) of the PDA lays down a general obligation to obtain consent for all development projects within the scope of Annexes I and II to Directive 85/337 as amended; the application for permission must be lodged and the permission obtained before the

commencement of works. In addition, section 32(1)(b) of the PDA provides that permission can be obtained to regularise unauthorised development (retention permission).

25 On receipt of an application for permission, the planning authority must decide whether the proposed development should be subject to an environmental impact assessment.

26 Section 151 of the PDA provides that any person who has carried out or is carrying out unauthorised development is guilty of an offence.

27 It is clear from sections 152 and 153 of the PDA that, on receipt of a complaint, planning authorities are, as a general rule, under an obligation to issue a warning letter, and must then decide whether or not it is appropriate to issue an enforcement notice. Failure to comply with the requirements of an enforcement notice constitutes an offence.

28 Under section 160 of the PDA:

'(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.'

29 Section 162 of the PDA makes clear that an application for retention permission does not entail any ongoing enforcement action being stayed or withdrawn.

**Pre-litigation procedure**

30 After sending a letter of formal notice on 5 April 2001, the Commission sent to Ireland a reasoned opinion dated 21 December 2001.

31 On 7 July 2004, the Commission sent an additional letter of formal notice to Ireland.

32 On 5 January 2005, after the receipt of Ireland's observations as set out in a letter dated 6 December 2004, an additional reasoned opinion was sent to Ireland.

33 Since the Commission considered that Ireland's response to that reasoned opinion, in letters of 8 March, 17 June and 1 December 2005, was unsatisfactory, it brought this action under the second paragraph of Article 226 EC.

**The action**

*The first complaint*

34 The Commission's complaint is that Ireland has not taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337 either in its original version or as amended by Directive 97/11. This complaint will be examined, first, in relation to Directive 85/337 as amended.

35 The first complaint, that transposition of Directive 85/337 as amended is incomplete and that, as a result, the directive is not properly implemented is based on three pleas in law.

36 First, the Commission claims that Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain, in accordance with Article 2(1) of Directive 85/337 as amended, whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out, as laid down by that provision, before the grant of development consent.

37 Secondly, the Commission considers that the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended.

38 Thirdly, the Commission claims that the enforcement regime established by Ireland does not guarantee the effective application of the directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC.

39 In support of the third plea in law, the Commission reports a number of examples which, in its opinion, illustrate the deficiencies in the application of the system of enforcement.

The first two pleas in law

– Arguments of the parties

40 The Commission claims that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.

41 In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.

42 The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is

nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases.

43 Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.

44 Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.

45 According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.

46 Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.

47 On that point, Ireland relies on Case C-201/02 *Wells* [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.

48 That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.

– Findings of the Court

49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2004] ECR I-723, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 36).

50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.

51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54 As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55 However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56 In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their

prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62 Consequently, the first two pleas in law are well founded.

The third plea in law

– Arguments of the parties

63 According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64 First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65 Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66 As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67 In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68 Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69 Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.

70 The warning letter is intended to enable the persons responsible for unauthorised developments to undertake remedial action before the enforcement notice and the other stages of enforcement proceedings.

71 If an enforcement notice is issued, that sets out obligations and failure to comply with its requirements constitutes an offence.

72 Ireland adds that the enforcement regime must take account of various competing rights held by developers, landowners, the public and individuals directly affected by the development, and the weight of those various rights must be measured in order to reach a fair result.

73 Lastly, Ireland does not accept that the examples reported by the Commission prove the alleged failure to fulfil its obligations, since the Commission limits itself to general assertions.

– Findings of the Court

74 It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

75 The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76 The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to

fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77 That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

78 Accordingly, it becomes superfluous to analyse the various examples put forward by the Commission to illustrate the deficiencies in application of the enforcement measures, since those deficiencies are the direct result of the inadequacies of the Irish legislation itself.

79 Consequently, the third plea in law is also well founded, and therefore the first complaint must be upheld on all of the pleas in law.

80 Lastly, the decision that the first complaint is well founded holds good both with regard to Directive 85/337 as amended and with regard to Directive 85/337. Under both the original and the amended version of the directive, projects likely to have significant effects on the environment must be subject to an assessment of their effects before the grant of development consent, the definition of development consent moreover remaining unchanged. In addition, the characteristics of the retention permission that are specified by the Irish legislation have remained the same.

81 It follows from the foregoing that, by failing to adopt all measures necessary to ensure that projects which are within the scope of Directive 85/337 either before or after amendment by Directive 97/11 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

*The second complaint*

82 This complaint relates to the circumstances obtaining for the construction of a wind farm at Derrybrien, County Galway, in relation to which it is useful first to note the various consents obtained.

83 As is clear from the documents before the Court, applications for consent relating to the first two phases of the development, each involving 23 wind turbines, were submitted on 4 and 18 December 1997. Fresh applications were lodged on 23 January 1998, since the earlier applications for consent were held to be invalid. Permission was issued on 12 March 1998. On 5 October 2000, an application was made for consent for a third phase of works relating, inter alia, to 25 turbines and service roadways, which was approved on 15 November 2001. On 20 June 2002, the developer applied for consent to alter the first two phases of the development, and those changes were authorised on 30 July 2002. In October 2003, when the consent granted for the first two phases of the works had expired, the developer applied for renewal of that consent, which was granted in November 2003.

Arguments of the parties

84 By this complaint, the Commission claims that Ireland did not take all the measures necessary to ensure that the development consents relating to the wind farm and associated works were preceded by an assessment of the environmental effects of the project, in accordance with Articles 5 to 10 of Directive 85/337 and of Directive 85/337 as amended.

85 The Commission argues that, while, pursuant to the Irish legislation, environmental impact assessments were carried out for various constituent parts of the development, those assessments were deficient.

86 In particular, the environmental impact assessment carried out in 1998 did not properly address the environmental risks attached to execution of the various constituent parts of the development. The impact assessment carried out for the third phase of the development was vitiated by the same inadequacies.

87 The Commission adds that the wind farm is the largest terrestrial wind-energy development ever planned in Ireland and one of the largest in Europe.

88 The Commission claims also that the construction of the wind farm required the destruction of large areas of coniferous forest amounting to 263 hectares, a felling licence having been granted on 20 May 2003. However, no environmental impact assessment was carried out for that operation, contrary to the very requirements of the Irish legislation.

89 The Commission adds that, after the landslide which occurred on 16 October 2003 and the consequent ecological disaster, when the mass of peat which was dislodged from an area under development for the wind farm polluted the Owendalulleegh river, causing the death of about 50 000 fish and lasting damage to the fish spawning beds, Ireland carried out no fresh environmental impact assessment of this construction before the resumption of work on the site by the developer in 2004.

90 Ireland contends that, when consents were applied for, in 1997 and in 1998, for the first two phases of construction of the wind farm, neither Annex I nor Annex II to Directive 85/337 referred to that category of project as being among those within its scope. Accordingly, it was not necessary that consent be preceded by an environmental impact assessment as governed by that directive. Ireland adds that the applications submitted in 1998 were, however, accompanied, in accordance with the Irish legislation, by an environmental impact statement.

91 Ireland considers, moreover, that it is artificial to attempt to suggest that ancillary aspects of the wind farm project, such as road construction, peat extraction, quarrying or electricity transmission, were of such importance that they made an environmental impact assessment within the meaning of Directive 85/337 necessary.

92 Ireland considers, in addition, that an application to extend the duration of a planning permission does not constitute 'development consent' within the meaning of Directive 85/337 as amended.

93 Ireland contends lastly that the landslide was caused by the construction methods used and that there was no question of difficulties which could have been anticipated by an

environmental impact assessment, even one in conformity with the Community requirements. It also states that, in order to ensure the safe completion of the wind farm, construction work practices were changed, after construction work had been suspended and an investigation carried out.

Findings of the Court

94 First, as regards the circumstances in which the consents relating to the first two phases of construction of the wind farm project were granted on 12 March 1998 following applications submitted on 23 January 1998, it is necessary to begin by deciding whether Directive 85/337 is applicable.

95 It is clear from Article 3 of Directive 97/11 that if an application for development consent was submitted to a competent authority before 14 March 1999, the provisions of Directive 85/337 continued to apply.

96 Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d).

97 Consequently, Directive 85/337 was applicable to the first two phases of construction of the wind farm in so far as they involved specifically the carrying out of work on projects referred to in Annex II to that directive.

98 It follows that Ireland was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-2/07 *Abraham and Others* [2008] ECR I-0000, paragraph 37).

99 However, Ireland states that the competent authorities took the view that Annex II to Directive 85/337 was not applicable, since the ancillary works of peat extraction and road construction were minor aspects of the project of wind farm construction itself.

100 The competent authorities therefore considered that there was no need either to investigate whether the intended projects were likely to have significant effects on the environment or, accordingly, to conduct an environmental impact assessment meeting the requirements of Directive 85/337 prior to granting the consents.

101 However, the fact that the abovementioned projects falling under Annex II to that directive may have been of secondary importance vis-à-vis the wind farm construction project taken as a whole did not mean that, by virtue of that fact alone, those projects were not likely to have significant effects on the environment.

102 The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in

Ireland, and they were moreover essential both to the installation of the turbines and to the progress of the construction works as a whole. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, largely covered by plantation forestry.

103 It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46 wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.

104 The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors. In the present case, the environmental impact statements supplied by the developer had certain deficiencies and did not examine, in particular, the question of soil stability, although that is fundamental when excavation is intended.

105 Consequently, by failing to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of the wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under that directive.

106 Secondly, as regards the application for consent relating to the third phase of construction of the wind farm, submitted on 5 October 2000, and the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.

108 However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

109 In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area,

which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

110 Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.

111 Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112 It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

**Costs**

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to adopt all measures necessary to ensure that:**

– **projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and**

– **the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11,**

**Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive;**

2. **Orders Ireland to pay the costs.**

[Signatures]

ARRÊT DE LA COUR (deuxième chambre)

28 février 2008 *

Dans l'affaire C-2/07,

ayant pour objet une demande de décision préjudicielle au titre de l'article 234 CE, introduite par la Cour de cassation (Belgique), par décision du 14 décembre 2006, parvenue à la Cour le 4 janvier 2007, dans la procédure

**Paul Abraham e.a.**

contre

**Région wallonne,**

**Société de développement et de promotion de l'aéroport de Liège-Bierset,**

**T. N. T. Express Worldwide (Euro Hub) SA,**

* Langue de procédure: le français.

**Société nationale des voies aériennes-Belgocontrol,**

**État belge,**

**Cargo Airlines Ltd,**

LA COUR (deuxième chambre),

composée de M. C. W. A. Timmermans, président de chambre, MM. L. Bay Larsen, K. Schiemann, P. Kūris et J.-C. Bonichot (rapporteur), juges,

avocat général: M[me] J. Kokott,
greffier: M. M.-A. Gaudissart, chef d'unité,

vu la procédure écrite et à la suite de l'audience du 18 octobre 2007,

considérant les observations présentées:

— pour M. Abraham e.a., par M[es] L. Misson, L. Wysen et X. Close, avocats, ainsi que par M[e] A. Kettels, Rechtsanwältin,

— pour M. Beaujean e.a., par M[es] L. Cambier et M. t'Serstevens, avocats,

— pour M. Dehalleux e.a., par M[e] L. Cambier, avocat,

— pour M. Descamps e.a., par M[e] A. Lebrun, avocat,

— pour la Région wallonne, par M[e] F. Haumont, avocat,

— pour la Société de développement et de promotion de l'aéroport de Liège-Bierset, par M[e] P. Ramquet, avocat,

— pour T. N. T. Express Worldwide (Euro Hub) SA, par M[es] P. Henfling et V. Bertrand, avocats,

— pour le gouvernement belge, par M[mes] A. Hubert et C. Pochet, en qualité d'agents, assistées de M[e] F. Haumont, avocat,

— pour le gouvernement tchèque, par M. T. Boček, en qualité d'agent,

— pour la Commission des Communautés européennes, par MM. M. Konstantinidis et J.-B. Laignelot, en qualité d'agents,

ayant entendu l'avocat général en ses conclusions à l'audience du 29 novembre 2007,

rend le présent

## Arrêt

1 La demande de décision préjudicielle porte sur l'interprétation de la directive 85/337/CEE du Conseil, du 27 juin 1985, concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement (JO L 175, p. 40, ci-après la «directive 85/337»), dans sa rédaction antérieure à celle issue de la directive 97/11/CE du Conseil, du 3 mars 1997 (JO L 73, p. 5, ci-après la «directive 97/11»), et notamment du point 7 de son annexe I et du point 12 de son annexe II.

2 Cette demande a été présentée dans le cadre d'un litige opposant de nombreux riverains de l'aéroport de Liège-Bierset (Belgique) à la Région wallonne, à la Société de développement et de promotion de l'aéroport de Liège-Bierset, à T. N. T. Express Worldwide (Euro Hub) SA (ci-après «T. N. T. Express Worldwide»), à la Société nationale des voies aériennes Belgocontrol, à l'État belge et à Cargo Airlines Ltd, au sujet des nuisances sonores provoquées par l'installation, dans cet aéroport, d'un centre de fret aérien.

## Le cadre juridique

*La réglementation communautaire*

3 La directive 85/337, ici applicable dans sa rédaction d'origine, concerne, selon son article 1er, paragraphe 1, l'évaluation des incidences sur l'environnement de certains projets publics et privés susceptibles d'avoir des incidences notables sur l'environnement.

4 Aux termes du paragraphe 2 du même article:

«[...] on entend par:

projet:

— la réalisation de travaux de construction ou d'autres installations ou ouvrages,

— d'autres interventions dans le milieu naturel ou le paysage, y compris celles destinées à l'exploitation des ressources du sol;

maître d'ouvrage:

soit l'auteur d'une demande d'autorisation concernant un projet privé, soit l'autorité publique qui prend l'initiative d'un projet;

autorisation:

la décision de l'autorité ou des autorités compétentes qui ouvre le droit du maître d'ouvrage de réaliser le projet.»

5 Selon l'article 2, paragraphe 1, de la directive 85/337, «[l]es États membres prennent les dispositions nécessaires pour que, avant l'octroi de l'autorisation, les projets susceptibles d'avoir des incidences notables sur l'environnement, notamment en raison de leur nature, de leurs dimensions ou de leur localisation, soient soumis à une évaluation en ce qui concerne leurs incidences. Ces projets sont définis à l'article 4».

6 L'article 3 décrit l'objet de l'évaluation des incidences sur l'environnement:

«L'évaluation des incidences sur l'environnement identifie, décrit et évalue de manière appropriée, en fonction de chaque cas particulier et conformément aux articles 4 à 11, les effets directs et indirects d'un projet sur les facteurs suivants:

— l'homme, la faune et la flore,

— le sol, l'eau, l'air, le climat et le paysage,

— l'interaction entre les facteurs visés aux premier et deuxième tirets,

— les biens matériels et le patrimoine culturel.»

7 L'article 4 distingue deux types de projets.

8 L'article 4, paragraphe 1, exige que, sous réserve de l'article 2, paragraphe 3, les projets appartenant aux classes énumérées à l'annexe I de la directive soient soumis à une évaluation conformément aux articles 5 à 10 de la même directive. Parmi les projets qui relèvent de l'article 4, paragraphe 1, le point 7 de l'annexe I vise la «construction [...] d'aéroports (2) dont la piste de décollage et d'atterrissage a une longueur de 2 100 mètres ou plus».

9 La note en bas de page (2), relative à ce point 7, précise que: «[l]a notion d'"aéroports' au sens de la présente directive correspond à la définition donnée par la convention de Chicago de 1944 constituant l'Organisation de l'aviation civile internationale (annexe 14)».

10 En ce qui concerne les autres types de projets, l'article 4, paragraphe 2, de la directive 85/337 prévoit:

«Les projets appartenant aux classes énumérées à l'annexe II sont soumis à une évaluation, conformément aux articles 5 à 10, lorsque les États membres considèrent que leurs caractéristiques l'exigent.

À cette fin, les États membres peuvent notamment spécifier certains types de projets à soumettre à une évaluation ou fixer des critères et/ou des seuils à retenir pour pouvoir déterminer lesquels, parmi les projets appartenant aux classes énumérées à l'annexe II, doivent faire l'objet d'une évaluation conformément aux articles 5 à 10.»

11 Au titre de ces mêmes projets qui relèvent de l'article 4, paragraphe 2, de la directive, le point 10, sous d), de l'annexe II de cette dernière vise la «[c]onstruction [...] d'aérodromes (projets qui ne figurent pas à l'annexe I)» et le point 12 de la même annexe mentionne la «modification des projets figurant à l'annexe I».

12 Les articles 5 à 9 de la directive 85/337, auxquels l'article 4 de cette directive fait référence, prévoient essentiellement ce qui suit: l'article 5 précise les informations minimales que doit fournir le maître d'ouvrage, l'article 6 instaure, notamment, l'obligation du maître d'ouvrage d'informer les autorités et le public, l'article 8 mentionne l'obligation des autorités compétentes de prendre en considération les informations recueillies dans le cadre de la procédure d'évaluation et l'article 9 institue l'obligation des autorités compétentes d'informer le public de la décision qui a été prise ainsi que des conditions dont celle-ci est éventuellement assortie.

*La réglementation nationale*

13 En Région wallonne, l'évaluation des incidences des projets sur l'environnement était régie, jusqu'au 1er octobre 2002, par un décret du 11 septembre 1985 et par son arrêté d'exécution du 31 octobre 1991.

14 Ces textes prévoyaient que les projets cités à l'annexe I du décret du 11 septembre 1985, laquelle reprend la liste de l'annexe I de la directive 85/337, et à l'annexe II de

l'arrêté du 31 octobre 1991 étaient soumis d'office à une étude d'incidences sur l'environnement. Les autres projets, pour lesquels une étude d'incidences n'était pas prescrite d'office, devaient seulement faire l'objet d'une notice d'évaluation préalable des incidences sur l'environnement.

15 Conformément à l'annexe I du décret du 11 septembre 1985, la construction d'aéroports dont la piste de décollage et d'atterrissage a une longueur d'au moins 2 100 mètres est obligatoirement soumise à une étude d'incidences sur l'environnement. Par ailleurs et en vertu de l'annexe II de l'arrêté du 31 octobre 1991, la construction d'aéroports dont la piste de décollage et d'atterrissage a une longueur de 1 200 mètres ou plus, en ce compris l'allongement de pistes existantes au-delà de ce dernier seuil, ainsi que les aéroports à vocation de loisirs, doivent également faire l'objet d'une étude d'incidences sur l'environnement.

## Le litige au principal et les questions préjudicielles

16 Les riverains de l'aéroport de Liège-Bierset se plaignent des nuisances sonores, souvent nocturnes, résultant de la restructuration de cet ancien aéroport militaire et de son utilisation depuis 1996 par des sociétés de fret aérien.

17 Une convention, signée le 26 février 1996 entre la Région wallonne, la Société de développement et de promotion de l'aéroport de Liège-Bierset et T. N. T. Express Worldwide, a prévu un certain nombre de travaux de modification des infrastructures de cet aéroport afin de permettre une utilisation 24 heures sur 24 et 365 jours par an. Les pistes de décollage et d'atterrissage ont notamment été aménagées et élargies. Une tour de contrôle ainsi que des nouvelles bretelles de sortie de pistes et des zones de stationnement ont également été construites. La longueur de la piste de décollage et d'atterrissage, de 3 297 mètres, est en revanche restée inchangée.

18 Des autorisations d'urbanisme et des autorisations d'exploiter ont également été accordées afin de permettre la mise en œuvre de ces travaux.

19 Le litige pendant devant la juridiction nationale belge se situe sur le terrain de la responsabilité: en effet, les parties requérantes au principal ont demandé réparation du préjudice qu'elles estiment subir du fait des nuisances, graves selon elles, liées à la restructuration de l'aéroport.

20 C'est dans ce cadre que la Cour de cassation a été saisie d'un pourvoi en cassation dirigé contre un arrêt rendu le 29 juin 2004 par la cour d'appel de Liège.

21 Estimant que le litige dont elle est saisie soulève des questions d'interprétation de droit communautaire, la Cour de cassation a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes:

«1) Une convention liant les pouvoirs publics et une entreprise privée, signée dans le but d'amener cette entreprise à s'installer sur le site d'un aéroport muni d'une piste [de décollage et d'atterrissage] d'une longueur de plus de 2 100 mètres, comportant la description précise des travaux d'infrastructure qui seront réalisés relativement à l'aménagement de ladite piste, sans que celle-ci soit allongée, et à la construction d'une tour de contrôle en vue de permettre le vol d'avions gros porteurs 24 heures par jour et 365 jours par an, et qui prévoit des vols tant nocturnes que diurnes à partir de l'installation de cette entreprise, constitue-t-elle un projet au sens de la directive 85/337 [...], telle qu'elle était d'application avant sa modification par la directive 97/11 [...]?

2) Les travaux de modification apportés à l'infrastructure d'un aéroport existant en vue de l'adapter à une augmentation projetée du nombre de vols nocturnes et diurnes, sans allongement de la piste [de décollage et d'atterrissage], correspondent-ils à la notion de projet, pour lequel une étude d'incidences s'impose au sens des articles 1er, 2 et 4 de la directive 85/337 [...], telle qu'elle était d'application avant sa modification par la directive 97/11 [...]?

3) L'augmentation projetée de l'activité d'un aéroport n'étant pas directement visée par les annexes de la directive 85/337 [...], l'État membre doit-il néanmoins tenir compte de cette augmentation, lorsqu'il examine l'effet potentiel sur l'environnement des modifications apportées aux infrastructures de cet aéroport en vue d'accueillir ce surcroît d'activité?»

## Sur les questions préjudicielles

*Sur la première question*

22 Par sa première question, la juridiction de renvoi demande si une convention telle que celle en cause dans le litige au principal est un «projet» au sens de la directive 85/337.

23 Cette question appelle une réponse négative. Il ressort en effet des termes mêmes de l'article 1er, paragraphe 2, de la directive 85/337 que le terme «projet» vise des travaux ou des interventions physiques. Une convention ne saurait être, dès lors, considérée comme un projet au sens de la directive 85/337, indépendamment de la question de savoir si cette convention comporte une description, plus ou moins précise, de travaux à réaliser.

24 Toutefois, en vue de fournir à la juridiction qui lui a adressé une question préjudicielle une réponse utile, la Cour peut être, en outre, amenée à prendre en considération des normes de droit communautaire auxquelles le juge national n'a pas fait référence dans l'énoncé de sa question (voir, notamment, arrêt du 20 mars 1986, Tissier, 35/85, Rec. p. 1207, point 9).

25 Dans la présente affaire, il y a lieu d'indiquer à la juridiction de renvoi qu'il lui appartient de déterminer, sur la base de la réglementation nationale applicable, si une convention telle que celle en cause dans le litige au principal comporte une autorisation au sens de l'article 1er, paragraphe 2, de la directive 85/337, à savoir une décision de l'autorité compétente ouvrant au maître d'ouvrage le droit de réaliser le projet en question (voir, en ce sens, arrêt du 18 juin 1998, Gedeputeerde Staten van Noord-Holland, C-81/96, Rec. p. I-3923, point 20). Tel serait le cas si cette décision pouvait, en application du droit national, être considérée comme une décision de la ou des autorités compétentes qui donnerait au maître d'ouvrage le droit de réaliser des travaux de construction ou d'autres installations ou ouvrages ou d'intervenir dans le milieu naturel ou le paysage.

26 Par ailleurs, lorsque le droit national prévoit que la procédure d'autorisation se déroule en plusieurs étapes, l'évaluation des incidences sur l'environnement d'un projet doit, en principe, être effectuée aussitôt qu'il est possible d'identifier et d'évaluer tous les effets que ce projet est susceptible d'avoir sur l'environnement (voir arrêt du 7 janvier 2004, Wells, C-201/02, Rec. p. I-723, point 53). Ainsi, lorsque l'une de ces étapes est une décision principale et l'autre une décision d'exécution qui ne peut aller au-delà des paramètres déterminés par la décision principale, les effets que le projet est susceptible d'avoir sur l'environnement doivent être identifiés et évalués lors de la procédure relative à la décision principale. Ce n'est que si ces effets ne sont identifiables que lors de la procédure relative à la décision d'exécution que l'évaluation devrait être effectuée au cours de cette dernière procédure (arrêt Wells, précité, point 52).

27 Il y a lieu, enfin, de rappeler à la juridiction de renvoi que l'objectif de la réglementation ne saurait être détourné par un fractionnement des projets et que l'absence de prise en considération de leur effet cumulatif ne doit pas avoir pour résultat pratique de les soustraire dans leur totalité à l'obligation d'évaluation alors que, pris ensemble, ils sont susceptibles d'avoir des incidences notables sur l'environnement au sens de l'article 2, paragraphe 1, de la directive 85/337 (voir, en ce sens, arrêt du 21 septembre 1999, Commission/Irlande, C-392/96, Rec. p. I-5901, point 76).

28 Il convient, par suite, de répondre à la première question que si une convention telle que celle en cause dans le litige au principal n'est pas un projet au sens de la directive 85/337, il appartient à la juridiction de renvoi de déterminer, sur la base de la réglementation nationale applicable, si une telle convention comporte une autorisation au sens de l'article 1er, paragraphe 2, de la directive 85/337. Il y a lieu, dans ce contexte, d'examiner si cette autorisation s'insère dans une procédure en plusieurs étapes comportant une décision principale ainsi que des décisions d'exécution et s'il y a lieu de tenir compte de l'effet cumulatif de plusieurs projets dont les incidences sur l'environnement doivent s'apprécier globalement.

*Sur la deuxième question*

29 Par sa deuxième question, la juridiction de renvoi demande, en substance, si des travaux portant sur l'infrastructure d'un aéroport déjà construit et dont la piste de décollage et d'atterrissage a déjà une longueur de plus de 2 100 mètres relèvent du champ d'application des dispositions du point 12 de l'annexe II lues en combinaison avec celles du point 7 de l'annexe I de la directive 85/337, dans sa rédaction d'origine.

30 En vertu du point 12 de l'annexe II dans sa rédaction antérieure à celle issue de la directive 97/11, est un projet visé par l'article 4, paragraphe 2, la «modification des projets figurant à l'annexe I». Le point 7 de cette annexe I mentionne pour sa part la «construction [...] d'aéroports [...] dont la piste de décollage et d'atterrissage a une longueur de 2 100 mètres ou plus».

31 La Société de développement et de promotion de l'aéroport de Liège-Bierset T. N. T. Express Worldwide et le Royaume de Belgique soutiennent qu'il découle nécessairement de cette rédaction que seules sont visées les modifications apportées à la «construction» d'un aéroport dont la piste de décollage et d'atterrissage a une longueur de 2 100 mètres ou plus, et non les modifications apportées à un aéroport existant.

32 La Cour a toutefois relevé à de nombreuses reprises que le champ d'application de la directive 85/337 est étendu et son objectif très large (voir, en ce sens, arrêts du 24 octobre 1996, Kraaijeveld e.a., C-72/95, Rec. p. I-5403, point 31, et du 16 septembre 1999, WWF e.a., C-435/97, Rec. p. I-5613, point 40). À cet égard, il serait contraire à l'objet même de la directive 85/337 de faire échapper au champ d'application de son annexe II des travaux d'amélioration ou d'agrandissement de l'infrastructure d'un aéroport déjà construit, au motif que l'annexe I de la directive 85/337 vise la «construction d'aéroports» et non les «aéroports» en tant que tels. Une telle interprétation permettrait en effet de faire échapper aux obligations qui découlent de la directive 85/337 tous les travaux de modification apportés à un aéroport préexistant, quelle que ce soit l'ampleur de ces travaux, et viderait ainsi, sur ce point, de toute portée l'annexe II de la directive 85/337.

33 Par suite, les dispositions du point 12 de l'annexe II lues en combinaison avec celles du point 7 de l'annexe I doivent être considérées comme visant également les travaux de modification apportés à un aéroport déjà construit.

34 Cette interprétation n'est nullement remise en cause par la circonstance que la directive 97/11 a remplacé le point 12 de l'annexe II de la directive 85/337 par un nouveau point 13, qui désigne expressément comme projet visé à l'article 4, paragraphe 2, de la directive 85/337, telle que modifiée par la directive 97/11, «[t]oute modification ou extension des projets figurant à l'annexe I ou à l'annexe II, déjà autorisés, réalisés ou en cours de réalisation [...]», alors que le point 12 de l'annexe II se bornait à viser la «modification des projets figurant à l'annexe I». En effet, la nouvelle rédaction adoptée par la directive 97/11, dont le quatrième considérant souligne l'expérience acquise dans l'évaluation des effets environnementaux et insiste sur la nécessité d'introduire des dispositions visant à clarifier, compléter et améliorer les règles relatives à la procédure d'évaluation, ne fait, sur ce point, qu'expliciter avec davantage de clarté la portée qu'il convenait de donner à la directive 85/337 dans sa rédaction d'origine. Il ne saurait, dès lors, être déduit de l'intervention du législateur communautaire une interprétation a contrario de la directive dans sa version d'origine.

35 En outre, la circonstance que les travaux en cause dans le litige au principal ne portent pas sur la longueur de la piste de décollage et d'atterrissage est sans incidence sur la question de savoir si ces travaux entrent dans le champ d'application du point 12 de l'annexe II de la directive 85/337. En effet, le point 7 de l'annexe I de la directive 85/337 prend le soin de préciser la notion d'«aéroport» en renvoyant à la définition donnée à l'annexe 14 de la convention de Chicago, du 7 décembre 1944, relative à l'aviation civile internationale. Aux termes de cette annexe: «[u]n aérodrome est une surface sur terre ou sur l'eau (y compris les bâtiments, installations et équipements) destinée à être utilisée en totalité ou en partie pour l'arrivée, le départ des aéronefs et pour leurs évolutions».

36 Il en résulte que tous les travaux portant sur les bâtiments, les installations ou les équipements d'un aéroport doivent être considérés comme des travaux portant sur l'aéroport en tant que tel. Pour l'application du point 12 de l'annexe II lu en combinaison avec le point 7 de l'annexe I de la directive 85/337, cela signifie que les travaux de modification d'un aéroport dont la piste de décollage et d'atterrissage a une longueur de 2 100 mètres ou plus sont donc non seulement les travaux qui

auraient pour objet d'allonger la piste, mais tous les travaux portant sur les bâtiments, les installations ou les équipements de cet aéroport dès lors qu'ils peuvent être regardés, notamment par leur nature, leur importance et leurs caractéristiques, comme une modification de l'aéroport lui-même. Il en va notamment ainsi des travaux destinés à augmenter de manière significative l'activité de l'aéroport et le trafic aérien.

37 Il convient, enfin, de rappeler à la juridiction de renvoi que si l'article 4, paragraphe 2, second alinéa, de la directive 85/337 confère aux États membres une marge d'appréciation pour spécifier certains types de projets à soumettre à une évaluation ou pour fixer des critères et/ou des seuils à retenir, celle-ci trouve ses limites dans l'obligation, énoncée à l'article 2, paragraphe 1, de cette directive, de soumettre à une étude d'incidences les projets susceptibles d'avoir des incidences notables sur l'environnement, notamment en raison de leur nature, de leurs dimensions ou de leur localisation (arrêt Kraaijeveld e.a., précité, point 50).

38 Ainsi, un État membre qui fixerait des critères et/ou des seuils ne tenant compte que des dimensions des projets, sans prendre en considération également leur nature et leur localisation, outrepasserait la marge d'appréciation dont il dispose en vertu des articles 2, paragraphe 1, et 4, paragraphe 2, de la directive 85/337.

39 Il appartient à la juridiction de renvoi de s'assurer que les autorités compétentes ont correctement évalué si les travaux en cause dans le litige au principal devaient être soumis à une étude d'impact environnemental.

40 Il y a lieu, par conséquent, de répondre à la deuxième question que les dispositions du point 12 de l'annexe II lues en combinaison avec celles du point 7 de l'annexe I de la directive 85/337, dans leur rédaction d'origine, visent également les travaux de

modification apportés à l'infrastructure d'un aéroport existant sans allongement de la piste de décollage et d'atterrissage dès lors qu'ils peuvent être regardés, notamment par leur nature, leur importance et leurs caractéristiques, comme une modification de l'aéroport lui-même. Il en va notamment ainsi des travaux destinés à augmenter de manière significative l'activité de l'aéroport et le trafic aérien. Il appartient à la juridiction de renvoi de s'assurer que les autorités compétentes ont correctement apprécié si les travaux en cause dans le litige au principal devaient être soumis à une évaluation de leur incidence sur l'environnement.

*Sur la troisième question*

41 Par sa troisième question, la juridiction de renvoi demande, en substance, si les autorités compétentes ont l'obligation de prendre en compte l'augmentation projetée de l'activité d'un aéroport en vue de déterminer si un projet visé au point 12 de l'annexe II de la directive 85/337 doit être soumis à une évaluation de ses incidences sur l'environnement.

42 Ainsi qu'il a été dit au point 32 du présent arrêt, la Cour a relevé à de nombreuses reprises que le champ d'application de la directive 85/337 est étendu et son objectif très large. En outre, si l'article 4, paragraphe 2, second alinéa, de la directive confère aux États membres une marge d'appréciation pour spécifier certains types de projets à soumettre à une évaluation ou pour fixer des critères et/ou des seuils à retenir, celle-ci trouve ses limites dans l'obligation, énoncée à l'article 2, paragraphe 1, de soumettre à une étude d'incidences les projets susceptibles d'avoir des incidences notables sur l'environnement, notamment en raison de leur nature, de leurs dimensions ou de leur localisation. À cet égard, la directive 85/337 s'attache à une appréciation globale des incidences sur l'environnement des projets ou de leur modification.

43 Il serait réducteur et contraire à cette approche de ne prendre en considération, pour l'évaluation des incidences sur l'environnement d'un projet ou de sa modification, que les effets directs des travaux envisagés eux-mêmes, sans tenir compte des incidences sur l'environnement susceptibles d'être provoquées par l'utilisation et l'exploitation des ouvrages issus de ces travaux.

44 Au demeurant, l'énumération faite à l'article 3 de la directive 85/337 des éléments à prendre en compte, tels que l'effet du projet sur, notamment, l'homme, la faune et la flore, le sol, l'eau, l'air ou le patrimoine culturel, montre par elle-même que l'incidence sur l'environnement que la directive 85/337 a pour objet de permettre d'évaluer est non seulement celle des travaux envisagés, mais aussi et surtout celle du projet à réaliser.

45 La Cour a ainsi considéré, s'agissant d'un projet de dédoublement d'une voie ferrée déjà existante, qu'un projet de cette nature peut avoir une incidence importante sur l'environnement au sens de la directive 85/337 dès lors qu'il est susceptible d'avoir, notamment, un impact sonore significatif (arrêt du 16 septembre 2004, Commission/Espagne, C-227/01, Rec. p. I-8253, point 49). Or, dans l'affaire ayant donné lieu à cet arrêt, l'impact sonore significatif était non pas celui provoqué par les travaux de dédoublement de la voie ferrée, mais bien celui provoqué par la prévisible augmentation de la fréquence du trafic ferroviaire, augmentation permise précisément par ces travaux de dédoublement de la voie ferrée. Il doit en aller de même s'agissant d'un projet, tel que celui en cause dans le litige au principal, qui a pour objet de permettre une augmentation de l'activité d'un aéroport et, par conséquent, de l'intensité du trafic aérien.

46 Il y a lieu, par suite, de répondre à la troisième question que les autorités compétentes doivent tenir compte de l'augmentation projetée de l'activité d'un aéroport lorsqu'elles examinent l'effet sur l'environnement des modifications apportées à ses infrastructures en vue d'accueillir ce surcroît d'activité.

## Sur les dépens

47 La procédure revêtant, à l'égard des parties au principal, le caractère d'un incident soulevé devant la juridiction de renvoi, il appartient à celle-ci de statuer sur les dépens. Les frais exposés pour soumettre des observations à la Cour, autres que ceux desdites parties, ne peuvent faire l'objet d'un remboursement.

Par ces motifs, la Cour (deuxième chambre) dit pour droit:

1) **Si une convention telle que celle en cause dans le litige au principal n'est pas un projet au sens de la directive 85/337/CEE du Conseil, du 27 juin 1985, concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement, il appartient à la juridiction de renvoi de déterminer, sur la base de la réglementation nationale applicable, si une telle convention comporte une autorisation au sens de l'article 1er, paragraphe 2, de la directive 85/337. Il y a lieu, dans ce contexte, d'examiner si cette autorisation s'insère dans une procédure en plusieurs étapes comportant une décision principale ainsi que des décisions d'exécution et s'il y a lieu de tenir compte de l'effet cumulatif de plusieurs projets dont les incidences sur l'environnement doivent s'apprécier globalement.**

2) **Les dispositions du point 12 de l'annexe II lues en combinaison avec celles du point 7 de l'annexe I de la directive 85/337, dans leur rédaction d'origine, visent également les travaux de modification apportés à l'infrastructure d'un aéroport existant sans allongement de la piste de**

**décollage et d'atterrissage dès lors qu'ils peuvent être regardés, notamment par leur nature, leur importance et leurs caractéristiques, comme une modification de l'aéroport lui-même. Il en va notamment ainsi des travaux destinés à augmenter de manière significative l'activité de l'aéroport et le trafic aérien. Il appartient à la juridiction de renvoi de s'assurer que les autorités compétentes ont correctement apprécié si les travaux en cause dans le litige au principal devaient être soumis à une évaluation de leur incidence sur l'environnement.**

3) **Les autorités compétentes doivent tenir compte de l'augmentation projetée de l'activité d'un aéroport lorsqu'elles examinent l'effet sur l'environnement des modifications apportées à ses infrastructures en vue d'accueillir ce surcroît d'activité.**

Signatures

# JUDGMENT OF THE COURT (First Chamber)

4 May 2006 *

In Case C-508/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 December 2003,

**Commission of the European Communities,** represented by F. Simonetti and X. Lewis, acting as Agents,

applicant,

v

**United Kingdom of Great Britain and Northern Ireland,** represented by K. Manji, acting as Agent, D. Elvin QC and J. Maurici, Barrister,

defendant,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2005,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that:

— by failing to apply correctly Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and

private projects on the environment (OJ 1985 L 175, p. 40) in relation to the proposed urban development projects at White City and at Crystal Palace as projects falling within point 10(b) of Annex II to the directive, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

— by failing to ensure the correct application of Articles 2(1), 4(2), 5(2) and 8 of Directive 85/337, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337, as amended'), when development consent is granted in a multi-stage procedure, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

## Legal context

### *Community legislation*

2 According to the fifth recital in the preamble thereto, Directive 85/337 is intended to establish general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects which are likely to have an effect on the environment.

3 For this purpose, Article 1(2) of Directive 85/337 defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

4 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 4 of the directive provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Article 5(2) of the directive provides that 'the information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3'.

7 Under Article 8 of the directive, 'information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

8 Point 10(b) of Annex II to the directive refers to 'urban development projects'.

9 Directive 85/337, in particular the rules relating to projects falling within Annex II, was substantially amended by Directive 97/11, which had to be transposed in the United Kingdom by 14 March 1999 at the latest. Since the applications seeking consent for the two projects at issue in the first complaint were submitted to the competent authorities before that date, those amendments are not relevant to the projects, as is clear from Article 3(2) of Directive 97/11.

10 The second complaint, however, must be considered in the light of Directive 85/337, as amended.

11 In that regard, while Article 1(2) of Directive 85/337, as amended, remains unchanged, Article 2(1) of the directive now provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4'.

12 Directive 97/11 also made a minor amendment to the wording of Article 5(2) of Directive 85/337 by inserting an indent requiring the developer also to provide:

'— an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects'.

13 The numbering of that provision also changed and it became Article 5(3) of Directive 85/337, as amended.

14 Article 8 of the directive provides, in its amended version, that 'the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

*National legislation*

15 In England, the principal legal instrument relating to land planning is the Town and Country Planning Act 1990 ('the Town and Country Planning Act'), which lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission. This Act is amplified by the Town and Country Planning (General Development Procedure) Order 1995 ('the General Development Procedure Order') and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the Assessment of Environmental Effects Regulations').

16 The Assessment of Environmental Effects Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ('the 1999 Regulations'). Since these new regulations apply only to applications lodged on or after 14 March 1999, they are not relevant to the two

projects at issue in the first complaint. On the other hand, they determine the relevant national law for the purposes of the second complaint.

— The Town and Country Planning Act and the General Development Procedure Order

17 Under section 57(1) of the Town and Country Planning Act, planning permission is required for any 'development' within the meaning of section 55, a term which includes 'the carrying out of building ... or other operations in, on, over or under land ...'.

18 Planning permission may be granted in several forms, one of which is outline permission with a requirement of subsequent approval of the reserved matters.

19 Section 92(1) of the Town and Country Planning Act provides that 'outline planning permission' is permission 'granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")'.

20 Article 1(2) of the General Development Procedure Order defines such 'reserved matters' as 'any of the following matters in respect of which details have not been given in the application, namely (a) siting, (b) design, (c) external appearance, (d) means of access, (e) the landscaping of the site'.

21 Section 92(2) of the Town and Country Planning Act implicitly provides that consent is deemed to be finally given for a reserved matter by the decision granting subsequent approval.

22 It is apparent from section 73 of the Town and Country Planning Act that an application for an amendment to an existing permission constitutes an application for a new planning permission.

— The Assessment of Environmental Effects Regulations and the 1999 Regulations

23 By virtue of the Assessment of Environmental Effects Regulations, certain projects must be subject to an environmental impact assessment before consent is granted.

24 Schedule 2 to the Assessment of Environmental Effects Regulations sets out the classes of project which are listed in Annex II to Directive 85/337, including 'urban development project[s]'.

25 Under regulation 2(1) of the Assessment of Environmental Effects Regulations, 'Schedule 2 application' means 'an application for planning permission ... for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location', this being a matter to be assessed by the competent authority on a case-by-case basis.

26 As provided in regulation 4(1) and (2) of the Assessment of Environmental Effects Regulations, the competent authority cannot grant planning permission in respect of, inter alia, a Schedule 2 application unless it has first taken the environmental information into consideration and states in its decision that it has done so.

27 When faced with an application for planning permission in respect of a project envisaged in Schedule 2 to the regulations, the competent authority must therefore, on a case-by-case basis, determine prior to any grant of planning permission whether the characteristics of the project require an assessment of its environmental impact, that is to say whether the project is likely to have significant effects on the environment, and refuse permission if it does not have sufficient information to come to a decision on this point.

28 Under national law, outline planning permission constitutes 'planning permission' for the purposes of regulation 4 of the Assessment of Environmental Effects Regulations, whereas the decision approving reserved matters does not. For this reason, an environmental impact assessment can, under national law, be carried out in respect of a project only at the initial outline planning permission stage, and not at the later stage of approval of the reserved matters.

29 While the 1999 Regulations made substantive amendments to the rules applying to environmental impact assessment, they in no way altered the fact, at issue in the second complaint, that an assessment cannot be carried out at the reserved matters stage.

*National implementing measures*

30 Circular 15/88, issued by the Department of the Environment, provides non-statutory guidance to help the competent authorities to identify projects as referred to in Schedule 2 to the Assessment of Environmental Effects Regulations which must be the subject of an environmental impact assessment.

31 After stating, in paragraph 18, that the basic question to be asked is whether a project is likely to give rise to significant environmental effects, Circular 15/88 then explains, in paragraph 20, that in general terms an assessment is needed (i) for projects which are of more than local importance, (ii) for projects proposed in sensitive locations and (iii) for projects with unusually complex and potentially adverse effects.

32 Paragraphs 30 and 31 of Circular 15/88 state that, for certain categories of project, criteria and thresholds are listed in Appendix A to the circular that are intended to give a broad indication of the types of cases in which, in the Secretary of State's view, an environmental assessment may be required under the Assessment of Environmental Effects Regulations or, conversely, is not likely to be required. The circular adds, however, that those criteria and thresholds are purely indicative and the fundamental test to be applied in each case is whether the project is likely to have significant environmental effects.

33 With regard, more particularly, to urban development projects, the circular states, in paragraph 15 of Appendix A, that redevelopment of previously developed land is unlikely to require an assessment, unless the proposed development is one of certain specific types or is on a very much greater scale than the previous development.

34 The circular states, in paragraph 16 of Appendix A, with regard to projects on sites which have not previously been intensively developed that 'the need for [an assessment] should be considered in the light of the sensitivity of the particular location'. Thus, 'such schemes ... may require [an assessment] where:

(i) the site area of the scheme is more than five hectares in an urbanised area; or

(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development, e.g. more than 700 dwellings within 200 metres of the site boundaries; or

(iii) the development would provide a total of more than 10 000 square metres (gross) of shops, offices or other commercial uses'.

35 In addition, paragraph 42 of the circular states that the preparation of an environmental statement is bound to require the developer to work out his proposals in some detail. Otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.

36 Paragraph 48 of Circular 2/99 issued by the Department of the Environment, Transport and the Regions, which replaced Circular 15/88 in March 1999 (in order to take account of the 1999 Regulations), notes that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an environmental impact assessment can be carried out only at the initial stage of granting such permission and not at the later stage of approval of the reserved matters.

## Facts and pre-litigation procedure

### *White City*

37 In December 1993 Chesfield Plc ('Chesfield') applied to the London Borough of Hammersmith & Fulham ('Hammersmith & Fulham LBC'), the competent planning authority, for outline planning permission to develop retail and leisure facilities at White City, London (the 'White City development project'), a project falling within Annex II to Directive 85/337.

38 After considering the effects of the project, as set out in a number of reports, and following public consultation, Hammersmith & Fulham LBC took the view that an assessment of the effects that the project might have on the environment was not required.

39 In March 1996 Hammersmith & Fulham LBC granted outline planning permission. Certain matters were reserved for subsequent approval by that authority.

40 In October 1997 and September 1998 Chesfield made applications for approval of the reserved matters.

41 On 12 October 1999 Hammersmith & Fulham LBC gave such approval.

42 Works commenced after the approval.

43 Following receipt of a complaint, the Commission, by letter of 19 April 2001, gave the United Kingdom the opportunity to submit its observations and, on 20 August 2002, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the White City development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 29 October 2002, the Commission brought the present action.

*Crystal Palace*

44 Crystal Palace Park, in London, is Metropolitan Open Land listed as a Grade II* historic park on the statutory register kept by English Heritage. Part of the site at issue relating to the access and adjoining land fall within the Crystal Palace Park Conservation Area.

45 On 4 April 1997 London & Regional Properties Ltd ('L&R') applied to the London Borough of Bromley ('Bromley LBC'), the competent planning authority, for outline planning permission to develop a leisure complex in Crystal Palace Park ('the Crystal Palace development project'), a project falling within Annex II to Directive 85/337.

46 After consideration which took into account a number of reports and additional information, Bromley LBC concluded that an environmental impact assessment was not required for the project.

47 On 24 March 1998 Bromley LBC granted outline planning permission, reserving certain matters for subsequent approval before any development was commenced.

48 On 25 January 1999 L&R applied to Bromley LBC for final determination of certain reserved matters. The details of the Crystal Palace development project then showed: (i) on the ground floor, 18 cinemas, a leisure area and an exhibition area; (ii) at the gallery level, restaurants and cafes, two leisure areas and public toilets; (iii) at roof level, a roof-top car park with a maximum of 950 spaces, four viewing areas and areas enclosing plant and equipment; (iv) the addition of a mezzanine floor of 800 square metres; and (v) changes to the construction of the external walls.

49 Those matters fell wholly within the parameters of the outline permission already granted.

50 However, at the meeting where a decision was to be taken on approval of the reserved matters, some Bromley LBC councillors expressed the wish that an environmental impact assessment should be carried out. After legal advice had been sought, they were informed that as a matter of domestic law an assessment could be carried out only at the initial outline planning permission stage.

51 Bromley LBC issued the notice of approval on 10 May 1999.

52 However, the planning permission has expired in the meantime without the project being carried out.

53 Following receipt of a complaint, the Commission, by letter of 6 November 2000, gave the United Kingdom the opportunity to submit its observations and, on 26 July 2001, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the Crystal Palace development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

*Incorrect transposition of Directive 85/337, as amended, regarding outline planning permission with a requirement of subsequent approval of the reserved matters*

54 On 26 July 2001, having given the United Kingdom the opportunity to submit its observations, the Commission sent it a reasoned opinion, in which it stated that some aspects of the national legislation concerning assessment of the environmental

impact of projects, in particular as regards outline planning permission with a requirement of subsequent approval of the reserved matters, appeared to it to be incompatible with Directive 85/337, as amended. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

## The action

55 The Commission puts forward two complaints in support of its action.

56 The first complaint, as advanced by the Commission during the pre-litigation procedure and in its reply, is in essence divided into three limbs:

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to investigate whether the White City development project required an environmental impact assessment;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to adopt a formal decision allowing it to be checked that the decision was based on adequate prior investigation;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively.

57 However, in its application the Commission mentions only the third limb of this complaint.

58 The second complaint concerns the incorrect transposition into national law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended, in the national rules which provide that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage ('the rules at issue in the present case').

*The first complaint: breach of the obligations to investigate whether an assessment was required, to adopt a formal decision in that regard and to carry out such an assessment (Articles 2(1) and 4(2) of Directive 85/337)*

Admissibility of the first complaint

59 The United Kingdom Government puts forward four pleas of inadmissibility, alleging that a new complaint is involved, that the principle of legal certainty is infringed, that the national courts have jurisdiction and that the action is devoid of purpose.

— A new complaint

60 The United Kingdom Government contends that the first and second limbs of the first complaint, as set out in the Commission's reply, constitute a new complaint. While mention was admittedly made of those limbs in the letter of formal notice and the reasoned opinion and they were subsequently restated in the reply submitted to the Court, they were not, however, set out in the application initiating the proceedings. It is the application which defines the subject-matter of a case.

61 As to those submissions, it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, to that effect, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3, and Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraph 31).

62 Furthermore, by virtue of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of its Rules of Procedure, the Commission must, in any application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17).

63 In the present case, no mention is made of the first and second limbs of the first complaint in the claims at the end of the application. Nor do they appear in the part of the application headed 'in law'.

64 Accordingly, the first two limbs of the first complaint, which were not included in the application initiating proceedings, are inadmissible although they were set out in the Commission's reply and mention is made of them in the letter of formal notice and the reasoned opinion.

65 It remains to consider, therefore, the admissibility of the third limb of the first complaint in the light of the other pleas of inadmissibility raised by the United Kingdom Government.

— Infringement of the principle of legal certainty

66 The United Kingdom Government contends that, in view of the considerable length of time that has passed since the planning permissions at issue were granted, the action for failure to fulfil obligations offends against the principle of legal certainty and undermines the legitimate expectations which developers derive from acquired rights.

67 It should be stated with regard to those submissions, first, that the infringement procedure is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, to that effect, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14, and Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 23).

68 Secondly, it follows from case-law that, while the principles of legal certainty and of the protection of legitimate expectations require the withdrawal of an unlawful measure to occur within a reasonable time and regard must be had to how far the person concerned might have been led to rely on the lawfulness of the measure, the

fact remains that such withdrawal is, in principle, permitted (see, in particular, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 39, at 55 and 56; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; and Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12).

69 A Member State cannot therefore rely on legal certainty and legitimate expectations derived by developers from acquired rights in order to prevent the Commission from bringing an action seeking an objective finding that the Member State has failed to fulfil its obligations under Directive 85/337 with regard to assessment of the effects of certain projects on the environment.

— The jurisdiction of the national courts

70 The United Kingdom Government contends that it is for national courts and not the Court of Justice to determine whether a competent authority has correctly assessed whether a project will have significant effects on the environment.

71 As to that submission, the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of the remedies available through the national courts cannot prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (see Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9; Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24; and Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 39).

— The action is devoid of purpose

72 The United Kingdom Government maintains that the permission granted in respect of the Crystal Palace development project expired in March 2003 without being implemented and that any infringement, even if established, is therefore wholly theoretical.

73 As to that submission, an action in respect of an infringement which no longer existed on the date upon which the period laid down in the reasoned opinion expired is, according to the case-law, inadmissible because it is devoid of purpose (see Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 13, and Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraphs 17 and 18).

74 It is clear from settled case-law that the purpose of an action brought under Article 226 EC is to obtain a declaration that the State concerned has failed to fulfil its obligations under the Treaty and that it has failed to put an end to that infringement within the time set by the Commission in its reasoned opinion (Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 40). The Court has also consistently held that the question whether a Member State has failed to fulfil its obligations must be assessed by reference to the situation prevailing in the Member State concerned at the end of the period laid down in the reasoned opinion (see Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13, and Case C-362/90 *Commission* v *Italy*, paragraph 10).

75 In the present case, the fact that on expiry of the period laid down in the reasoned opinion, namely on 26 September 2001, the planning permission at issue was still in force is sufficient to preclude the action for failure to fulfil obligations from being regarded as devoid of purpose.

76 It follows from the above considerations that the pleas of inadmissibility in respect of the third limb of the first complaint must be dismissed.

The merits of the third limb of the first complaint

77 Before considering the merits, it is appropriate first to note that in proceedings under Article 226 EC for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, in particular, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited).

78 Thus, with regard more specifically to Directive 85/337, the Court held in Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, at paragraph 85, that the Commission must furnish at least some evidence of the effects that the project in question is likely to have on the environment.

79 However, the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (see, in particular, *Commission* v *Ireland*, paragraph 42 and the case-law cited).

80 It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on

the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (see *Commission* v *Ireland*, paragraph 44 and the case-law cited).

81 It is in the light of those principles that the merits should be considered.

82 The Commission submits, in the third limb of its first complaint, that Articles 2(1) and 4(2) of Directive 85/337 have been infringed, on the ground that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively, although those projects are likely to have significant effects.

83 The Commission notes that the White City development project involves about 58 000 square metres of retail and leisure development, including a major new road junction, 4 500 car parking spaces and a link to the Underground network. In its opinion, for a project of that size there is a presumption that an assessment is necessary, unless such a presumption is mitigated by other factors.

84 The Commission notes that the Crystal Palace development project includes leisure and commercial uses (18 cinemas, galleries, restaurants) covering 52 000 square metres, a roof-top car park with 950 spaces and a car park at ground level. The Commission is of the view that the scale and size of the project are such that it is likely to have significant effects on the environment, and that the competent authority therefore exceeded the limits of its discretion.

85 The United Kingdom Government considers that the competent authorities, in the light of the reports and studies in their possession and following the consultations that they carried out, were entitled to conclude that neither of the two projects was likely to have significant effects on the environment, and that they did not therefore need to be the subject of an environmental impact assessment.

86 As to those submissions, it should be noted that, as provided in Article 2(1) of Directive 85/337, 'projects' within the meaning of Article 4 of that directive which are likely to have significant effects must be made subject to an assessment with regard to their effects on the environment before consent for them is given.

87 For that purpose, Article 4(2) of Directive 85/337, read in conjunction with Annex II thereto, lists the projects to be made subject to an impact assessment where Member States consider that their characteristics so require.

88 Although in those circumstances Article 4(2) of Directive 85/337 gives the competent authority a degree of freedom in appraising whether or not a particular project must be made subject to an assessment, it is, however, clear from settled case-law that the limits of that discretion are to be found in the obligation, set out in Article 2(1) of the directive, that all projects which are likely to have significant effects on the environment are to be subject to an assessment (see, to that effect, Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraphs 44 and 45; Case C-87/02 *Commission* v *Italy*, paragraphs 43 and 44; and Case C-83/03 *Commission* v *Italy* [2005] ECR I-4747, paragraph 19).

89 Thus, it is clear from case-law that Directive 85/337 requires that all projects falling within Annex II that are likely to have significant effects on the environment be

made subject to an assessment (see, to that effect, *WWF and Others*, paragraph 45; *Commission* v *Portugal*, paragraph 82; and Case C-87/02 *Commission* v *Italy*, paragraph 44).

90 However, as has already been noted in paragraphs 77 to 80 above, proof that Article 2(1) of Directive 85/337 has been infringed requires the Commission to demonstrate that a Member State has failed to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects. That proof may effectively be furnished by demonstrating that a Member State did not take the measures necessary to ascertain whether a project which does not reach the thresholds envisaged in Article 4(2) of Directive 85/337 is nevertheless likely to have significant effects on the environment by virtue inter alia of its nature, size or location. The Commission might also establish that a project likely to have significant effects on the environment was not the subject of an impact assessment although it should have been (*Commission* v *Portugal*, paragraph 82).

91 In that last respect, it is also clear from paragraphs 85 and 87 of *Commission* v *Portugal* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project. The Commission must furnish at least some evidence of the effects that the project is likely to have on the environment.

92 In the present case, it is clear that the Commission did not satisfy the burden of proof placed upon it. It cannot merely rely on presumptions that large-scale projects are automatically likely to have significant effects on the environment without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment.

93 Despite the analytical material and documents supplied by the United Kingdom Government, the Commission did not seek to back up its own assertions and refute those of the defendant Member State through detailed examination of that material or by obtaining, producing, examining or providing an analytical presentation of tangible and specific evidence which might have enabled the Court to assess whether the competent authorities did in fact exceed the limits of their discretion.

94 In those circumstances, the third limb of the first complaint must be dismissed as unfounded.

*The second complaint: incorrect transposition into domestic law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended*

95 By its second complaint, the Commission in essence contends that the national rules at issue, under which an assessment may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage, incorrectly transpose into domestic law Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

96 The Commission argues that, where national law provides for a consent procedure comprising more than one stage, Directive 85/337, as amended, requires that an assessment may in principle be carried out at each stage in that procedure if it appears that the project in question is likely to have significant effects on the environment.

97 The Commission contends that, in so far as the national rules at issue in the present case preclude an assessment at the later reserved matters stage, they do not satisfy that requirement.

98 In its view, those rules allow some projects to escape assessment although they are likely to have significant effects on the environment.

99 The United Kingdom Government contends, on the other hand, that Article 2(1) of that directive makes it clear that a project must be subject to an assessment 'before consent is given'. Since that 'consent' is given when outline planning permission is granted (and not when the reserved matters are subsequently approved), the rules at issue correctly transpose Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

100 As to those submissions, it should be noted that Article 1(2) of that directive defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

101 In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102 Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended.

103 In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 42).

104 In that regard, the Court stated in *Wells*, at paragraph 52, that where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

105 In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.

106 Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended. The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law.

107 However, so far as concerns Articles 5(3) and 8 of Directive 85/337, as amended, the Commission has not provided any explanation as to why it considers that those two provisions have not been complied with.

108 Accordingly, the second complaint is partly well founded.

109 In the light of all the above considerations, it must be held that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) of Directive 85/337, as amended, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage.

## Costs

110 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, if each party succeeds on some and fails on other heads. Since the parties have respectively been unsuccessful on a number of heads, they must be ordered to bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the United Kingdom to bear their own costs.**

[Signatures]

# JUDGMENT OF THE COURT (First Chamber)

4 May 2006 *

In Case C-290/03,

REFERENCE for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by order of 30 June 2003, received at the Court on 3 July 2003, in the proceedings

**The Queen,** on the application of:

**Diane Barker,**

v

**London Borough of Bromley,**

intervener:

**First Secretary of State,**

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2005,

after considering the observations submitted on behalf of:

— Ms Barker, by R. McCracken QC and G. Jones and J. Pereira, Barristers, instructed by R.M. Buxton, Solicitor,

— the London Borough of Bromley, by T. Straker QC and J. Strachan, Barrister, instructed by Sharpe Pritchard, Solicitors,

— the United Kingdom Government, by K. Manji, acting as Agent, D. Elvin QC and J. Maurici, Barrister,

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Commission of the European Communities, by F. Simonetti and X. Lewis, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(2), 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

2 The reference was made in the course of proceedings between Ms Barker and the London Borough of Bromley ('Bromley LBC'), the competent planning authority, concerning the grant of planning permission to develop a leisure complex in Crystal Palace Park, London, without an environmental impact assessment having been carried out.

## Legal context

*Community legislation*

3 According to the fifth recital in the preamble thereto, Directive 85/337 is intended to establish general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects which are likely to have an effect on the environment.

4 For this purpose, Article 1(2) of Directive 85/337 defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

5 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

6 Article 4 of the directive provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Point 10(b) of Annex II to the directive refers to 'urban development projects'.

8 Directive 85/337, in particular the rules relating to projects falling within Annex II, was substantially amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), which had to be transposed in the United Kingdom by 14 March 1999 at the latest. Since the application seeking consent for the project at issue in the main proceedings was submitted to the competent authority before the latter date, those amendments are not relevant to the project, as is clear from Article 3(2) of Directive 97/11.

*National legislation*

9 In England, the principal legal instrument relating to land planning is the Town and Country Planning Act 1990 ('the Town and Country Planning Act'), which lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission. This Act is amplified by the Town and Country Planning (General Development Procedure) Order 1995 ('the General Development Procedure Order') and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the Assessment of Environmental Effects Regulations').

10 The Assessment of Environmental Effects Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. However, since these new regulations apply only to applications lodged on or after 14 March 1999, they are not relevant to the project at issue in the main proceedings.

— The Town and Country Planning Act and the General Development Procedure Order

11 Under section 57(1) of the Town and Country Planning Act, planning permission is required for any 'development' within the meaning of section 55, a term which includes 'the carrying out of building ... or other operations in, on, over or under land ...'.

12 Planning permission may be granted in several forms, one of which is outline permission with a requirement of subsequent approval of the reserved matters.

13 Section 92(1) of the Town and Country Planning Act provides that 'outline planning permission' is permission 'granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")'.

14 Article 1(2) of the General Development Procedure Order defines such 'reserved matters' as 'any of the following matters in respect of which details have not been given in the application, namely (a) siting, (b) design, (c) external appearance, (d) means of access, (e) the landscaping of the site'.

15 Section 92(2) of the Town and Country Planning Act implicitly provides that consent is deemed to be finally given for a reserved matter by the decision granting subsequent approval.

16 It is apparent from section 73 of the Town and Country Planning Act that an application for an amendment to an existing permission constitutes an application for a new planning permission.

— The Assessment of Environmental Effects Regulations

17 By virtue of the Assessment of Environmental Effects Regulations, certain projects must be subject to an environmental impact assessment before consent is granted.

18 Schedule 2 to the regulations sets out the classes of project which are listed in Annex II to Directive 85/337, including 'urban development project[s]'.

19 Under regulation 2(1) of the Assessment of Environmental Effects Regulations, 'Schedule 2 application' means 'an application for planning permission ... for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location', this being a matter to be assessed by the competent authority on a case-by-case basis.

20 As provided in regulation 4(1) and (2) of the Assessment of Environmental Effects Regulations, the competent authority cannot grant planning permission in respect of, inter alia, a Schedule 2 application unless it has first taken the environmental information into consideration and states in its decision that it has done so.

21 When faced with an application for planning permission in respect of a project envisaged in Schedule 2 to the regulations, the competent authority must therefore, on a case-by-case basis, determine prior to any grant of planning permission whether the characteristics of the project require an assessment of its environmental

impact, that is to say whether the project is likely to have significant effects on the environment, and refuse permission if it does not have sufficient information to come to a decision on this point.

22 Under national law, outline planning permission constitutes 'planning permission' for the purposes of regulation 4 of the Assessment of Environmental Effects Regulations, whereas the decision approving reserved matters does not. For this reason, an environmental impact assessment can, under national law, be carried out in respect of a project only at the initial outline planning permission stage, and not at the later stage of approval of the reserved matters.

*Implementing measures*

23 Circular 15/88, issued by the Department of the Environment, provides non-statutory guidance to help the competent authorities to identify projects as referred to in Schedule 2 to the Assessment of Environmental Effects Regulations which must be the subject of an environmental impact assessment.

24 After stating, in paragraph 18, that the basic question to be asked is whether a project is likely to give rise to significant environmental effects, Circular 15/88 then explains, in paragraph 20, that in general terms an assessment is needed (i) for projects which are of more than local importance, (ii) for projects proposed in sensitive locations and (iii) for projects with unusually complex and potentially adverse effects.

25 Paragraphs 30 and 31 of Circular 15/88 state that, for certain categories of project, criteria and thresholds are listed in Appendix A to the circular that are intended to give a broad indication of the types of cases in which, in the Secretary of State's view, an environmental assessment may be required under the Assessment of Environmental Effects Regulations or, conversely, is not likely to be required. The circular adds, however, that those criteria and thresholds are purely indicative and the fundamental test to be applied in each case is whether the project is likely to have significant environmental effects.

26 With regard, more particularly, to urban development projects, the circular states, in paragraph 15 of Appendix A, that redevelopment of previously developed land is unlikely to require an assessment, unless the proposed development is one of certain specific types or is on a very much greater scale than the previous development.

27 The circular states, in paragraph 16 of Appendix A, with regard to projects on sites which have not previously been intensively developed that 'the need for [an assessment] should be considered in the light of the sensitivity of the particular location'. Thus, 'such schemes ... may require [an assessment] where:

(i) the site area of the scheme is more than five hectares in an urbanised area; or

(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development, e.g. more than 700 dwellings within 200 metres of the site boundaries; or

(iii) the development would provide a total of more than 10 000 square metres (gross) of shops, offices or other commercial uses'.

28 In addition, paragraph 42 of the circular states that the preparation of an environmental statement is bound to require the developer to work out his proposals in some detail. Otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.

## The main proceedings and the questions referred for a preliminary ruling

29 Ms Barker lives in the vicinity of Crystal Palace Park.

30 On 4 April 1997 London & Regional Properties Ltd ('L&R') applied to Bromley LBC for outline planning permission to develop a leisure complex in Crystal Palace Park ('the Crystal Palace development project'), a project falling within Annex II to Directive 85/337.

31 After consideration which took into account a number of reports and additional information, Bromley LBC concluded that an environmental impact assessment was not required for the project.

32 On 24 March 1998 Bromley LBC granted outline planning permission, reserving certain matters for subsequent approval before any development was commenced.

33 On 25 January 1999 L&R applied to Bromley LBC for final determination of certain reserved matters. The details of the Crystal Palace development project then showed: (i) on the ground floor, 18 cinemas, a leisure area and an exhibition area; (ii) at the gallery level, restaurants and cafes, two leisure areas and public toilets; (iii) at roof level, a roof-top car park with a maximum of 950 spaces, four viewing areas and areas enclosing plant and equipment; (iv) the addition of a mezzanine floor of 800 square metres; and (v) changes to the construction of the external walls.

34 At the meeting where a decision was to be taken on approval of the reserved matters, some Bromley LBC councillors expressed the wish that an environmental impact assessment should be carried out. However, after legal advice had been sought, they were informed that as a matter of domestic law an assessment could be carried out only at the initial outline planning permission stage.

35 Bromley LBC issued the notice of approval on 10 May 1999.

36 Ms Barker's action challenging that approval and the legal advice on which it was based was dismissed at first instance and by the Court of Appeal.

37 Since the House of Lords, before which Ms Barker brought an appeal, had doubts as to the compatibility with Community law of the national rules according to which an

environmental impact assessment can be carried out only at the outline planning permission stage and not when the reserved matters are subsequently approved ('the rules at issue in the main proceedings'), it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is identification of "the decision of the competent authority or authorities which entitles the developer to proceed with the project" (Article 1(2) of Directive 85/337/EEC ("the Directive")) exclusively a matter for the national court applying national law?

(2) Does the Directive require an EIA [environmental impact assessment] to be carried out if, following the grant of outline planning permission subject to conditions that reserved matters be approved, without an EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment by virtue inter alia of its nature, size or location (Article 2(1) of the Directive)?

(3) In circumstances where:

(a) national planning law provides for the grant of outline planning permission at an initial stage of the planning process and requires consideration by the competent authority at that stage as to whether an EIA is required for purposes of the Directive; and

(b) the competent authority then determines that it is unnecessary to carry out an EIA and grants outline planning permission subject to conditions reserving specified matters for later approval; and

(c) that decision can then be challenged in the national courts;

may national law, consistently with the Directive, preclude a competent authority from requiring that an EIA be carried out at a later stage of the planning process?'

## Consideration of the questions

*Question 1*

38 By its first question, the national court essentially asks whether classification of a decision as a 'development consent' within the meaning of Article 1(2) of Directive 85/337 depends exclusively on national law.

39 Article 1(2) of Directive 85/337 defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

40 Thus, while this term is modelled on certain elements of national law, it remains a Community concept which, contrary to the submissions of Bromley LBC and the United Kingdom Government, falls exclusively within Community law. According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (see, to this effect, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37).

41 The answer to the first question must therefore be that classification of a decision as a 'development consent' within the meaning of Article 1(2) of Directive 85/337 must be carried out pursuant to national law in a manner consistent with Community law.

*Questions 2 and 3*

42 By its second and third questions, which it is appropriate to consider together, the national court essentially asks whether Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, following the grant of outline planning permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

43 First, according to Article 2(1) of Directive 85/337, projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before development consent is given (*Wells*, paragraph 42).

44 As has been noted in paragraph 39 of the present judgment, Article 1(2) of Directive 85/337 defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

45 It is apparent from the scheme and the objectives of Directive 85/337 that this provision refers to the decision (involving one or more stages) which allows the developer to commence the works for carrying out his project.

46 Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a 'development consent' for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraphs 101 and 102).

47 Second, as the Court explained in *Wells*, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of

the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

48 If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, *Commission* v *United Kingdom*, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

49 In the light of all of the foregoing, the answer to the second and third questions must be that Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

## Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Classification of a decision as a 'development consent' within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be carried out pursuant to national law in a manner consistent with Community law.**

2. **Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.**

[Signatures]

## Judgment of the Court (Third Chamber) of 16 March 2006 — Commission of the European Communities v Kingdom of Spain

**(Case C-332/04)** ([1])

***(Failure of a Member State to fulfil its obligations — Directive 85/337/EEC as amended by Directive 97/11/EC — Assessment of the effects of projects on the environment — Inter-action between factors likely to be directly and indirectly affected — Obligation to publish the impact statement — Assessment limited to urban development projects outside urban areas — Construction project for a leisure complex at Paterna)***

(2006/C 131/29)

*Language of the case: Spanish*

### Parties

*Applicant:* Commission of the European Communities (represented by: G. Valero Jordana and F. Simonetti, acting as Agents)

*Defendant:* Kingdom of Spain (represented by: M. Muñoz Perez, acting as Agent)

### Re:

Failure of a Member State to fulfil its obligations — Incomplete/incorrect transposition of Arts. 3, 9(1) and Paragraph 10(b) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) — Failure to apply the transitional scheme established by Article 3 of Directive 97/11/EC — Failure to have submitted a construction project for a leisure complex at Paterna (Valencia) for an assessment

### Operative part of the judgment

*The Court:*

1. *Declares that, by failing to fully transpose Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11, by failing to transpose Article 9(1) of Directive 85/337, as amended by Directive 97/11, by failing to comply with the transitional scheme provided for by Article 3 of Directive 97/11, by failing to correctly transpose the combined provisions of Paragraph 10(b) of Annex II and Articles 2(1) and 4(2) of Directive 85/337, as amended by Directive 97/11, and by failing to submit the construction project for a leisure complex at Paterna to the procedure for the assessment of the effects on the environment and, consequently, by failing to apply the provisions of Articles 2(1), 3, 4(2), 8 and 9 of Directive 85/337, as amended by Directive 97/11, the Kingdom of Spain has failed to fulfil its obligations under that directive;*

2. *The Kingdom of Spain is ordered to pay the costs.*

([1]) OJ C 262 of 23.10.2004.

## Judgment of the Court (First Chamber) of 9 March 2006 (reference for a preliminary ruling from the Audiencia Provincial de Barcelona) — Matratzen Concord AG v Hukla Germany SA

**(Case C-421/04)** ([1])

***(Reference for a preliminary ruling — Article 3(1)(b) and (c) of Directive 89/104/EEC — Grounds for refusal to register — Articles 28 EC and 30 EC — Free movement of goods — Measure having equivalent effect to a quantitative restriction — Justification — Protection of industrial and commercial property — National word mark registered in a Member State — Trade mark consisting of a term borrowed from the language of another Member State in which it is devoid of distinctive character and/or descriptive of the goods in respect of which the trade mark was registered)***

(2006/C 131/30)

*Language of the case: Spanish*

### Referring court

Audiencia Provincial de Barcelona

### Parties to the main proceedings

*Applicant:* Matratzen Concord AG

*Defendant:* Hukla Germany SA

### Re:

Reference for a preliminary ruling — Audiencia Provincial de Barcelona — Interpretation of Article 30 EC — Protection of industrial and commercial property — Disguised restriction in trade between Member States resulting from a national word mark composed of a word which, in the language of another Member State, is descriptive of the products concerned ('matratzen')

**Operative part of the judgment**

*Article 3(1)(b) and (c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks does not preclude the registration in a Member State, as a national trade mark, of a term borrowed from the language of another Member State in which it is devoid of distinctive character or descriptive of the goods or services in respect of which registration is sought, unless the relevant parties in the Member State in which registration is sought are capable of identifying the meaning of the term.*

---

([1]) OJ C 300, 04.12.2004.

---

**Judgment of the Court (Second Chamber) of 9 March 2006 (reference for a preliminary ruling from the Hof van Cassatie van België) — Criminal proceedings against Léopold Henri van Esbroeck**

**(Case C-436/04)** ([1])

***(Convention implementing the Schengen Agreement — Articles 54 and 71 — Ne bis in idem principle — Application ratione temporis — Concept of 'the same acts' — Import and export of narcotic drugs subject to legal proceedings in different Contracting States)***

(2006/C 131/31)

*Language of the case: Dutch*

**Referring court**

Hof van Cassatie van België

**Party in the main proceedings**

Léopold Henri van Esbroeck

**Re:**

Reference for a preliminary ruling — Hof van Cassatie van België — Interpretation of Arts. 54 and 71 of the Convention implementing the Schengen Agreement — *Ne bis in idem* principle — Person prosecuted in a Member State for illegally exporting drugs after having been prosecuted and convicted in Norway for illegal importing drugs before the Schengen Agreement was applicable to that State

**Operative part of the judgment**

1. *The ne bis in idem principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 in Schengen, must be applied to criminal proceedings brought in a Contracting State for acts for which a person has already been convicted in another Contracting State even though the Convention was not yet in force in the latter State at the time at which that person was convicted, in so far as the Convention was in force in the Contracting States in question at the time of the assessment, by the court before which the second proceedings were brought, of the conditions of applicability of the ne bis in idem principle.*

2. *Article 54 of the Convention must be interpreted as meaning that:*

   — *the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected;*

   — *punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Article 54, the definitive assessment in that respect being the task of the competent national courts.*

---

([1]) OJ C 300 of 4.12.2004.

---

**Judgment of the Court (Third Chamber) of 23 February 2006 (reference for a preliminary ruling from the Landesgericht Klagenfurt) — A-Punkt Schmuckhandels GmbH v Claudia Schmidt**

**(Case C-441/04)** ([1])

***(Free movement of goods — Articles 28 EC and 30 EC — Measures having equivalent effect — Doorstep selling — Sale of silver jewellery — Prohibition)***

(2006/C 131/32)

*Language of the case: German*

**Referring court**

Landesgericht Klagenfurt (Austria)

**Parties to the main proceedings**

*Applicant:* A-Punkt Schmuckhandels GmbH

*Defendant:* Claudia Schmidt

# JUDGMENT OF THE COURT (Second Chamber)
16 September 2004 *

In Case C-227/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 7 June 2001,

**Commission of the European Communities**, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain**, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.N. Cunha Rodrigues, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: L. Poiares Maduro,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 February 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2004,

gives the following

## Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that in failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations

under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

## Legal framework

*Community legislation*

2 According to the first and sixth recitals in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

3 As is clear from the fifth recital in the preamble, to that end the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

4 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

5 The provisions of Directive 85/337 relevant in this case, in their wording prior to Council Directive 97/11/EC of 3 March 1997 amending that directive (OJ 1997 L 73, p. 5), are as follows.

6 Article 1 of Directive 85/337 reads:

— '1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

— 2. For the purposes of this Directive:

— "project" means:

— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape ...'.

7 Article 2 of the Directive states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter

alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

...'

8 Article 3 of the Directive provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

9 Article 4 of Directive 85/337, to which the second subparagraph of Article 2(1) thereof refers, states:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

10 Point 7 of Annex I to that directive refers, among other projects, to 'construction of ... lines for long-distance railway traffic'.

11 Point 12 of Annex II to the Directive refers, inter alia, to 'modifications to development projects included in Annex I'.

12 Article 5(1) and (2) of Directive 85/337 state:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.'

13 According to Article 6(2) of the Directive:

'Member States shall ensure that:

— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

— the public concerned is given the opportunity to express an opinion before the project is initiated.'

14 Article 12 of Directive 85/337 provides:

'1. Member States shall take the measures necessary to comply with this Directive within three years of its notification.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

15 The Directive was notified to the Member States on 3 July 1985.

*National legislation*

16 The Spanish legislation which implements point 7 of Annex I to Directive 85/337 lists, among the projects which must be made subject to an environmental impact assessment procedure, 'long-distance railway lines which involve a new route'.

## The pre-litigation procedure

17 Following receipt of a complaint in May 1999 and an exchange of letters between the Commission and the Spanish authorities, the Commission gave the Kingdom of Spain formal notice by letter of 13 April 2000 to submit its observations within two months. It took the view that those authorities had incorrectly implemented Directive 85/337 by not subjecting to a prior environmental impact assessment the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor'.

18 Since it was not satisfied with the explanations provided by the Spanish Government, the Commission sent a reasoned opinion to the Kingdom of Spain on 26 September 2000, requesting that it adopt, within two months from the notification of that opinion, the measures necessary to comply therewith.

19 After the Spanish Government replied to that reasoned opinion by a letter of 2 January 2001 in which it repeated its earlier arguments, the Commission decided to bring the present action.

## The application

20 The Commission complains that the Spanish Government failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337 by not carrying out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of

the project known as the 'Mediterranean corridor' linking the Spanish region of Levante to Catalonia and the French border.

*Admissibility*

21 At the hearing, the Spanish Government challenged the admissibility of the action on the ground that the application was based on a complaint different from that relied on during the pre-litigation procedure.

22 That Government maintains that during the pre-litigation procedure, the subject-matter of the dispute was clearly limited to a 13.2-km-long section of the railway line which separates Las Palmas from the town of Oropesa. At that stage of the proceedings the Commission complained more particularly that the Spanish Government had not complied with the requirements of Directive 85/337 as regards a 7.64-km-long part of that section, where the route was moved a maximum of 800 m to the west in order to bypass the town of Benicasim. The Commission did not, however, in either the letter of formal notice or the reasoned opinion, refer to the doubling of the track on the rest of the section, which is 13.2 km in length; in particular, it at no point stated that the doubling of existing track falls within the scope of the Directive.

23 In its application, the Commission insists that such a doubling of the track of an existing railway line should be held to be subject to the requirements of the Directive. In addition, it refers to the entire length of the Valencia-Tarragona line, which is 251 km.

24 Under those conditions, the subject-matter of the dispute has clearly been expanded.

25 First of all, in this case, the Court notes that the validity of the reasoned opinion and of the procedure which preceded it is not in dispute. Nevertheless, the Spanish Government maintains that the complaint put forward in the application differs from that contained in the letter of formal notice and the reasoned opinion.

26 It is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18).

27 In the present case, however, it cannot be maintained that the subject-matter of the dispute as defined during the pre-litigation procedure has been expanded or modified.

28 First, in response to a question by the Court, the Commission confirmed that the subject-matter of the present action is limited to a 13.2-km-long section between Las Palmas and Oropesa and that, contrary to the Spanish Government's assertion, it in no way extends to the whole of the route of the Valencia-Tarragona line, which is 251 km in length.

29 Secondly, both the letter of formal notice and the reasoned opinion sent by the Commission to the Kingdom of Spain refer, as does the application, to the 'Las Palmas-Oropesa section', which the defendant Government does not deny is 13.2 km in length. Moreover, the defence lodged by the Spanish Government shows unambiguously that it in no way misunderstood the scope of the proceedings, since it itself considers that the project at issue concerns the 13.2 km section which separates the towns of Las Palmas and Oropesa, on which the existing track is doubled and adapted for speeds of up to 220 km/h, a 7.64-km-long section of which constitutes a new route intended to bypass the town of Benicasim.

30 Consequently, the present action is admissible.

*Substance*

Arguments of the parties

31 In support of its action, the Commission states that it is common ground that the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', was not made subject to the environmental impact assessment procedure laid down in Directive 85/337.

32 According to the Commission, such an assessment was mandatory in the present case, since it involved one of the projects mentioned in point 7 of Annex I to the Directive, to which Article 4(1) thereof refers.

33 The Commission infers from this that Directive 85/337 was incorrectly implemented in respect of the project in question and that the Kingdom of Spain has therefore infringed Articles 2, 3, 5(2) and 6(2) of the Directive.

34 In the opinion of the Commission, none of the reasons relied on by the Spanish Government to justify its method of proceeding in the present case can be accepted.

35 The line of argument put forward by that Government conflicts with the letter of Directive 85/337, and in particular the actual wording of point 7 of Annex I thereto, and is incompatible with the spirit and purpose of that directive.

36 The Spanish Government admits that the project at issue was not formally made subject to the environmental impact assessment procedure laid down by Directive 85/337, but it takes the view that that procedure was not necessary in the present case.

37 That directive was not applicable since the work undertaken merely consisted in improving an already existing railway line by doubling the original single track without constructing a new railway line and with no need for a new long-distance route.

38 That view is supported by the wording of the national legislation transposing point 7 of Annex I to Directive 85/337 into Spanish law, which the Commission at no time claimed was incompatible with the requirements of the Directive. Moreover, as regards the wording of point 7, the English-language version also uses the term 'lines' rather than the term 'tracks'.

39 In addition, the project at issue is not intended for long-distance traffic within the meaning of point 7, since it links two towns which are only 13.2 km distant from one another.

40 Moreover, the doubling of the tracks does not in fact have environmental effects beyond those caused by the construction of the original line and, in any event, the Commission has not furnished evidence of the existence of such effects.

41 The Spanish Government adds, in the alternative, that the requirements of the Directive have in the present case been complied with in substance, since the revision of the general development plan for Benicasim, which took place in 1992, was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration. Since the subject-matter of that revision was precisely the setting aside of an area for construction of the loop line around the town of Benicasim, a new study on the effects of the work undertaken for that purpose was not required.

42 Finally, the competent national authorities acted in good faith in the present case and demonstrated their cooperative spirit by accepting the Commission's position as regards the part of the project where it was still possible to do so, since they submitted 'modification No 3' of that project, which in essence relates to the construction of a 754.5-m-long viaduct, to a public inquiry before completion of the works.

Findings of the Court

43 Given the line of argument of the defendant Government, in order to assess the merits of the Commission's action it is appropriate to establish whether Directive 85/337 and, in particular, the obligation which it lays down to carry out an environmental impact assessment, apply to the project in question and, if so, whether that project was carried out in compliance with the rules set out in that directive.

44 As regards the first point, the argument put forward by the Spanish Government that point 7 of Annex I to the Directive refers only to the construction of a new line in the sense of a new railway connection between two towns and therefore does not apply to a doubling of existing tracks cannot be upheld.

45 While it is not necessary in the context of these proceedings to give a ruling on whether all the language versions of point 7 of Annex I to Directive 85/337 use a

term equivalent to the term 'tracks' ('vias' in the Spanish-language version) or on the compatibility with the Directive of the Spanish legislation adopted to implement that provision inasmuch as it uses the term 'lines' ('líneas'), it is clear from the Court's case-law that the need for a uniform interpretation of Community law requires, in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, inter alia, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28).

46 The Court has already held that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (*Kraaijeveld and Others*, cited above, paragraphs 31 and 39).

47 In particular, Articles 1(1) and 2(1) and the first, fifth, sixth, eighth and 11th recitals in the preamble make clear that the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects (see to that effect Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52).

48 On the basis of those considerations alone, point 7 of Annex I to Directive 85/337 must be understood to include the doubling of an already existing railway track.

49 A project of that kind can have a significant effect on the environment within the meaning of that directive, since it is likely to have lasting effects on, for example, flora and fauna and the composition of soil or even on the landscape and produce significant noise effects, inter alia, so that it must be included in the scope of the Directive. The objective of Directive 85/337 would be seriously undermined if that type of project for the construction of new railway track, even parallel to existing track, could be excluded from the obligation to carry out an assessment of its effects on the environment. Accordingly, a project of that sort cannot be considered a mere modification to an earlier project within the meaning of point 12 of Annex II to the Directive.

50 Moreover, that conclusion is all the more obvious when, as in the present case, the execution of the project at issue involves a new track route, even if that applies only to part of the project. Such a construction project is by its nature likely to have significant effects on the environment within the meaning of Directive 85/337.

51 The argument of the Spanish Government that the conditions for applying point 7 of Annex I to the Directive are not fulfilled, since the project in question does not relate to long-distance traffic within the meaning of that provision but rather only to a 13.2 km section between neighbouring towns, is also without substance.

52 As the Commission rightly maintains, the project in question is part of a 251-km-long railway line between Valencia and Tarragona, which forms part of the project known as the 'Mediterranean corridor', linking the Spanish region of Levante to Catalonia and the French border.

53 If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.

54 In the light of all those considerations, the project which is the subject of the Commission's action, which concerns laying a supplementary 13.2-km-long railway track, a 7.64 km section of which covers a new route in order to bypass the town of Benicasim, and which is part of a 251-km-long railway line, belongs in one of the categories listed in Annex I to Directive 85/337 which must in principle be made subject to a mandatory systematic assessment pursuant to Articles 4(1) and 5(1) of the Directive.

55 As to whether that project was carried out in compliance with the rules set out in Directive 85/337, it should be noted that the Spanish Government admits that the project as such was not made subject to the requirements of the Directive as regards assessment of its effects on the environment. Moreover, that Government does not claim that the conditions laid down in Article 2(3) of the Directive are fulfilled in this case.

56 Next, as regards the Spanish Government's argument that the 1992 revision of the general development plan for Benicasim was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration, it must be pointed out that even if that plan included all the information necessary to fulfil the

minimum conditions set by Directive 85/337 it could not, in any event, be considered adequate since, as the Commission claims without being seriously contradicted on that point by the defendant Government, the plan involves only the territory of the town of Benicasim and, more specifically, the bypass around that town, while the parties agree that the contested project is far broader. It follows that, at least for the remaining part of that project, the Directive's requirements have not been correctly applied.

57 Nor is the Spanish Government's assertion that the competent authorities complied with the requirements of that directive as regards 'modification No 3' of the project justified. First, according to the defendant Government, the information intended for the public was published only after work on the project had begun. Such a method of proceeding is clearly contrary to the requirements of Article 6(2) of Directive 85/337, which states that the public concerned is to be given the opportunity to express an opinion before the project is initiated. The fact, invoked by the Spanish Government, that the public inquiry took place before the work was completed is therefore wholly irrelevant. Secondly, that procedure related to only one part of the section in question, which is 13.2 km in length, namely 'modification No 3', relating essentially to the construction of a viaduct of some 750 m in length.

58 Moreover, the fact that the national authorities acted in good faith is also irrelevant. It is settled case-law that an action for failure to fulfil obligations is objective in nature and the fact that a failure to fulfil obligations results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure (Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19).

59 Finally, as regards the Spanish Government's contention that the Commission failed to provide a proper statement of reasons for the alleged infringement since it did not furnish evidence that the doubling of an existing track has effects on the environment beyond those produced by the construction of the original line, suffice it to point out that the relevant criterion for the implementation of Directive 85/337 is the significant effect that a particular project is 'likely' to have on the environment (see, in that regard, Article 1(1) of the Directive and the fifth and sixth recitals in the preamble thereto). Under those conditions, it is not for the Commission to establish the concrete negative effects that a project in fact has on the environment. On the other hand, the Commission has in the present case proved to the requisite legal standard that the project in question falls within the scope of one of the provisions of Annex I to that directive and must therefore be made subject to a mandatory environmental impact assessment. Moreover, it is indisputable that a project of this type is such as to create significant new nuisances, even if only as the result of the adaptation of the railway line with a view to traffic which can attain a speed of 220 km/h.

60 In the light of all the foregoing considerations, the Commission's application must be considered well-founded.

61 Consequently, it must be held that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337.

## Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment;**

2. **Orders the Kingdom of Spain to pay the costs.**

Signatures.

# JUDGMENT OF THE COURT (First Chamber)

10 June 2004 *

In Case C-87/02,

**Commission of the European Communities,** represented by M. van Beek and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Italian Republic,** represented by I.M. Braguglia, acting as Agent, assisted by M. Massella Ducci Teri, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo (Italy) e Giulianova, alla strada statale SS 80'), of a

* Language of the case: Italian

type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas (Rapporteur), A. La Pergola, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 January 2004,

gives the following

## Judgment

1 By an application lodged at the Registry of the Court on 13 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (Italy) (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80', hereinafter the 'Lotto zero' project), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

## Legal background

### *Community legislation*

2 Directive 85/337 applies, according to Article 1(1) thereof, to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

3 Article 1(2) of the Directive defines a project as:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

4 Article 2(1) of Directive 85/337 states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II to Directive 85/337, relating to projects subject to Article 4(2) thereof, lists in paragraph (d) of point 10, headed 'Infrastructure projects':

'Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)'.

7 Article 5 of Directive 85/337 in essence specifies the minimum information to be provided by the developer. Article 6 requires Member States to take the measures necessary to ensure that the authorities and members of the public concerned are informed and are able to express an opinion before the project is initiated. Article 8 requires the competent authorities to take into consideration information gathered pursuant to Articles 5 and 6. Article 9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

8 Article 12 of Directive 85/337 provides that Member States are to take the measures necessary to comply with the Directive within three years of its notification. It was notified to Member States on 3 July 1985.

9 That directive was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), Article 3(1) of which provides for implementation by 14 March 1999 at the latest. Directive 97/11 was therefore not applicable in the present case at the material time.

10 Article 4(2) et seq. of Directive 85/337, as amended by Directive 97/11, states:

'2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

*National legislation*

11 The Decree of the President of the Republic of 12 April 1996, entitled 'Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della L. 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale' (Policy and coordination measure for the application of Article 40(1) of Law No 146 of 22 February 1994 on the provisions relating to the assessment of environmental effects) (GURI No 210, of 7 September 1996, p. 28, hereinafter 'the Decree of 12 April 1996') states, in Article 1:

'1. The Regions and the Autonomous Provinces of Trento and Bolzano shall ensure that an environmental impact assessment is carried out for projects listed in Annexes A and B, in conformity with Directive 85/337/EEC, following the guidelines contained in the present measure.

...

4. Projects included in Annex B which are situated, even in part, within the protected natural areas defined by Law No 394 of 6 December 1991 shall be made subject to an assessment of their effects on the environment.

...

6. For projects listed in Annex B which are not situated in a protected natural area, the competent authority shall ascertain, in accordance with the rules laid down in Article 10 and on the basis of the information provided in Annex D, whether the characteristics of a project require an assessment of its effects on the environment to be undertaken.'

12 Article 10(1) and (2) of the Decree of 12 April 1996 states:

'1. For the projects referred to in paragraph 6 of Article 1, the developer or authority which submits the proposal shall request the screening provided for in that paragraph. The information which the proposing developer or authority must provide for that screening shall contain a description of the project and the information necessary in order to understand and assess the main effects which the project could have on the environment.

2. The competent authority shall take a decision within 60 days on the basis of the information required under Annex D and shall identify potential measures making it possible to mitigate effects and to monitor works and/or installations. In the event that the competent authority does not respond within the period referred to above, the project shall be considered exempted from the procedure. The Regions and Autonomous Provinces of Trento and Bolzano shall adopt the measures necessary to make public the list of projects for which screening has been requested and the results thereof.'

13 Annex B to the Decree of 12 April 1996 on the types of projects referred to in Article 1(4) of that decree lists in point 7(g) and (h):

'(g) Secondary outer roads,

(h) Construction of relief roads in urban areas or reinforcement of existing roads of four or more lanes of a length greater than 1 500 metres in an urban area.'

14 Annex D to the Decree of 12 April 1996 specifies the information which the competent authority must take into account when examining the characteristics and location of a project in the context of the screening provided for in the sixth paragraph of Article 1 of that decree.

15 The Abruzzo Region transposed the Decree of 12 April 1996 by Regional Law No 112, of 23 September 1997, entitled 'Norme urgenti per il recepimento del decreto del Presidente della Repubblica 12 aprile 1996' (Urgent rules for the transposition of the Decree of the President of the Republic, of 12 April 1996).

**Pre-litigation procedure**

16 It is apparent from the application made by the Commission that on 11 May 1998 it asked the Italian authorities to provide information on the 'Lotto zero' project. According to the information available to the Commission at the time, consent for

that project was given without its being made subject to an environmental impact assessment and to screening intended to determine whether an assessment of its effects on the environment was necessary.

17 The Commission had been informed, in the context of a question put by a Member of the European Parliament, that the purpose of the project was to construct a stretch of express relief road 10.50 metres wide, comprising four viaducts and four tunnels. The road, which would cross an area close to residences some metres from the historic centre of the commune of Teramo in Abruzzo (Italy), would affect the bed of the Tordino river, the subject of the environmental improvement project known as 'Fiume Tordino medio corso', financed by the Community. That area was proposed by the Italian Republic as a site of Community importance under the procedure intended to set up the European ecological network known as 'Natura 2000', within the meaning of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

18 By letter of 23 July 1998, the Republic of Italy confirmed to the Commission that the project concerned construction of a two-lane road 10.50 metres in width and of an unspecified length, one section of which, crossing the territory of the commune of Teramo, would affect the right part of the basin of the Tordino river and would measure 5 440 metres in length, including 2 260 metres of viaduct and 930 metres of tunnel.

19 It emerges from the correspondence between the Commission, the Italian Environment Ministry and the Permanent Representation that, on 12 March 1999, the Abruzzo Region gave its consent to carrying out the works and that the special commissioner appointed for that work decided not to subject the operation to either an environmental impact assessment or screening.

20 By letter of 21 May 1999, the Ministry drew attention to the requirements imposed by the Decree of 12 April 1996 and asked the special commissioner for the project and the Abruzzo Region to give reasons for the decision not to subject that project to either an impact assessment or screening. The special commissioner then asked the Abruzzo Region to initiate the regional procedures for screening environmental compatibility, in accordance with the Decree of 12 April 1996.

21 The project was subjected to the procedure intended to ascertain whether it was required to undergo an assessment of its effects on the environment. Since the Abruzzo Region considered that the area in question was not part of a protected area within the meaning of Law No 394/91 and Regional Law No 38/96, it decided, by means of Regional Decree No 25/99, prot. No 3624 of 15 November 1999, to approve the screening of environmental compatibility and thereby exempt the project from the environmental impact assessment procedure.

22 By letter of 30 May 2000, sent to the Commission by a note of 16 June 2000 from the Permanent Representation, the Italian Environment Ministry pointed out that Regional Decree No 25/99 had been adopted following the favourable opinion by the Comitato di Coordinamento Regionale sulla Valutazione di Impatto Ambientale (Regional Coordinating Committee on environmental impact assessment, hereinafter 'the Coordinating Committee') No 3/76 of 22 October 1999, which for its part referred back to a civil engineering opinion which was not mentioned in Regional Decree No 25/99. The Decree provided no explanation for that omission and no argument in support of the decision taken by the regional administration.

23 On 24 October 2000, the Commission sent a letter of formal notice to the Italian Republic, stating that the information available to it did not indicate that the Abruzzo Region had subjected the project in question, which is listed in Annex II to Directive 85/337, to screening intended to establish whether its characteristics required an assessment within the meaning of Articles 5 to 10 of the Directive.

24 Since the Commission did not consider the various responses by the Italian authorities to that formal notice to be satisfactory, it delivered a reasoned opinion to the Italian Republic by letter of 18 July 2001, giving it two months in which to adopt the measures required in order to comply with it.

## Procedure before the Court

25 The Court decided to ask various questions of the Italian Republic and of the Commission and to request that they produce several documents. In particular, it asked the Italian Republic to produce the civil engineer's opinion referred to in the context of the pre-litigation procedure. After examining the responses and documents, the Court decided, in accordance with Article 44a of the Rules of Procedure, to give judgment without a hearing.

## Substance

*Arguments of the parties*

26 The Commission points out that, under the first paragraph of Article 4(2) of Directive 85/337, projects listed in Annex II are to be made subject to an assessment, in accordance with Articles 5 to 10 of the Directive, when Member States consider that their characteristics require it. The second paragraph of Article 4(2) of Directive 85/337 authorises Member States, inter alia, to set criteria or thresholds in order to determine which of the projects listed in the classes set out in Annex II must be made subject to an assessment in accordance with Articles 5 to 10 of that directive.

27 The Commission states that, as is clear from Case C-435/97 *WWF and Others* [1999] ECR I-5613, in the absence of a legislative measure which specifies, from the outset and in its entirety, which projects to subject to an environmental impact assessment procedure, Member States have the power to exclude a specific project from that procedure only following a concrete examination of that project which makes clear, on the basis of a full screening, the reasons why it cannot have an effect on the environment.

28 In the Decree of 12 April 1996, the Italian Republic failed to specify, from the outset and in their entirety, in accordance with the second paragraph of Article 4(2) of Directive 85/337, what projects must be made subject to an environmental impact assessment. It merely referred to those likely to be made subject to screening intended to establish the need to carry out an environmental impact assessment. Such is the case for the projects listed in Annex B to the Decree of 12 April 1996, in particular in point 7(g) (secondary outer roads) or 7(h) (construction of relief roads in urban areas or widening of an existing road to four or more lanes, of a length greater than 1 500 metres within an urban area), which correspond to the projects listed in Annex II to Directive 85/337, in particular in point 10(d) and (e) (construction of airfields, roads, harbours, including fishing harbours).

29 Since the project 'Lotto zero' corresponds to the projects provided for by those provisions, it should have been made subject to screening, and clear and precise reasons should have been given for the decision not to carry out an assessment in accordance with Articles 5 to 10 of Directive 85/337. However, the decision not to make the project subject to assessment makes no mention of any established assessment criteria and fails to explain whether the screening referred to in the sixth paragraph of Article 1 of the Decree of 12 April 1996 was carried out or, if it was, how it was carried out. The statement of reasons provided for Regional Decree No 25/99 therefore suggests that the Abruzzo Region did not ascertain whether it was necessary for the project to be made subject to an assessment in accordance with Articles 5 to 10 of Directive 85/337. In its reply, the Commission states that the opinion of the Coordinating Committee referred to in Decree No 25/99 was never brought to its attention.

30 It points out that, even if the content and mechanism of the screening referred to in Article 4(2) of Directive 85/337 were elaborated only by Directive 97/11, which amends Directive 85/337 but which is not applicable in the present case, it is not acceptable that it be completely ignored without any reasons being given for the decision.

31 In addition, the argument that the rejection by national courts of applications brought by environmental protection associations prevents the Commission from ascertaining whether a Member State has fulfilled its obligations under the Directive is without any foundation and contrary to the Court's case-law. It is in fact clear from *WWF*, cited above, that it is for the national court to ascertain whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. However, that does not preclude the Court's ruling on the obligations for Member States which result from Article 4(2) of Directive 85/337 and, accordingly, the Commission, on the basis of the powers conferred on it under Article 226 EC, has the duty to draw attention to a failure to comply with a provision of Community law.

32 Finally, the Commission points out that a Member State must deal with infringements not only by its central government but also those by its local and decentralised authorities.

33 The Italian Republic recalls the circumstances in which the Abruzzo Region adopted Regional Decree No 25/99 of 15 November 1999.

34 As regards the reasons for that decision, it maintains that Article 4(2) of Directive 85/337 allows a case-by-case examination to determine whether the project must be made subject to assessment. That directive thus provides for the adoption of an express measure before subjecting a project to an assessment. Accordingly, it is

warranted to allow the competent authorities not to respond when no assessment is needed and not to require them to adopt formal measures unless the project must be made subject to an impact assessment.

35 Such would be the procedure under Article 10(2) of the Decree of 12 April 1996, by which the competent authority may fail to respond where it takes the view that no assessment is needed, which is tantamount to a decision to close the screening procedure.

36 The Italian Republic in any event denies the alleged infringement, since the national competent authority adopted an explicit measure, namely Decree No 25/99, on the basis of an opinion by the Coordinating Committee.

37 It points out that, as is clear from the judgment in *WWF*, cited above, it is for the national court to review whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. In the present case, the project 'Lotto zero' was subjected to review by the Tribunale amministrativo regionale del Lazio as the result of an application introduced by the Associazione Italiana Nostra-Onlus and the Associazione Italiana per il World Wildlife Fund. By an order of 21 June 2000, that court rejected the application to suspend implementation of the contested decisions relating to that project.

*Findings of the Court*

38 First of all, it should be recalled that the fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member

State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law (Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24; also, to that effect, the order in Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 7). Therefore, it is not relevant in the present case that the infringement results from a decision by the Abruzzo Region.

39 The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24).

40 As regards the present action, in accordance with the first paragraph of Article 4(2) of Directive 85/337, projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require. The second paragraph of Article 4(2) of the Directive provides that 'Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

41 The Court has already held that the second paragraph of Article 4(2) mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of Directive 85/337 (*WWF*, paragraph 42).

42 Consequently, Directive 85/337 confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects (*WWF*, paragraph 43).

43 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects (*WWF*, paragraph 44).

44 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis

of a comprehensive screening, be regarded as not being likely to have such effects (*WWF*, paragraph 45).

45 In the present case, the infringement relates to a project to construct a road which, in accordance with the Italian legislation which transposes Directive 85/337 and with the Directive itself, should have been screened to determine whether it needed to be subjected to an assessment. The Commission claims that the Italian Republic in essence failed to state reasons for the decision by the Abruzzo Region not to carry out an impact assessment, which suggests that no preliminary screening was carried out.

46 Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47 As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48 That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49 It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

50 In conclusion, it must be held that since the Abruzzo Region did not ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero — Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Directive 85/337, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

## Costs

51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Declares that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.**

2. **Orders the Italian Republic to pay the costs.**

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 10 June 2004.

Registrar President of the First Chamber

R. Grass P. Jann

# JUDGMENT OF THE COURT (Fifth Chamber)

7 January 2004 *

In Case C-201/02,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), for a preliminary ruling in the proceedings pending before that court between

**The Queen** on the application of **Delena Wells**

and

**Secretary of State for Transport, Local Government and the Regions,**

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, D.A.O. Edward and A. La Pergola, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Wells, by R. Gordon QC and J. Pereira, barrister, instructed by R. Buxton, solicitor,

— the United Kingdom Government, by P. Ormond, acting as Agent, D. Elvin QC and J. Maurici, barrister,

— the Commission of the European Communities, by X. Lewis, acting as Agent, and N. Khan, barrister,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Wells, represented by R. Gordon and J. Pereira, instructed by S. Ring, solicitor; the United Kingdom Government, represented by R. Caudwell, acting as Agent, and D. Elvin; and the Commission, represented by X. Lewis and N. Khan, at the hearing on 12 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

## Judgment

1 By order of 12 February 2002, received at the Court on 6 May 2002, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

2 Those questions were raised in proceedings between Mrs Wells and the Secretary of State for Transport, Local Government and the Regions (hereinafter 'the Secretary of State') concerning the grant of a new consent for mining operations at Conygar Quarry without an environmental impact assessment having first been carried out.

## Legal context

### *Community legislation*

3 As stated in the fifth recital in its preamble, Directive 85/337 is intended to introduce general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures for public and private projects likely to have a major effect on the environment.

4 Article 1(2) of the directive defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

5 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

6 In Article 4, the directive divides projects into two wide categories: those likely by their nature to give rise to significant effects on the environment and those which will not necessarily do so in all cases. Article 4(2) thus provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Point 2(c) of Annex II to the directive refers to projects for 'extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash'.

*National legislation*

8 Prior to the Town and Country Planning Act 1947, the Town and Country Planning (General Interim Development) Order 1946 empowered the competent authorities to grant, by interim development orders, consents for mineral

extraction ('old mining permissions') in order to respond to the need for construction materials which arose during the period immediately following World War II.

9 Since then, the Town and Country Planning Act, as enacted in 1947 and in its subsequent versions, has constituted the principal legal instrument relating to land planning in the United Kingdom.

10 The Act lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission.

11 Thus, under sections 97 and 100 of the Town and Country Planning Act 1990, the competent authorities have the power to revoke or modify any permission on planning grounds. The power to revoke a permission may be exercised at any time before the operations authorised have been completed.

12 By virtue of paragraphs 1 and 11 of Schedule 9 to the Town and Country Planning 1990, the competent authorities may by order require discontinuance of the use of land for the winning and working of minerals or impose certain conditions on the continuance of such use.

13 Section 22 of the Planning and Compensation Act 1991 lays down a special set of rules for old mining permissions.

14 Section 22(3) of the Planning and Compensation Act 1991 provides that if no development has, at any time in the period of two years ending on 1 May 1991, been carried out to any substantial extent, operations may not resume until 'the conditions to which the [old mining] permission is to be subject' have been determined and registered in accordance with section 22(2). On the other hand, if no application for registration is made before 25 March 1992, the old mining permission will cease to have effect (section 22(4) of the Act and paragraph 1(3) of Schedule 2 thereto).

15 Schedule 2 to the Planning and Compensation Act 1991 describes in detail the procedures for determining the registration conditions.

16 Under paragraphs 1 and 2 of Schedule 2 to the Planning and Compensation Act 1991, applications for registration and for determination of planning conditions are to be made to the competent mineral planning authority (hereinafter 'MPA').

17 If the conditions determined by the MPA differ from those set out in the application, the applicant may appeal to the Secretary of State (paragraph 5(2) of Schedule 2 to the Planning and Compensation Act 1991).

18 In accordance with section 22(7) of the Planning and Compensation Act 1991, the provisions relating to old mining permissions are to have effect as if they were included in the Town and Country Planning Act 1990. That presumption has the effect of integrating the provisions relating to old mining permissions into the general land use planning regime, in so far as no specific provision was adopted in the Planning and Compensation Act 1991.

19 Under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, mining permissions granted pursuant to the Town and Country Planning Act 1990 are subject to environmental impact assessment in accordance with Directive 85/337. The regime prescribed in section 22 of the Planning and Compensation Act 1991 for old mining permissions was not, on the other hand, considered to be subject to such an environmental impact assessment procedure.

## The main proceedings and the questions referred for a preliminary ruling

20 In 1947 an old mining permission was granted for Conygar Quarry by interim development order under the Town and Country Planning (General Interim Development) Order 1946.

21 Conygar Quarry is divided into two sections, of slightly more than 7.5 hectares each, separated by a road on which Mrs Wells's house is situated. Mrs Wells bought her house in 1984, that is to say 37 years after the permission had been granted, but at a time when the quarry had long since been dormant. However, in June 1991 operations recommenced for a short period.

22 The site is recognised to be environmentally extremely sensitive. The area in or adjacent to which the quarry lies is subject to several designations of nature and environmental conservation importance.

23 At the beginning of 1991, the owners of Conygar Quarry applied to the competent MPA for registration of the old mining permission under the Planning and Compensation Act 1991.

24 Registration was granted by a decision of 24 August 1992, which stated that no development could lawfully be carried out unless and until an application for the determination of new planning conditions had been made to the MPA and finally determined ('the registration decision').

25 The owners of Conygar Quarry therefore applied to the competent MPA for determination of new planning conditions.

26 After the MPA, by decision of 22 December 1994, had imposed more stringent conditions than those submitted by the owners of Conygar Quarry, the latter exercised their right of appeal to the Secretary of State.

27 By decision of 25 June 1997 (hereinafter, together with the decision of 22 December 1994, 'the decision determining new conditions'), the Secretary of State imposed 54 planning conditions, leaving some matters to be decided by the competent MPA.

28 Those matters were approved by the competent MPA by decision of 8 July 1999 (hereinafter 'the decision approving matters reserved by the new conditions').

29 Neither the Secretary of State nor the competent MPA examined whether it was necessary to carry out an environmental impact assessment pursuant to Directive 85/337. At no time was a formal environmental statement considered.

30 By letter of 10 June 1999, Mrs Wells requested the Secretary of State to take appropriate action, namely revocation or modification of the planning permission, to remedy the lack of an environmental impact assessment in the consent procedure. Since she received no reply to her request, she brought proceedings before the High Court of Justice.

31 Pursuant to an undertaking given to the High Court at the first hearing, the Secretary of State, by letter of 28 March 2001, provided a reasoned response to Mrs Wells's letter, in which he declined to revoke or modify the planning permission. Mrs Wells then amended her initial application to include a challenge to the decision contained in the letter of 28 March 2001.

32 Since the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), considered that interpretation of Community law was needed in the case before it, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'[1] Whether an approval of a new set of conditions on an existing permission granted by an Interim Development Order ("old mining permission") pursuant to section 22 and Schedule 2 of the Planning and Compensation Act 1991 is a "development consent" for the purposes of the EIA [Environmental Impact Assessment] Directive.

[2] Whether, following the approval of a new scheme of conditions on an IDO "old mining permission" under the Planning and Compensation Act 1991, the approval of further matters required under the new scheme of conditions is itself capable of being a "development consent" for the purposes of the EIA Directive.

[3] If the answer to [1.] is "yes" but [2.] is "no", is the Member State nevertheless under a continuing duty to remedy its failure to require EIA, and if so, how?

[4] Whether (i) it is open to individual citizens to challenge the State's failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. by "horizontal direct effect" or by the imposition of burdens or obligations on individuals by an emanation of the State.

[5] If the answer to [4.](ii) is "yes" what are the limits of such prohibitions on direct effect in the present circumstances and what steps may the UK lawfully take consistent with the EIA Directive?'

## Consideration of the questions referred for a preliminary ruling

*The first and second questions: the obligation to carry out an environmental impact assessment*

33 By its first two questions, which it is appropriate to consider together, the referring court essentially asks whether Article 2(1) of Directive 85/337, read in

conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, involve a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

Classification as a 'development consent'

— Admissibility

34 While recognising that Community law favours giving an autonomous interpretation to concepts used in Community measures, the Commission contends that in Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923 the Court held that the question of when 'development consent' is granted is a question of national law. In the Commission's submission, the Court did not resile from that position in Case C-435/97 *WWF and Others* [1999] ECR I-5613 and Case C-287/98 *Linster* [2000] ECR I-6917. The question whether certain procedural measures in national law are development consents for the purpose of Directive 85/337 is therefore inadmissible.

35 As to that, a question referred by a national court for a preliminary ruling is inadmissible only if it is quite obvious that the question does not concern the interpretation of Community law or that it is hypothetical (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraphs 25 and 32, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 10, and Case C-143/94 *Furlanis* [1995] ECR I-3633, paragraph 12).

36 That is not the case here.

37 The question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of Article 1(2) of Directive 85/337 is a question concerning the interpretation of Community law. The Court has consistently held that, in light of both the principle that Community law should be applied uniformly and the principle of equality, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and *Linster*, cited above, paragraph 43).

38 Accordingly, the question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of Article 1(2) of Directive 85/337 is admissible.

— Substance

39 The United Kingdom Government contends that neither the decision determining new conditions nor the decision approving matters reserved by the new conditions constitutes development consent within the meaning of Article 1(2) of Directive 85/337.

40 It states with regard to the decision determining new conditions that development was authorised many years before Directive 85/337 created obligations for the Member States. The determination of conditions under the Planning and Compensation Act 1991 involves merely the detailed regulation of activities for which the principal consent has already been given. In the United Kingdom Government's submission, the reasoning with regard to the decision determining new conditions and the decision approving matters reserved by the new conditions is therefore the same as in 'pipeline' cases (see paragraph 43 of this judgment). For reasons of legal certainty, the directive does not apply to such projects.

41 As regards the decision approving matters reserved by the new conditions, the United Kingdom Government observes that the decision likely to affect the environment had already been taken and the approval of details may not extend beyond the parameters set by the initial determination of the scheme of planning conditions.

42 As to those submissions, under Article 2(1) of Directive 85/337 projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to such effects before consent is given.

43 This does not apply only where consent was granted before 3 July 1988 (an old consent), that is to say before the time-limit laid down for implementation of Directive 85/337, or where consent was granted after 3 July 1988 but the consent procedure was initiated before that date ('pipeline' projects) (see, to this effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32, and

*Gedeputeerde Staten van Noord-Holland*, cited above, paragraph 23). The directive thus requires an assessment of the environmental effects of the project in question in the case of new consents.

44 In the main proceedings, the owners of Conygar Quarry were obliged under the Planning and Compensation Act 1991, if they wished to resume working of the quarry, to have the old mining permission registered and to seek decisions determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission would have ceased to have effect.

45 Without new decisions such as those referred to in the previous paragraph, there would no longer have been 'consent', within the meaning of Article 2(1) of Directive 85/337, to work the quarry.

46 It would undermine the effectiveness of that directive to regard as mere modification of an existing 'consent' the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.

47 Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of Conygar Quarry must be considered to constitute, as a whole, a new 'consent' within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof.

48 It should be added that, since those decisions were adopted on 25 June 1997 and 8 July 1999 respectively, an old consent granted before 3 July 1988 is not in issue. Nor is this a 'pipeline' case since the applications leading to the decisions were submitted in 1993 or 1994 and in 1997 or 1998 respectively.

The time at which the environmental impact assessment must be carried out

49 Given that, in the context of a consent procedure comprising several stages, merely establishing that there is a 'development consent' within the meaning of Directive 85/337 cannot provide the referring court with a complete answer as regards the obligation on Member States to carry out an assessment of the environmental effects of the project at issue, it is necessary to consider the question as to when such an assessment must be carried out.

50 As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out 'before consent is given'.

51 According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.

52 Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters

set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

53 The answer to the first two questions must therefore be that Article 2(1) of Directive 85/337, read in conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

*The fourth and fifth questions: the ability of individuals to invoke the provisions of Directive 85/337*

54 By its fourth and fifth questions, which it is appropriate to consider together, the referring court essentially asks whether, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof, or whether the principle of legal certainty precludes such an interpretation.

The 'direct effect' of Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2)

55 According to the United Kingdom Government, acceptance that an individual is entitled to invoke Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof, would amount to 'inverse direct effect' directly obliging the Member State concerned, at the request of an individual, such as Mrs Wells, to deprive another individual or individuals, such as the owners of Conygar Quarry, of their rights.

56 As to that submission, the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (see Case 152/84 *Marshall* [1986] ECR 723, paragraph 48). Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see, to this effect, Case C-221/88 *Busseni* [1990] ECR I-495, paragraphs 23 to 26, and Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, paragraphs 24 and 26).

57 On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned (see to this effect, in particular, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 28 to 33, *WWF and Others*, cited above, paragraphs 69 and 71, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 40 to 55, Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819, paragraphs 33 to 39, and Case C-443/98 *Unilever* [2000] ECR I-7535, paragraphs 45 to 52).

58 In the main proceedings, the obligation on the Member State concerned to ensure that the competent authorities carry out an assessment of the environmental effects of the working of the quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as 'inverse direct effect' of the provisions of that directive in relation to the quarry owners.

The period that elapsed between the decision determining new conditions and Mrs Wells's request that the situation be remedied

59 The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.

60 As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty.

61 Accordingly, the answer to the fourth and fifth questions must be that, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof.

*The third question: the obligation to remedy the failure to carry out an environmental impact assessment*

62 By its third question, the referring court essentially seeks to ascertain the scope of the obligation to remedy the failure to carry out an assessment of the environmental effects of the project in question.

63 The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.

64 As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13).

65 Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). Such particular measures include, subject to the limits laid down

by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

68 So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.

69 In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

70 The answer to the third question must therefore be that under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

Costs

71 The costs incurred by the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), by order of 12 February 2002, hereby rules:

1. Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, read in conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

   In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

2. In circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof.

3. Under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

Jann Edward La Pergola

Delivered in open court in Luxembourg on 7 January 2004.

R. Grass V. Skouris

Registrar President

# JUDGMENT OF THE COURT (Third Chamber)

14 June 2001 *

In Case C-230/00,

**Commission of the European Communities**, represented by H. van Lier, acting as Agent, assisted by M.H. van der Woude and T.E.M. Chellingsworth, lawyers, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Belgium**, represented by A. Snoecx, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully the following:

* Language of the case: Dutch.

— Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23),

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20), and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360, 2 and 8 of Directive 85/337 and Article 189 of the EC Treaty (now Article 249 EC),

THE COURT (Third Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2001,

gives the following

## Judgment

1 By application lodged at the Registry of the Court on 9 June 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully:

— Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23),

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20), and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360, 2 and 8 of Directive 85/337 and Article 189 of the EC Treaty (now Article 249 EC).

## Legal context

2 Directives 75/442, 76/464, 80/68 and 84/360 require the Member States to take the necessary measures to ensure that the activities or industrial plants which they regulate are subjected to prior authorisation.

3 Article 2 of Directive 85/337 provides that the Member States are to adopt all measures necessary to ensure that projects likely to have significant effects on the environment are made subject to an assessment of such effects prior to the grant of authorisation.

4 The provisions of Belgian law which were intended to implement Directives 75/442, 76/464, 80/68, 84/360 and 85/337 imposed a requirement to seek authorisation. However, some of the provisions, particularly those contained in the rules of the Regions of Flanders and Wallonia, provide for a system of tacit grant and refusal of authorisation.

5 If the first-level competent authority does not determine a request for authorisation, it is deemed to have been refused. On the other hand, at second level, in the absence of a decision by the competent authority within the time allowed, authorisation is deemed to have been granted. Such is, essentially, the system laid down in Articles 34 to 42 and 49 to 55 of the Order of the Flemish Government of 6 February 1991 enacting the regulations concerning environmental consent (*Moniteur belge* of 26 June 1991, p. 14269), and in Article 11 of the Decree of the Walloon Regional Council of 27 June 1996 on waste (*Moniteur belge* of 2 August 1996, p. 20685).

## Pre-litigation procedure

6 Taking the view that the Kingdom of Belgium had not properly implemented Directives 75/442, 76/464, 80/68, 84/360 and 85/337, by letter of 6 July 1998, the Commission gave the Member State an opportunity to submit its observations in accordance with the procedure laid down in the Treaty in respect of the failure by a Member State to fulfil its obligations.

7 Since no reply to that letter was received, the Commission sent a reasoned opinion to the Kingdom of Belgium on 18 December 1998.

8 On 6 January 1999 the Commission received a letter from the Belgian Government to which was attached a letter from the Flemish Government of 8 December 1998. In this, the Flemish authorities submitted the observations requested in the Commission's letter of 6 July 1998, emphasising particularly the limited field of application of tacit authorisation and the small number of such authorisations issued. The Flemish Government added that all the competent authorities and all the consultative bodies concerned were well aware of the consequences of the lack of a decision so that they always ensured that every request for authorisation was subjected to a thorough examination.

9 The reply of the Flemish Government to the reasoned opinion, which was received by the Commission on 15 March 1999, repeated the arguments set out in its letter of 8 December 1998. The Regional Government added, however, that tacit authorisation did not imply passive assessment or neglect on the part of the competent authority, as each request for authorisation gave rise to a detailed assessment.

10 Taking the view that the Kingdom of Belgium had not taken all the measures necessary to comply with the reasoned opinion, the Commission decided to bring the present action.

## Substance

11 The Commission submits that the Court has already held that a system of tacit authorisation is incompatible with the requirements of Directive 80/68 (Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 31). That case-law should also apply to the authorisation referred to in Directives 75/442, 76/464, 84/360 and 85/337.

12 The system of tacit authorisation described in paragraph 5 of this judgment is therefore, according to the Commission, incompatible with the provisions of the directives in question.

13 Without disputing the failure of which it is accused, the Kingdom of Belgium confines itself to pointing out, in its defence, that the Flemish Government is in the process of preparing a draft decree on this subject and that the Walloon Government has adopted two preliminary drafts of orders, as well as various measures implementing the Decree of 11 March 1999 relating to environmental consents (*Moniteur belge* of 8 June 1999, p. 21101).

14 In this respect it should be noted that the Court has held, in respect of Directive 80/68, that it 'requires that after each investigation and in the light of the results thereof an express measure, either prohibition or authorisation, must be adopted' (Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 38).

15 Moreover, as was pointed out at paragraph 52 of the judgment in Case C-287/98 *Linster* [2000] ECR I-6917, the essential aim of Directive 85/337 'is that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects'.

16 It follows from that case-law that tacit authorisation cannot be compatible with the requirements of the directives referred to in this action because they prescribe, in the case of Directives 75/442, 76/464, 80/68 and 84/360, systems of prior authorisation, and, in the case of Directive 85/337, assessment procedures preceding the grant of authorisation. The national authorities are therefore required under each of those directives to examine individually every request for authorisation.

17 As for the additional implementing measures which the Regions of Flanders and Wallonia are in the course of adopting, it is appropriate to point out that under the third paragraph of Article 189 of the Treaty, directives are binding upon each Member State to which they are addressed as to the result to be achieved. It follows from settled case-law that that obligation requires compliance with the time-limits set by directives (see, among others, Case 10/76 *Commission* v *Italy* [1976] ECR 1359, paragraphs 11 and 12, and Case C-176/00 *Commission* v *Greece* [2001] ECR I-2063, paragraph 7).

18 In those circumstances it must be held that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully Directives 75/442, 76/464, 80/68, 84/360 and 85/337, the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5 and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360 and 2 and 8 of Directive 85/337.

Costs

19 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Declares that by failing to adopt the laws, regulations and administrative provisions necessary to implement fully:

— Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991,

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community,

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances,

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, as amended by Directive 91/156, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360 and 2 and 8 of Directive 85/337.

2. Orders the Kingdom of Belgium to pay the costs.

Gulmann Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 14 June 2001.

R. Grass

Registrar

C. Gulmann

President of the Third Chamber

# Case C-287/98

## State of the Grand Duchy of Luxembourg

v

## Berthe Linster and Others

(Reference for a preliminary ruling
from the Tribunal d'arrondissement de Luxembourg)

(Environment — Directive 85/337/EEC — Assessment of the effects of certain public and private projects — Specific act of national legislation — Effect of the directive)

Opinion of Advocate General Léger delivered on 11 January 2000 . . . . I-6920
Judgment of the Court, 19 September 2000 . . . . . I-6949

## Summary of the Judgment

1. *Environment — Assessment of the effects of certain projects on the environment — Directive 85/337 — Assessment procedure — Discretion of the Member States — Power of national courts to review whether the limits of the discretion are observed (Council Directive 85/337, Arts 5 and 6(2))*

2. *Community law — Interpretation — Principle of uniform interpretation*

3. *Environment — Assessment of the effects of certain projects on the environment — Directive 85/337 — Scope — Projects the details of which are adopted by a specific act of national legislation — Not covered*
*(Council Directive 85/337, Art. 1(5))*

1. A national court, called on to examine the legality of a procedure for the expropriation in the public interest, in connection with the construction of a motorway, of immovable property belonging to a private individual, may review whether the national legislature kept within the limits of the discretion set by Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, in particular where prior assessment of the environmental impact of the project has not been carried out, the information gathered in accordance with Article 5 has not been made available to the public and the members of the public concerned have not had an opportunity to express an opinion before the project is initiated, contrary to the requirements of Article 6(2) of Directive 85/337.

(see para. 39 and operative part 1)

2. The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given a uniform and autonomous interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question.

(see para. 43)

3. On a proper construction of Article 1(5) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment — which excludes from the directive's scope projects whose details are adopted by a specific act of national legislation — a measure adopted by a parliament after public parliamentary debate constitutes a specific act of national legislation within the meaning of that provision where the legislative process has enabled the

objectives pursued by Directive 85/337, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project.

(see para. 59 and operative part 3)

# JUDGMENT OF THE COURT (Fifth Chamber)

21 September 1999 *

In Case C-392/96,

**Commission of the European Communities**, represented by Richard B. Wainwright, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Ireland**, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, Philip O'Sullivan SC and Niamh Hyland BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Ireland has failed to fulfil its

* Language of the case: English.

obligations under that directive, in particular Article 12 thereof, and under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward and L. Sevón (Rapporteur), Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 September 1998, at which the Commission was represented by Richard B. Wainwright and the Irish Government by James Connolly SC and Niamh Hyland,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

## Judgment

1 By application lodged at the Court Registry on 5 December 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the Directive'), Ireland has failed to fulfil its obligations under the Directive, in particular Article 12 thereof, and under the EC Treaty.

2 The Commission alleges that Ireland has incorrectly transposed Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto, as well as Articles 2(3), 5 and 7.

3 Article 2(1) of the Directive specifies the types of projects which are to be subject to an assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

4 An assessment is always required for certain projects, set out in Annex I to the Directive.

5 As regards other types of projects, Article 4(2) provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II lists a number of projects, including:

'1. Agriculture

...

(b) Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes;

...

(d) Initial afforestation where this may lead to adverse ecological changes and land reclamation for the purposes of conversion to another type of land use;

...

2. Extractive industry

(a) Extraction of peat

...'

7 Article 2(3) of the Directive states:

'Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.'

8 Article 3 provides that an environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project, in particular on human beings, fauna and flora, soil, water, air, climate, landscape, material assets and cultural heritage.

9 Article 5 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member

States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

10 Article 7 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

11 Under Article 12(1) of the Directive, the Member States had to take the measures necessary to comply with the Directive within three years of its notification. As the Directive was notified on 3 July 1985, that period expired on 3 July 1988.

12 Since the Commission considered that Ireland had not transposed the Directive correctly, on 13 October 1989 it sent a first letter of formal notice, in which it alleged that Articles 2 and 4 of the Directive had been inadequately transposed, having regard to the projects listed in Annexes I and II, and that Articles 5 to 9 had not been transposed.

13 In reply to that letter, Ireland sent the text of two legislative measures:

— the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No 349 of 1989) (hereinafter 'S.I. No 349 of 1989'); and

— the Local Government (Planning and Development) Regulations, 1990 (S.I. No 25 of 1990) (hereinafter 'S.I. No 25 of 1990').

14 However, since the Commission took the view that this new legislation still did not produce a correct transposition of the Directive, it sent Ireland a further letter of formal notice on 7 November 1991.

15 By letter of 12 May 1992 Ireland replied that the provisions of the Directive were, in practice, complied with.

16 On 28 April 1993 the Commission, dissatisfied with that reply, sent Ireland a reasoned opinion in which it alleged, in particular, that Ireland had failed:

— to transpose properly Article 4(2) of the Directive and Annex II thereto;

— to make proper provision for exemptions under Article 2(3) of the Directive;

— to specify properly the information to be supplied by the developer in accordance with Article 5 of the Directive; and

— to make proper provision for the information to be supplied to other Member States in accordance with Article 7 of the Directive.

17 By letter of 20 August 1993 Ireland disputed some of the objections formulated in its regard. It then sent, by letter of 7 December 1994, the text of the Local Government (Planning and Development) Regulations 1994 and last, by letter of 7 May 1996, the text of the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1996 (S.I. No 101 of 1996) (hereinafter 'S.I. No 101 of 1996').

18 In addition, after the reasoned opinion had been sent, correspondence was exchanged regarding complaints related to classes of projects at issue in this action, namely Complaint No P 95/4724 concerning afforestation on Pettigo Plateau and Complaint No P 95/4219 concerning peat extraction, in particular from Clonfinane Bog.

**Infringement of Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto**

19 The Commission alleges that Ireland has transposed Article 4(2) of the Directive incorrectly by setting absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive. The absolute nature of the thresholds means that it is not possible to ensure that every project likely to have significant effects on the environment is subject to an impact assessment, because the mere fact that a project does not reach the threshold is sufficient for it not to

subjected to such assessment, regardless of its other characteristics. Under Article 4(2) of the Directive, however, account must be taken of all the characteristics of a project, not the single factor of size or capacity. Furthermore, Article 2(1) refers also to a project's nature and location as criteria for assessing whether it is likely to have significant environmental effects. The Commission considers that this analysis is consistent with the judgments of the Court in Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323 and in Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

20 According to the Commission, projects which do not exceed the thresholds set may none the less have significant environmental effects. Two factors are important in that regard.

21 The first factor is that certain sites which are particularly sensitive or valuable may be damaged by projects which do not exceed the thresholds set. That is the case with areas identified as valuable and important for nature conservation and areas of particular archaeological or geomorphological interest.

22 The second factor is that the legislation fails to take account of the cumulative effect of projects. A number of separate projects, which individually do not exceed the threshold set and therefore do not require an impact assessment may, taken together, have significant environmental effects.

23 The Commission considers that the setting of absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive infringes Article 4(2) because one or both factors apply. It gives a number of examples of projects which are likely to have, or have had, significant environmental effects but which have not been the subject of any impact assessment because of the absolute nature of the thresholds.

24 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the Directive, the Commission challenges the threshold of 100 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 1(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive. It states that 60 000 ha of semi-natural terrain in the west of Ireland have come to be used for intensive sheep farming and are suffering from serious degradation. The increase in sheep numbers should, in its view, have been the subject of an impact assessment, in which the intensity of use could have been determined by reference to a criterion of stocking density per hectare. Furthermore, 'project' is defined broadly in the Directive and also covers an 'intervention' relating to open land such as sheep grazing. Projects of that type have significant environmental effects in that they involve an alteration in uncultivated land or semi-natural areas through overgrazing which leads to soil degradation and erosion.

25 So far as concerns initial afforestation covered by point 1(d) of Annex II to the Directive, the Commission contests in particular the threshold of 70 ha prescribed by S.I. No 101 of 1996. According to that provision, an impact assessment is to be carried out in the case of initial afforestation only where the area involved, either on its own or taken together with any adjacent area planted by or on behalf of the applicant within the previous three years, would result in a total area planted exceeding 70 ha.

26 The Commission states that afforestation projects may have a significant effect on the environment even where they fall below the 70 ha threshold.

27 In that regard, it refers to the acidification and eutrophication of waters caused by afforestation. It cites the report *The Trophic Status of Lough Conn, An Investigation into the Causes of Recent Accelerated Eutrophication* (McGarrigle and others on behalf of the Lough Conn Committee, published by Mayo County Council in association with the Environmental Protection Agency, Central Fisheries Board, North Western Fisheries Board, Teagasc, Bord na Mona, Department of Agriculture and Department of Marine, December 1993) and *A*

*Study of the Effects of Stream Hydrology and Water Quality in Forested Catchments on Fish and Invertebrates* (known as the 'Aquafor Report').

28 It also points out the failure of the Irish legislation to take account of the significant environmental effects which afforestation projects may have in areas of active blanket bog. Since afforestation entails ploughing, drainage, the use of fertilisers and a radical change in vegetation, it transforms the peatland ecosystem so fundamentally that it is effectively destroyed. The Commission refers in that regard to *Birds, Bogs and Forestry, the Peatlands of Caithness and Sutherland* (Strout, Reeds and Others, Nature Conservancy Council, United Kingdom), which analyses the effects of afforestation on blanket bog.

29 The Commission cites, by way of example, the afforestation carried out at Dunragh Loughs and Pettigo Plateau which was brought to its attention by Complaint No P 95/4724. Those sites are included in the list of Natural Heritage Areas (hereinafter 'NHAs') drawn up by the Irish authorities. Pettigo Plateau, in particular, is a vast intact blanket bog (approximately 2 097 ha) of great scientific interest and is one of the sites covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Council Regulation (EEC) No 1973/92 of 21 May 1992 establishing a financial instrument for the environment (LIFE) (OJ 1992 L 206, p. 1). Part of the plateau (619.2 ha) has been classified as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). It is also a cross-border site in that the plateau extends into County Fermanagh in the United Kingdom, which proposes to classify the portion of the plateau in its territory as a special protection area under Directive 79/409 and as a special area of conservation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7). There is a risk that the part of the plateau in the United Kingdom will be subjected to the significant effects of the afforestation projects on the environment, since planting is liable to affect adversely the hydrology of the peatlands on both sides of the border. Notwithstanding the interest of that area, planting, some grant-aided, has been carried out there, without the threshold set being exceeded in any case.

30 The Commission acknowledges that S.I. No 101 of 1996 is an improvement on the previous legislation inasmuch as it has lowered the threshold from 200 ha to 70 ha. Nevertheless, the protection remains inadequate because the whole of a proposed NHA could, in theory, be afforested without an impact assessment being required if the afforestation were carried out by different developers who all kept within the threshold of 70 ha over three years. The Irish legislation fails to take sufficient account of the cumulative effect of projects.

31 As regards land reclamation for the purposes of conversion to another type of land use, covered by point 1(d) of Annex II to the Directive, the Commission objects to the threshold of 100 ha set by the Irish legislation (Article 24 of S.I. No 349 of 1989 and paragraph 1(c)(ii) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive) and retained in the more recent legislation (S.I. No 101 of 1996).

32 It considers that the Irish legislation fails to ensure that a prior assessment is carried out with regard to the significant environmental effects of land reclamation projects which, because of their size, do not have to be the subject of an impact assessment but, considered together, are nevertheless likely to have such effects.

33 It refers in that regard to the reclamation which has taken place in the Burren, an extensive area of limestone pavement in County Clare which is of exceptional interest for its fauna, flora and natural landscape and rich in archaeological remains. The cumulative effects of this reclamation drew the attention of the Heritage Council and a report in 1996 commissioned by it, entitled 'A survey of recent reclamation in the Burren', shows that there are 59 'new' reclamation sites totalling 256 ha in that area, including 31 sites in proposed NHAs. The interventions involve the levelling of limestone pavement with bulldozers, the clearance of scrub (hazel bushes are a characteristic feature of that habitat) and the seeding and fertilisation of the cleared land. The report also records the loss of numerous archaeological and historical remains, such as holy wells and ancient field systems.

34 As regards, finally, peat extraction projects, covered by point 2(a) of Annex II to the Directive, the Commission objects to the threshold of 50 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 2(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive.

35 It explains that peat extraction entails drainage, which has a drying effect on the plants which form the peat. The vegetation changes from a sphagnum and peatmoss-dominated community to a vegetation dominated by dry bog species, after which the bog is colonised by trees. The lowering of the water table causes a reduction in peat volume. The sloping of the bog increases water run-off, which exacerbates the drying-out process. Peat extraction accordingly has significant and irreversible environmental effects.

36 The Commission cites the example of Ballyduff-Clonfinane Bog in County Tipperary, which it examined specifically following Complaint No P 95/4219. That site of approximately 312 ha comprises two bogs, Ballyduff and Clonfinane (187 ha). Following a survey carried out by the National Parks and Wildlife Service in 1983, the site was designated as an area of scientific interest (ASI). Under a report prepared in 1990 for the Irish Minister of Finance the site was to become part of a raised bog nature reserve network. In 1995 it became a proposed NHA. The site was also among those covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Regulation No 1973/92. In addition, it benefited from Commission Decision C(96) 2113 of 29 July 1996 in respect of the Cohesion Fund, which approved the grant of ECU 344 000 for the preservation of the bogs. None the less, a peat extraction project began in 1994 at Clonfinane without an impact assessment being required, as the area being developed was below the 50 ha threshold. When, in 1996, the question was raised as to whether an impact assessment was required, the development already covered more than 50 ha.

37 The Commission compares the threshold applicable to bogs (50 ha) with that applicable to the extraction of stone, gravel, sand or clay (5 ha) and notes that in the latter case an impact assessment is required below an area of 5 ha where the competent local authority considers that significant effects on the environment

are likely (Article 24 of S.I. No 349 of 1989, paragraph 2 of Part II of the First Schedule thereto, and Articles 4(1) and 6(1) of S.I. No 25 of 1990). The absolute nature of the threshold applicable to bogs precludes any real assessment as to whether a project might have significant environmental effects.

38 The Commission notes that there are at least 49 peat-producing companies, that the economics of small-scale extraction have been transformed by the introduction of new peat-extraction equipment and that the quantity of peat extracted by small producers has therefore increased considerably since 1980. The fact that no peat extraction project has given rise to an assessment, despite continuing losses harmful to nature conservation, shows that the Irish threshold is such that the Directive has no impact with regard to bogs of conservation importance.

39 In its defence, Ireland contests the admissibility of the objection relating to the cumulative effect of projects on the ground that it was not raised during the pre-litigation procedure and, in particular, in the reasoned opinion. It also maintains that the complaints to which the Commission refers cannot be used in evidence because they were not mentioned in the reasoned opinion and are the subject of separate investigation.

40 Generally, Ireland submits that the Commission has failed to prove actual abuse of thresholds through cumulative projects. The theoretical possibility of such abuse does not make the use of thresholds unlawful: their use is envisaged by the Directive and has been approved in the two cases considered by the Court (*Commission* v *Belgium* and *Kraaijeveld*, both cited above). It is only Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337 (OJ 1997 L 73, p. 5) which has required account to be taken of the cumulation of projects.

41 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the

Directive, Ireland disputes that sheep grazing as practised in its territory comes under intensive agriculture and can be considered to be a project within the meaning of Article 1(2) of the Directive. It is not an intervention in the natural surroundings and landscape within the meaning of that provision and it would be absurd to suggest that a farmer is obliged to seek prior consent whenever he wants to increase the number of sheep able to graze on a piece of land. That suggestion is particularly impracticable because much of the land used for the grazing of sheep is commonage, shared between a number of farmers who all have the right to graze their sheep there.

42 Ireland considers that the Directive was never intended to cover certain types of agriculture, such as sheep farming on vast areas of land, and is unsuited to such practices, in particular because of the cost of carrying out impact assessments in relation to the farmers' income. On the other hand, environmental protection is the object of the scheme established by Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), implemented by Commission Regulation (EC) No 746/96 of 24 April 1996 laying down detailed rules for the application of Regulation No 2078/92 (OJ 1996 L 102, p. 19). More than 15% of Irish farmers already participate in that Rural Environment Protection Scheme, which seeks to stop farmers from farming their land intensively, and the Minister for Agriculture submitted proposals to the Commission pursuant to the Operational Programme for Agriculture, Rural Development and Forestry under the Community Support Framework for Ireland 1994-99 to the effect that, from 1 January 1998, farmers in degraded areas are entitled to sheep/ewe headage premium grants only if they are participating in the Rural Environment Protection Scheme.

43 As regards the objection relating to afforestation, Ireland submits that the Commission has adduced no objectively verifiable evidence that afforestation below the threshold has had significant effects on waters. It failed to annex to the application the two reports which it cites (the report on Lough Conn and the Aquafor Report), one of which, moreover, is not yet final.

44 Nor is there any evidence that afforestation on peatland has had significant environmental effects. Besides, little forestry development takes place on peatland, because of the minimum productivity requirements of the grant system and the fact that peatland has a lower forestry yield per hectare than other types of land.

45 Ireland contends, furthermore, that the Commission's presentation of the issues relating to Pettigo Plateau is inaccurate. The afforestation took place on a very small area only and therefore did not require consultation with the United Kingdom authorities under Article 7 of the Directive. Furthermore, the part of Pettigo classified as a special protection area under Directive 79/409 belongs to the National Parks and Wildlife Service and was not affected by the afforestation. Finally, it was only after the afforestation grant was given that the National Parks and Wildlife Service decided to designate the area as a proposed NHA, without knowing that afforestation was to take place there. In any event, the allegations made in that complaint concern only the management of the regime and not Ireland's implementation of Article 4(2) of the Directive or Annex II thereto.

46 As regards land reclamation, covered by point 1(d) of Annex II to the Directive, Ireland states that the only example given by the Commission is the unique area of the Burren. The Commission relies on an unpublished and incomplete study and fails to identify the land reclamation which has taken place. Besides, the total area surveyed in the report which the Commission cites (approximately 250 ha) is not significant given the size of the Burren as a whole (approximately 30 000 ha). In the light of those factors, the Commission has not carried out an overall assessment of land reclamation projects in Ireland, as required by the judgment in *Kraaijeveld*, cited above.

47 Ireland puts forward the same argument in relation to peat extraction projects, referred to in point 2(a) of Annex II to the Directive, alleging that the Commission has provided just one example of an extraction project below the threshold which has supposedly had significant effects on the environment.

48 Also, the Commission's objections relate only to peat extraction from bogs which are of conservation interest. Legal and administrative measures exist to protect such bogs, namely the Habitats Regulations and the designation of areas as NHAs. The complaint concerning peat extraction from Ballyduff-Clonfinane Bog simply demonstrates the need for conservation measures. Ireland accepts that different thresholds could have been set but, given the adoption of special areas of conservation under the Habitats Regulations, it had not considered that to be necessary.

49 As for bogs which are not subject to the Habitats Regulations, Ireland justifies the threshold of 50 ha by stating that it is intended to distinguish between commercial peat extraction, which may have significant effects on the environment, and the non-commercial cutting of turf, which is a traditional activity in Irish rural life. The Directive was not intended to be interpreted as requiring an impact assessment for small-scale non-commercial peat extraction. The effect of requiring impact assessments for very small areas of bog would be to prevent all extraction because of the cost of an assessment compared with the likely return. Such an interpretation of the Directive would frustrate the traditional rights of landowning and tenant farmers to cut turf from the bog for their own needs.

*Findings of the Court*

50 It is necessary to consider first of all the plea raised by Ireland that the objection relating to the cumulative effect of projects is inadmissible on the ground that it was not relied on during the pre-litigation procedure and, in particular, in the reasoned opinion.

51 It should be remembered that the purpose of the pre-litigation procedure is to give the State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any objections other than those set out in the reasoned opinion (see, in particular, Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, paragraph 13).

52 In the present case, it is apparent from an examination of the documents exchanged in the course of the pre-litigation procedure that, while the Commission did not expressly use the words 'cumulative effect of projects', it was nevertheless addressing this question as part of the more general problem of the setting of thresholds and made the very point that a developer can avoid an impact assessment by splitting an initial project into a number of projects which do not exceed the threshold.

53 In those circumstances, it cannot be considered that the pre-litigation procedure did not allow Ireland to avail itself of its right to defend itself against the objection relating to the cumulative effect of projects.

54 Ireland also defends itself by pleading that the Commission cannot use complaints not mentioned in the reasoned opinion as evidence of an infringement, because they were received subsequent to the reasoned opinion and are still the subject of separate investigation.

55 This plea is linked, however, to the question of proof of the infringement, which should be examined as a whole.

56 Ireland disputes that the Commission has demonstrated that thresholds have actually been misused. In its view, such proof is necessary in order to establish that it has failed to fulfil its obligations.

57 The Commission replies that it is the use of absolute thresholds which constitutes the infringement and that all it had to do was put forward a body of evidence demonstrating that use of such thresholds could mean that projects likely to have significant effects on the environment escaped an impact assessment because they did not reach the threshold prescribed by law. It also maintains that it would be contrary to the objective of prevention pursued by the Directive if it were necessary to establish serious and grave environmental harm in order to prove inadequate transposition in Treaty infringement proceedings. Finally, it points out its difficulty in producing concrete evidence in the case of projects below the thresholds.

58 In that regard, it must be observed that the infringement alleged by the Commission is Ireland's incorrect transposition of Article 4(2) of the Directive through the use of thresholds which have the effect that all the characteristics of a project are not taken into consideration when it comes to determining whether the project is to be subject to an impact assessment. Certain projects likely to have significant effects on the environment may thus escape the assessment requirement because they do not reach the thresholds set.

59 So, the alleged infringement has to do with the way in which the Directive has been transposed into Irish law and not with the actual result of the application of the transposing legislation.

60 In order to prove that the transposition of a directive is insufficient or inadequate, it is not necessary to establish the actual effects of the legislation transposing it into national law: it is the wording of the legislation itself which harbours the insufficiencies or defects of transposition.

61 There is, therefore, nothing to prevent the Commission from demonstrating that transposition is defective or insufficient without waiting for the application of the transposing legislation to produce harmful effects.

62 Since the Directive forms part of Community environmental policy, which, as pointed out in the first recital in the preamble to the Directive, consists in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects, the opposite conclusion would be even more unjustified in this case.

63 It does not therefore matter that the evidence adduced by the Commission in support of its action consists of mere complaints which have not yet been investigated.

64 As far as the objection to thresholds is concerned, although the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which are to be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion lie in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld*, cited above, paragraph 50).

65 Thus, a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

66 Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive,

such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

67 Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.

68 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has put forward several convincing examples of projects which, whilst considered solely in relation to their size, may none the less have significant effects on the environment by reason of their nature or location.

69 The most significant example is afforestation because, when carried out in areas of active blanket bog, it entails, by its nature and location, the destruction of the bog ecosystem and the irreversible loss of biotopes that are original, rare and of great scientific interest. In itself, it may also cause the acidification or eutrophication of waters.

70 It was however necessary, and possible, to take account of factors such as the nature or location of projects, for example by setting a number of thresholds corresponding to varying project sizes and applicable by reference to the nature or location of the project.

71 Ireland's explanation that other environmental protection legislation, such as the Habitats Regulations, made it unnecessary to assess afforestation, land reclamation or peat extraction projects carried out in environmentally sensitive locations must be dismissed. Nothing in the Directive excludes from its scope regions or

areas which are protected under other Community provisions from other aspects.

72 It follows that, by setting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

73 As regards the cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (*Commission* v *Belgium*, cited above, paragraph 42, *Kraaijeveld*, cited above, paragraph 51, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45).

74 The question whether, in laying down such criteria and/or thresholds, a Member State goes beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project, but depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State concerned (*Kraaijeveld*, paragraph 52).

75 So, a Member State which established criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *Kraaijeveld*, paragraph 53).

76 That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.

77 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has also provided various examples of the effects of the Irish legislation as drafted.

78 Ireland has not denied that no project for the extraction of peat, covered by point 2(a) of Annex II to the Directive, has been the subject of an impact assessment, although small-scale peat extraction has been mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance.

79 As regards initial afforestation, covered by point 1(d) of Annex II to the Directive, such projects, encouraged by the grant of aid, may be implemented in proximity to one another without any impact assessment at all being carried out, if they are conducted by different developers who all keep within the threshold of 70 ha over three years.

80 The Commission has also cited the example of land reclamation projects, covered by point 1(d) of Annex II to the Directive, whose cumulative effect is not taken into account by the Irish legislation. Nor has it been disputed that much land clearance has taken place in the Burren without a single impact assessment being carried out, although it is an area of unquestionable interest. Limestone pavement, which is characteristic of the area, has been destroyed, as have vegetation and archaeological remains, giving way to pasture. Considered together, those interventions were likely to have significant environmental effects.

81 As regards sheep farming in particular, the Commission has proved that, again encouraged by the grant of aid, this has grown in an unrestrained fashion, which is a development which may have adverse environmental consequences. However, it has not demonstrated that sheep farming as practised in Ireland constitutes a project within the meaning of Article 1(2) of the Directive.

82 It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

83 Consequently, the objection relating to infringement of Article 4(2) of the Directive in respect of the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive is well founded.

**Infringement of Article 2(3) of the Directive**

84 The Commission explains that S.I. No 349 of 1989 provides for an exemption formula enabling the competent Minister to dispense with an impact assessment for a project where he considers this to be warranted by exceptional circumstances. It points out that this provision is inconsistent with the Directive inasmuch as, first, the Minister is not required to consider whether another form of assessment would be appropriate and whether the information collected should be made available to the public and, second, he is not required to inform the Commission.

85 Ireland stated at the hearing that amending legislation had just been adopted.

86 However, it is settled case-law that amendments to national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion (see, in particular, Case C-123/94 *Commission* v *Greece* [1995] ECR I-1457, paragraph 7).

87 It must accordingly be held that the objection relating to the infringement of Article 2(3) of the Directive is well founded.

**Infringement of Article 5 of the Directive**

88 The Commission considers that the Irish legislation does not properly transpose Article 5 since it makes no provision for considering the relevance or reasonableness of asking a developer for the information specified in Annex III. Article 2(5) of S.I. No 349 of 1989 merely provides that an impact assessment may include that information.

89 Ireland indicated at the hearing that amending legislation had just been adopted.

90 For the reason referred to in paragraph 86 above, it must be held that the objection relating to the infringement of Article 5 of the Directive is well founded.

## Infringement of Article 7 of the Directive

91 The Commission states that Article 17 of S.I. No 25 of 1990 appears to be the transposition of Article 7 in respect of projects requiring consent under the Irish Local Government (Planning and Development) Acts 1963-1983. Article 17 provides a mechanism whereby local authorities are to notify the Irish Minister for the Environment of any application likely to have significant effects on the environment of another Member State. The Minister may then ask the local authority to provide him with the information and documents which he considers necessary.

92 The Commission considers, however, that that provision does not properly transpose Article 7 of the Directive since the Minister is not expressly required to transmit the information to the other Member State. Nor does the Minister have the power to require information from local authorities when it is the other Member State which has asked to be consulted.

93 Ireland stated in the course of the written procedure that it intended to clarify its legislation and that the amending legislation was in the process of being drafted. It added at the hearing that the Northern Ireland Agreements would enable better communication with the United Kingdom in the future.

94 For the reason given in paragraph 86 above, it must be held that the objection relating to the infringement of Article 7 of the Directive is well founded.

95 It follows from all of the foregoing that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, the measures necessary to transpose Article 4(2) of the Directive correctly, and by not transposing Articles 2(3), 5 and 7 of the Directive, Ireland has failed to fulfil its obligations under the Directive. The remainder of the action is to be dismissed.

## Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for an order of costs against Ireland. Since the latter has been essentially unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the measures necessary to transpose Article 4(2) of that directive correctly, and by not transposing Articles 2(3), 5 and 7 thereof, Ireland has failed to fulfil its obligations under that directive;

2. Dismisses the remainder of the application;

3. Orders Ireland to pay the costs.

Puissochet Moitinho de Almeida Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)

16 September 1999 *

In Case C-435/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, Italy, for a preliminary ruling in the proceedings pending before that court between

**World Wildlife Fund (WWF) and Others**

and

**Autonome Provinz Bozen and Others**

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray and H. Ragnemalm (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the World Wildlife Fund (WWF) and Others, by W. Wielander, of the Bolzano Bar,

— Autonome Provinz Bozen, by H. Heiss and R. von Guggenberg, of the Bolzano Bar,

— Südtiroler Transportstrukturen AG, by C. Baur, of the Bolzano Bar, and S. Weber, Rechtsanwalt, Vienna,

— Airport Bolzano-Bozen AG, by P. Platter, of the Bolzano Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

— the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and D. Wyatt QC, and

— the Commission of the European Communities, by G. zur Hausen, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the World Wildlife Fund (WWF) and other applicants, Autonome Provinz Bozen, Südtiroler Transportstrukturen AG, Airport Bolzano-Bozen AG, the Italian Government, the United Kingdom Government and the Commission at the hearing on 18 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 29 April 1999,

gives the following

## Judgment

1 By order of 3 December 1997, received at the Court on 24 December 1997, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzano) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40; hereinafter 'the Directive').

2 Those questions have been raised in proceedings brought before the national court by the applicants, who are persons claiming to live near Bolzano-St Jacob Airport and two environmental associations, to have Decision No 1230 of 27 March 1997 of the Government of the Autonomous Province of Bolzano and a letter of the Landeshauptmann (Regional Prime Minister) of 11 April 1997, which approved a project for the restructuring of that airport, set aside.

3 It is apparent from the order for reference that the purpose of the project is to transform an airfield, which since 1925/26 has been used for military purposes, for private flying and, during a certain period and to a limited extent, also for civil purposes, into an airport which can be used commercially, with the aim of having regular scheduled flights as well as charter and cargo flights.

4 The works and alterations envisaged are essentially the following: renewal of the existing runway, construction of access roads and car parks, construction of a control tower with air traffic control installations, construction of a departure building and of a hangar, the carrying out of the necessary connections and diversions and so forth, and extension of the runway from 1 040 to 1 400 metres. It is not in dispute that, at the date of the order for reference, the extension had not yet been approved because the local development plan had to be altered first.

5 This restructuring of Bolzano Airport was provided for in the regional development plan approved by Law No 3 of the Autonomous Province of Bolzano of 18 January 1995 (hereinafter 'Law No 3/95'), which required, in particular, that an environmental impact study be carried out. That study, which the developer, Südtiroler Transportstrukturen AG, entrusted to a team of experts, was drawn up in June 1996. In addition, various bodies, including the agency responsible for the environment, were consulted, the municipalities concerned were informed and opinions were sought.

6 In particular, following one of those requests for an opinion, the project was considered by the Amtsdirektorenkonferenz (Regional Directors' Conference) which issued an opinion under the procedure referred to by the national court as 'simplified environmental assessment', provided for by Articles 11, 12 and 13 of Law No 27 of the Autonomous Province of Bolzano of 7 July 1992 introducing an environmental impact assessment procedure in the version in force at the material time (B.V. Ordinary Supplement, 28 July 1992, No 31; hereinafter 'Law No 27/92'). However, it is common ground that the procedure under which the contested measures were adopted, with the exception of the extension of the runway which remained unapproved, was not that laid down by the Directive.

## Legislation

### *The Directive*

7 The Directive, as provided in Article 1(1) thereof, applies to the assessment of the environmental effects of public and private projects which are likely to have significant effects on the environment.

8 Article 1(2) defines 'project' as:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

9 Article 1(4) and (5) respectively provide that the Directive does not cover 'projects serving national defence purposes' and that it is not to apply 'to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

10 Article 2(1) of the Directive provides: 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.'

11 Article 4 distinguishes between two types of projects.

12 Article 4(1) provides that, subject to Article 2(3), projects of the classes listed in Annex I are to be made subject to an assessment in accordance with Articles 5 to 10. The projects covered by Article 4(1) include the 'construction of... airports with a basic runway length of 2 100 m or more', referred to in point 7 of Annex I.

13 So far as concerns other types of projects, Article 4(2) states:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

14 As for the projects caught by Article 4(2), point 10(d) of Annex II refers to 'Construction of... airfields (projects not listed in Annex I)' and point 12 of Annex II refers to modifications to development projects in Annex I.

15 Articles 5 to 9 of the Directive, to which Article 4 refers, essentially provide as follows: Article 5 specifies the minimum information to be provided by the developer, Article 6 imposes, in particular, an obligation on the developer to inform the authorities and the public, Article 8 requires the competent authorities to take into consideration the information gathered in the course of the assessment procedure and Article 9 imposes a duty on the competent authorities to inform the public of the decision adopted and any conditions attached to it.

*Law No 27/92*

16 Law No 27/92 contains two annexes, Annex I and Annex II, which list various projects and, in conjunction with the main body of the Law, lay down the conditions in which those projects are subject to the environmental impact assessment procedure.

17 As regards airports, paragraph 11(e) of Annex II to Law No 27/92 makes all projects for the new construction of airports subject to such assessment.

18 On the other hand, the extension or alteration of existing airports, like all other projects comprising extensions or alterations, falls within Article 2(2) of Law No 27/92, which requires an environmental impact assessment for projects exceeding the thresholds referred to in Annex II by more than 20% and for projects required to be assessed under Annex I of that Law.

19 Annex II of Law No 27/92 does not set a threshold for airport projects while, under Annex I, an assessment is required only for airports with a runway length of 2 100 metres or more.

**Proceedings before the national court**

20 The applicants in the main proceedings have challenged before the national court the legality of the contested measures on the ground that the procedure followed for approving the project is not in conformity with the requirements of the Directive. According to them, since the project is likely, by virtue of its nature, size and location, to have significant effects on the environment, it falls within Article 2(1) of the Directive and should have been made subject to the assessment procedure under Article 4(2) thereof in conjunction with Annex II and not to a mere 'environmental impact study' followed by an examination of the project by the Amtsdirektorenkonferenz, which do not meet the Directive requirements.

21 According to the respondents in the main proceedings, on the other hand, the Directive is inapplicable to the project at issue for three fundamental reasons.

22 First, it is merely a small-scale project to improve an airport, which does not have a significant effect on the environment because it is designed to improve air traffic

and remedy the environmental harm caused by that traffic; furthermore, the extension of the runway from 1 040 to 1 400 metres remained unapproved.

23 Next, the project is not subject to environmental impact assessment under the Directive because, as is apparent from the provisions of Law No 27/92, it falls within the projects included in Annex II to the Directive which, in accordance with Article 4(2) thereof, are to be made subject to the assessment procedure under Articles 5 to 10 where Member States consider that their characteristics so require; it follows that Law No 27/92, which was adopted within the limits of the discretion allowed to the Member States by Article 4(2) of the Directive, is in conformity with the latter provision.

24 Finally, since the project serves both civil and military purposes and Law No 3/95, approving the regional development plan, makes provision for it, the exceptions respectively set out in Article 1(4) and (5) of the Directive apply.

25 The applicants in the main proceedings have challenged those arguments. They contend that, by allowing the national authorities not to subject to an impact assessment a project likely to have significant effects on the environment, Law No 27/92 is not in conformity with the Directive and should be disapplied in favour of the relevant provisions of the latter.

26 In its order for reference, the national court found that, inasmuch as the project at issue related to an airport with a runway shorter than 2 100 metres, it fell within the projects set out in Annex II to the Directive and was covered by Article 4(2);

also, by virtue of Article 2(2) of Law No 27/92, the extension or restructuring of airports with a runway shorter than 2 100 metres was not made subject to an environmental impact assessment by that Law since no threshold was set for airport projects. Nevertheless, the project at issue, by reason of its nature and size, and probably also by reason of its location in a hollow in the immediate vicinity of an industrial and a residential area, could have a significant effect on the environment.

27 Having regard to its findings of fact and the conclusions which it drew therefrom, to the arguments of the parties and to the relevant Community and national legislation, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, was uncertain as to the interpretation of the Directive. It therefore decided to stay proceedings and to submit the following questions for a preliminary ruling:

'(1) Is Article 4(2) of Directive 85/337/EEC to be interpreted as meaning:

(a) that certain classes of the projects listed in Annex II may from the outset, in the absolute discretion of the Member States, be excluded in their entirety from the obligation to carry out an environmental assessment; or

(b) that the margin of discretion enjoyed by the Member States is limited by the obligation laid down in Article 2(1) of the Directive to subject to an environmental assessment in any event those projects likely to have

significant effects on the environment, by virtue *inter alia* of their nature, size or location?

(c) Does Article 4(2) of the Directive, in conjunction with Article 2(1) thereof, allow a Member State to specify (or not to specify) types of project or criteria and/or thresholds so that the restructuring of an airport with a runway shorter than 2 100 metres is excluded from environmental assessment from the outset although it is environmentally significant, or is the margin of discretion which the Member State enjoys under Article 4(2) of the Directive (if (b) is answered in the affirmative) thereby exceeded?

(2) Is Article 4(2) of the Directive, in conjunction with Article 2(1), to be interpreted as meaning that the obligation to carry out an environmental assessment also applies to the extension and restructuring of the projects in Annex II if significant effects on the environment are likely, or do Articles 4(2) and 2(1) allow environmentally significant projects comprising restructuring to be excluded, expressly or *impliedly* (for example, by rules which are not applicable to airports), from environmental assessment from the outset?

(3) To what extent does Article 2(1) of the Directive, also in conjunction with Article 2(2), allow the Member States to introduce (or use) alternative

assessment procedures to that of an ordinary environmental assessment and if a positive answer is given to this question:

(a) what essential requirements or minimum requirements must such an assessment satisfy in order to accord with the objectives of the Directive and, in particular,

(b) is the participation of the public within the meaning of Article 6 of the Directive an essential requirement of an environmental assessment?

(4) May Article 1(5) of Directive 85/337 be interpreted as also covering projects which, while provided for in a legislative provision which sets out a programme, are approved under a separate administrative procedure?

What minimum environmental requirements must the "legislative process" contain in order to achieve the "objectives... including that of supplying information" pursued by the Directive?

(5) Is the exclusion of projects from the scope of the Directive pursuant to Article 1(4) to be applied to an airfield used for both civil and military purposes?

Could the applicable criterion be the *predominant use* or is it sufficient for the exclusion to apply that the airfield is *also* used for military purposes?

(6) If the Directive has been incorrectly transposed, is Article 4(2) thereof, in conjunction with Article 2(1), vertically directly effective (self-executing) in the sense that the authorities of the Member State are required to subject the projects at issue to an environmental assessment?'

## Preliminary issues

28 In their observations to the Court, the applicants in the main proceedings state that the national court, by a further order determining their ancillary application for interim measures, suspended the project at issue on the ground that no environmental impact assessment had been carried out; that order was contested in an action brought by the respondents and quashed by the Consiglio di Stato (Council of State) by judgment No 1411/97 of 29 August 1997, with the result that the works at issue have been pursued since then. The applicants ask the Court to rule, first, on the question whether the suspension of operation of the contested measure on which, according to them, the national court had validly decided in the present case, should have been upheld by the Consiglio di Stato and, second, should the Court consider that an environmental impact assessment was necessary, on the practical consequences of its own decision.

29 In response to those requests it is sufficient to state that the national court has not submitted any question in that regard and that there is therefore no need to consider them (see Case 5/72 *Grassi* v *Italian Finance Administration* [1972] ECR 443, paragraph 4, and Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647, paragraph 23).

30 One of the respondents in the main proceedings, Airport Bolzano-Bozen AG, disputes a number of facts set out by the national court in its order for reference. Relying on national law, it also challenges the jurisdiction of that court to adjudicate on the merits of the case, on the ground that its jurisdiction is limited to questions of law.

31 So far as concerns the contesting of certain facts by Airport Bolzano-Bozen AG, it should be remembered that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see Case C-30/93 *AC-ATEL Electronics Vertriebs* v *Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraph 16, and Case C-326/96 *Levez* v *T.H. Jennings (Harlow Pools)* [1998] ECR I-7835, paragraph 25).

32 It is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331, paragraph 12, *AC-ATEL Electronics Vertriebs*, cited above, paragraph 17, and *Levez*, cited above, paragraph 26).

33 As regards the challenge to the jurisdiction of the referring court made on the basis of national law, it is not for the Court of Justice, in view of the distribution of functions between itself and the national courts, to determine whether the decision whereby a matter is brought before it has been taken in accordance with the rules of national law governing the organisation of the courts and their procedure (see Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* v *Ente Nazional Risi* [1994] ECR I-711, paragraph 13).

## The first and second questions

34 By its first and second questions, which should be considered together, the national court essentially raises two issues.

35 The first is whether Articles 4(2) and 2(1) of the Directive are to be interpreted as conferring on a Member State the power to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, such as projects for the restructuring of an airport whose runway is shorter than 2 100 metres, even if they have significant effects on the environment.

36 In that regard, the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable. However, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 50, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45).

37 Thus, ruling on legislation of a Member State under which certain entire classes of projects listed in Annex II to the Directive were excluded from the assessment obligation, the Court held, in Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, at paragraph 42, that the criteria and/or thresholds mentioned in Article 4(2) of the Directive are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

38 The Court also held in paragraph 53 of its judgment in *Kraaijeveld*, cited above, that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

39 As regards modifications to such projects, the Court found in paragraph 40 of its judgment in *Kraaijeveld* that the mere fact that the Directive did not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, did not justify the conclusion that they were not covered by the Directive.

40 Thus, observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered 'modifications to development projects' even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment (*Kraaijeveld*, paragraph 39).

41 The second issue raised by the national court is whether, taking into account the fact that an airport is the only airport in the region in which it is located that can be restructured, Articles 4(2) and 2(1) of the Directive nevertheless confer on a Member State the power to exclude from the assessment procedure established by the Directive a specific project such as that in issue in the main proceedings as not being likely to have significant effects on the environment, either under national legislation, in the present case Law No 27/92, or on the basis of an individual examination of the project.

42 The second subparagraph of Article 4(2) of the Directive provides that '... Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'. That provision thus mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of the Directive.

43 Consequently, the Directive confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects.

44 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.

45 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning

of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.

46 It should be added, with regard to the exclusion of the project at issue in the main proceedings from the assessment procedure under Law No 27/92, that, even if that project concerns the only airport in the province which can be restructured and it has actually been specified by the legislature, the latter cannot in any event exempt the project from the assessment obligation unless, on the date when Law No 27/92 was adopted, it was able to assess precisely the overall environmental impact which all the works entailed by the project were likely to have.

47 As for the exclusion of the project on the basis of an individual examination carried out by the national authorities, the file shows that the contested measures were preceded by an environmental impact study carried out by a team of experts, that information was communicated to the municipalities concerned and that the public was informed by press notices. In addition, the environmental agency and the Amtsdirektorenkonferenz were consulted.

48 It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

49 In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a

runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

## The third question

50 By its third question, the national court asks essentially whether, in the case of a project requiring assessment under the Directive, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive and whether, where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2), it must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

51 In its order for reference the national court explains that it has doubts as to whether the consent procedure laid down in Articles 11, 12 and 13 of Law No 27/92 is appropriate for fully identifying the effects of the project on the environment. It states that neither noise nor the effects on the atmosphere were investigated, as Article 3 of the Directive requires, and that the public did not participate in that procedure, contrary to Article 6 of the Directive.

52 In that regard, Article 2(2) of the Directive provides: 'The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of [the] Directive.' It is therefore clear from that provision that the Directive does not prevent the assessment procedure which it introduces from being incorporated in a national procedure which exists or is to be established, provided that the aims of the Directive are met.

53 However, where a project requires assessment within the meaning of the Directive, a Member State cannot, without undermining the Directive's objective, use an alternative procedure, even one incorporated in a national procedure which exists or is to be established, to exempt that project from the requirements laid down in Articles 3 and 5 to 10 of the Directive.

54 The answer to third question must therefore be that, in the case of a project requiring assessment under the Directive, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2). However, an alternative procedure of that kind must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

## The fourth question

55 By its fourth question, the national court asks essentially whether Article 1(5) of the Directive is to be interpreted as also applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure and, if so, what requirements such a provision and the

process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved.

56 Article 1(5) provides that the Directive is not to apply 'to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

57 That provision accordingly exempts projects envisaged by the Directive from the assessment procedure subject to two conditions. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process.

58 With regard to the first condition, it is to be observed that Article 1(2) of the Directive refers not to legislative acts but to development consent, which it defines as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Therefore, if it is a legislative act, instead of a decision of the competent authorities, which grants the developer the right to carry out the project, that act must be specific and display the same characteristics as the development consent specified in Article 1(2) of the Directive.

59 Consequently, in order for a legislative act to display the same characteristics as development consent, as defined by Article 1 of the Directive, the act must lay down the project in detail, that is to say in a sufficiently precise and definitive manner so as to include, like development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment.

60 It is only by complying with such requirements that the objectives referred to in the second condition laid down by Article 1(5) can be achieved through the legislative process. If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include the elements of the specific project which may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.

61 That interpretation is borne out by the sixth recital in the preamble to the Directive, which states that development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects, and that this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project.

62 It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project.

63 The answer to the fourth question must therefore be that Article 1(5) of the Directive is to be interpreted as not applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision and the process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved

consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment.

## The fifth question

64 By its fifth question, the national court asks whether Article 1(4) of the Directive is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

65 The Directive, as stated in Article 1(4), does not cover 'projects serving national defence purposes'. That provision thus excludes from the Directive's scope and, therefore, from the assessment procedure for which it provides, projects intended to safeguard national defence. Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively. Only projects which mainly serve national defence purposes may therefore be excluded from the assessment obligation.

66 It follows that the Directive covers projects, such as that at issue in the main proceedings which, as the file shows, has the principal objective of restructuring an airport in order for it to be capable of commercial use, even though it may also be used for military purposes.

67 Accordingly, the answer to the fifth question must be that Article 1(4) of the Directive is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

## The sixth question

68 By its sixth question, the national court is essentially asking whether Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, the national court is asking whether it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

69 As regards the right of individuals to rely on a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect conferred on directives by Article 189 of the EC Treaty (now Article 249 EC) for the possibility for those concerned to rely on the obligation which directives impose to be excluded in principle. Particularly where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set out in the directive (Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraphs 22, 23 and 24, and *Kraaijeveld*, cited above, paragraph 56).

70 Consequently, if that discretion has been exceeded and the national provisions must therefore be set aside on that account, it is for the authorities of the Member State, according to their relevant powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine

whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see *Kraaijeveld*, paragraph 61).

71 The answer to the sixth question must therefore be that Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

## Costs

72 The costs incurred by the Italian, Netherlands and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, by order of 3 December 1997, hereby rules:

1. Articles 4(2) and 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

2. In the case of a project requiring assessment under Directive 85/337, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2) of the Directive. However, an alternative procedure of that kind

must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

3. Article 1(5) of Directive 85/337 is to be interpreted as not applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision and the process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment.

4. Article 1(4) of Directive 85/337 is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

5. Articles 4(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to

**have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.**

Kapteyn Murray Ragnemalm

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber

# JUDGMENT OF THE COURT (Sixth Chamber)
22 October 1998 *

In Case C-301/95,

**Commission of the European Communities**, represented by Götz zur Hausen, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Federal Republic of Germany**, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent, and Dieter Sellner, Rechtsanwalt, Bonn, D-53107 Bonn,

defendant,

APPLICATION for a declaration that the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EC Treaty and under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), in particular Articles 2, 3, 5(2), 6(2), 8, 9 and 12(1) and (2) thereof,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm and K. M. Ioannou (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1998,

gives the following

## Judgment

1 By application lodged at the Court Registry on 20 September 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that the Federal Republic of Germany had failed to comply with its obligations under Articles 5 and 189 of the EC Treaty and under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, 'the Directive'), in particular Articles 2, 3, 5(2), 6(2), 8, 9 and 12(1) and (2) thereof.

2 The Directive was adopted on the basis of Articles 100 and 235 of the EEC Treaty. According to the 11th recital in the preamble, 'the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

3 Article 1 of the Directive provides:

'1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

"project" means:

— the execution of construction works or of other installations or schemes,

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

...'

4 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

5 Pursuant to Article 12(1), the Member States were required to take the measures necessary to comply with the Directive within three years of its notification. Since the Directive was notified on 3 July 1985, that period expired on 3 July 1988.

6 In Germany the Directive was transposed by the Gesetz über die Umweltverträglichkeitsprüfung (Law on environmental impact assessment, 'the UVPG') of 12 February 1990, which came into force on 1 August 1990 (BGBl. I, p. 205).

7 On examining the provisions of the UVPG, the Commission reached the conclusion that the legislation in force in Germany, as notified to it, did not comply with the provisions of the Directive. It therefore sent a letter of formal notice on 4 February 1992 informing the German Government of the various points with which it took issue.

8 The German Government replied by letter of 16 June 1992, and the Commission reconsidered its position with regard to certain of the points raised in its letter of formal notice, finally limiting them, in its reasoned opinion sent to the German Government on 4 July 1994, to those falling under six headings each constituting a distinct instance of failure to transpose the Directive correctly. The Commission called on the German Government to take the measures necessary to comply with the reasoned opinion within two months from its notification.

9 Having received no reply to its reasoned opinion, the Commission brought the matter before the Court. Its action related to instances of failure to fulfil obligations falling under six different headings: delay in transposing the Directive; failure to communicate all the provisions adopted in the field covered by the Directive; failure to apply the Directive to all projects for which consent was given after 3 July 1988; incomplete transposition of Article 2 of the Directive with regard to the

projects listed in Annex II thereto; incomplete transposition of Article 5(2) of the Directive; and failure to apply the Directive to the implementation of two specific projects.

10 In the light of details furnished by the German Government in its defence, the Commission has withdrawn its claim concerning the aspects referred to under the sixth heading in its application.

**Delay in transposing the Directive**

11 The Commission submits that the German Government failed to take the measures necessary to comply with the Directive within the prescribed period, which expired on 3 July 1988 whereas the UVPG came into force on 1 August 1990. Germany has thus failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(1) of the Directive.

12 The German Government considers that it would be inappropriate to make a formal declaration of the alleged failure to fulfil obligations, since the Court has already held, in Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, that there had been a delay in transposing the Directive in Germany.

13 Here, though, it must be noted that the *Bund Naturschutz in Bayern* judgment was given in response to a request for a preliminary ruling on the interpretation of Article 12(1) of the Directive. An action for failure to fulfil obligations differs, however, in both its purpose and its consequences.

14 The purpose of such an action is to obtain a formal finding that a Member State has failed to fulfil its obligations under Community law.

15 As regards its consequences, that formal finding is a prerequisite for the initiation, where appropriate, of the procedure provided for in Article 171 of the EC Treaty, as amended by the Treaty on European Union.

16 Finally, as the Court has consistently held, the Commission, given its role as guardian of the Treaty, is alone competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22).

17 It must therefore be held that, by failing to take the necessary measures to comply with the Directive within the prescribed period, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(1) thereof.

**Failure to communicate all the provisions adopted in the field covered by the Directive**

18 Article 12(2) of the Directive provides: 'Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

19 The Commission states that the German Government did not communicate all the national provisions intended to transpose the Directive, in particular those adopted by the *Länder*. Such provisions, having been adopted in the field covered by the Directive, should in the Commission's view have been communicated in accordance with Article 12(2). Germany has thus failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(2) of the Directive.

20 The German Government counters that neither Article 12(2) nor any other provision of Community law obliges it to communicate to the Commission all the measures it has taken to comply with the Directive.

21 It further argues that under Paragraph 4 of the UVPG, that Law takes precedence over specific Laws and over the legislation of the *Länder*. In any instance where the requirements laid down by the latter fall short of those contained in the UVPG, the rules in the UVPG are directly applicable. The UVPG thus ensures that the requirements of the Directive are fully satisfied, making it unnecessary to communicate other provisions to the Commission.

22 Here it must be noted that the wording of Article 12(2) of the Directive leaves no doubt as to the scope of the obligation placed on Member States to communicate to the Commission all the provisions which they adopt in the field covered by the Directive. Nor does it give any reason to suppose that distinctions may be drawn as to the nature of that obligation according to whether a Member State has a federal or centralised structure or according to the legislative technique which it employs.

23 Since the obligation to communicate national provisions concerns all such provisions adopted in the field covered by the Directive, the finding that the Member State has failed to fulfil its obligations as alleged cannot be affected by the consideration that the provisions of the UVPG, which have been communicated to the Commission, take precedence over those which have not been communicated.

24 It must therefore be held that, by failing to communicate to the Commission all the measures which it has taken to comply with the Directive, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(2) thereof.

**Failure to apply the Directive to all projects for which consent was given after 3 July 1988**

25 Paragraph 22(1) of the UVPG contains a transitional provision under which consent procedures already commenced are to be completed in accordance with the provisions of that Law where the project had not yet been made public by 1 August 1990, when the UVPG came into force.

26 In the Commission's submission, that transitional provision limits the scope *ratione temporis* of the UVPG, in that consent procedures commenced before 1 August 1990 but after 3 July 1988, when the period within which the Directive was to be transposed expired, are not subject to an environmental impact assessment in accordance with the requirements of the Directive. Germany has thus failed to fulfil its

obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(1) of the Directive.

27 The Federal Government argues that it was already made clear in the *Bund Naturschutz in Bayern* and *Commission* v *Germany* judgments, cited above, that the Federal Republic of Germany was not entitled to adopt a derogating provision such as that contained in Paragraph 22(1) of the UVPG concerning projects for which the consent application had been lodged before 3 July 1988 and thus to exempt such projects from the environmental impact assessment requirement. That question having been settled by those two judgments, there is no reason for the Court to rule afresh on the same point of law.

28 Here it must be observed that the subject-matter of the *Commission* v *Germany* case, cited above, was different, since it concerned a finding that Germany had failed to fulfil its obligations by failing to comply with the environmental impact assessment requirement laid down by the Directive in a specific case relating to a specific project. The application in that case did not seek a finding that the Member State had failed to fulfil its obligations by adopting Paragraph 22 of the UVPG.

29 Consequently, having regard to the considerations set out in paragraphs 13 to 15 above, it must be held that, by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with the Directive, where the consent procedure was commenced after 3 July 1988, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(1) of the Directive.

**Incomplete transposition of Article 2 of the Directive with regard to the projects listed in Annex II thereto**

30 Article 2 of the Directive provides:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...'

31 Article 4 provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

32 Annex I to the Directive lists nine categories of projects defined according to their nature, such as oil refineries, integrated chemical installations, construction of motorways and trading ports. Annex II, entitled 'Projects subject to Article 4(2)', lists 12 categories of projects. Unlike those in Annex I, the categories in Annex II are divided into sub-categories, each preceded by a letter of the alphabet, with the exception of those listed under points 5, 9 and 12.

33 The Federal Republic of Germany, availing itself of its right under Article 4(2) of the Directive in conjunction with Annex II thereto, defined certain projects in Paragraph 3 of the UVPG and in the Annex thereto which it decided to subject to the obligation to carry out an environmental impact assessment.

34 The Commission argues that the German legislation does not include all the classes of projects listed in Annex II to the Directive. In its opinion, all the projects listed in Annex II under the various letters of the alphabet preceding the subdivisions of the categories listed in that annex must be considered as 'classes' within the meaning of Article 4(2) of the Directive. The Commission does not dispute that the Member States may, under Article 4(2), distinguish on the basis of their characteristics between the projects falling within a particular class in Annex II to the Directive, but it considers that it is unacceptable not to impose the environmental assessment requirement on whole classes in general.

35 The Commission therefore asks the Court to find that, by excluding in advance whole classes of projects listed in Annex II to the Directive from the environmental impact assessment requirement, Germany has failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Articles 2(1) and 12(1) of the Directive.

36 The German Government considers that a distinction is to be drawn between the concepts of 'classes' and 'projects'. In its opinion, Annex II to the Directive lists a total of '12 classes of projects' within which there are 'specific' projects. Each of the 12 categories in the annex thus constitutes a class of projects and each of the subdivisions of those categories, preceded by a letter of the alphabet, constitutes a specific project.

37 It submits that, under Article 4(2) of the Directive, each Member State may decide, at its own discretion, which of the specific projects listed under the 12 classes has to be subject to the assessment requirement. The UVPG takes account of all the classes of projects in Annex II to the Directive and, within those classes, requires an environmental impact assessment to be carried out on those projects whose characteristics warrant it in the opinion of the federal legislature. To that end, the German Government used its discretionary power to set criteria and/or thresholds for certain types of projects in respect of the assessment obligation. It is thus wrong to claim that the Federal Republic of Germany has excluded whole classes of projects from the assessment requirement.

38 The Court has held that Article 4(2) of the Directive does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II (see Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 43). In order to settle the dispute on this point, therefore, the question of the interpretation of the concept of classes of projects, within the meaning of Article 4 of the Directive, must first be dealt with.

39 Here, it must be noted that Article 4 of the Directive uses the same wording in both paragraphs 1 and 2 in relation to the concept in question, namely 'projects of the classes listed in Annex I shall be made subject to an assessment ...' and 'projects of the classes listed in Annex II shall be made subject to an assessment ... where ...'.

40 The tenor and scope of that concept thus clearly cannot differ depending whether it is used in Annex I or Annex II of the Directive.

41 Referring as it does in Annex I to categories of projects defined according to their nature, it can only refer to the same kind of categories of projects with regard to Annex II.

42 However, the nine categories of projects in Annex I cannot, by their nature, correspond to the 12 categories in Annex II, each of which constitutes a vast field of economic activity; they must rather correspond to the subdivisions of those categories, each preceded by a letter of the alphabet. That consideration is borne out by the fact that categories 5, 9 and 12 in Annex II, which are not subdivided, each constitute an activity confined within clear limits.

43 For example, the category of projects entitled 'Construction of motorways, express roads and lines for long-distance railway traffic and of airports ...' under point 7 in Annex I cannot correspond, as a class of projects, to the category under point 10 of Annex II, entitled 'Infrastructure projects'; it must rather correspond to subdivision (d) within that point, which refers to 'Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)'.

44 Any other interpretation of the concept in question would negate the effectiveness of the rule laid down in Article 2(1) of the Directive, that projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are to be made subject to an environmental impact assessment, and would leave Member States free to apply Annex II as they saw fit.

45 It is specifically on the basis of that rule that the Court has held that the limits of the discretion conferred on the Member States by Article 4(2) of the Directive are to be found in the obligation set out in Article 2(1) (Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 50), and that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (Case C-133/94 *Commission* v *Belgium*, cited above, paragraph 42).

46 It must therefore be held that, by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to the Directive, the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1) and 4(1) of the Directive.

**Incomplete transposition of Article 5(2) of the Directive**

47 Article 5(1) of the Directive requires Member States to adopt the necessary measures to ensure that the developer supplies certain information concerning any project subject to an environmental impact assessment. That information is specified in Article 5(2) and in Annex III to the Directive.

48 The Commission notes that the provisions of Paragraph 6(3) and (4) of the UVPG, in transposing Article 5(1) of the Directive, define the information which the developer must supply. However, the second sentence of Paragraph 6(2) of the UVPG states that those provisions are applicable only 'if the information listed in subparagraphs 3 and 4 is not defined in detail by a statutory provision'.

49 According to the Commission, this means that other statutory provisions, defining in detail the information that must be provided by the developer, take precedence over the provisions of the UVPG and thus replace them in such cases. The Commission therefore considers that, by failing to lay down a general requirement in respect of the information to be supplied under the Directive, Germany has failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, in conjunction with Articles 5(2) and 12(1) of the Directive.

50 The German Government claims that the Commission's approach is based on a misinterpretation of Paragraph 6(2) of the UVPG. That provision does not derogate from the general rule in Paragraph 4 of the UVPG, governing the relationship between that Law and other statutory provisions laid down by the Federation or the *Länder* within the field covered by the Directive. In accordance with that rule, if the requirements laid down by such statutory provisions fall short of those of the UVPG, then the latter take precedence.

51 Here, it must be noted that Article 5(2) of the Directive specifies the minimum scope of the information to be supplied by the developer. The Commission does not claim that the provisions of Paragraph 6(3) and (4) of the UVPG do not provide a correct transposition of their counterpart in the Directive.

52 If, for reasons which may be linked to the federal structure of the State, other specific provisions of the Federation or the *Länder* lay down particular requirements corresponding, possibly, to the individual needs of the various fields of activity covered by the Directive, it must be noted that Article 13 of the Directive allows

the Member States to lay down stricter rules than those contained in the Directive. Furthermore, the general rule in Paragraph 4 of the UVPG ensures, as has been explained by the German Government, that the provisions of Paragraph 6(3) and (4) are to apply when the requirements contained in specific provisions fall short of those laid down in the corresponding provision of the UVPG.

53 In the light of those considerations, this part of the application must therefore be dismissed.

54 In view of all the foregoing, it must accordingly be held that

— by failing to take the necessary measures to comply with the Directive within the prescribed period,

— by failing to communicate to the Commission all the measures which it has taken to comply with the Directive,

— by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with the Directive, where the consent procedure was commenced after 3 July 1988, and

— by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to the Directive,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1), 4(2) and 12(1) and (2) of the Directive.

55 The remainder of the application must be dismissed.

## Costs

56 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful in all essential respects, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

**1) Declares that,**

— **by failing to take the necessary measures to comply with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment within the prescribed period,**

— **by failing to communicate to the Commission all the measures which it has taken to comply with that directive,**

— **by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with that directive, where the consent procedure was commenced after 3 July 1988, and**

— **by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to that directive,**

**the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1), 4(2) and 12(1) and (2) of that directive;**

**2) Dismisses the remainder of the application;**

**3) Orders the Federal Republic of Germany to bear the costs.**

Kapteyn Mancini Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 22 October 1998.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber

# JUDGMENT OF THE COURT
24 October 1996 *

In Case C-72/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Nederlandse Raad van State (Netherlands) for a preliminary ruling in the proceedings pending before that court between

**Aannemersbedrijf P. K. Kraaijeveld BV and Others**

and

**Gedeputeerde Staten van Zuid-Holland**

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and on the duty of national courts to ensure that a directive having direct effect is complied with although no individual has invoked it,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray, L. Sevón (Rapporteur), (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and M. Wathelet, Judges,

* Language of the case: Dutch.

Advocate General: M. B. Elmer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Aannemersbedrijf P. K. Kraaijeveld BV and Others, by J. A. Kraaijeveld, J. Kraaijeveld Sr., J. Kraaijeveld Jr., W. Kraaijeveld and P. K. Kraaijeveld,

— the Government of the Netherlands, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by P. G. Ferri, Avvocato dello Stato,

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by D. Wyatt QC,

— the Commission of the European Communities, by M. van der Woude, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Aannemersbedrijf P. K. Kraaijeveld BV and Others, represented by J. Kraaijeveld Jr. and W. Kraaijeveld; the Government of the Netherlands, represented by J. S. van den Oosterkamp, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by J. Poot, expert adviser; the Italian Government, represented by P. G. Ferri; the United Kingdom

Government, represented by J. E. Collins, assisted by D. Wyatt; and the Commission, represented by W. Wils of its Legal Service, acting as Agent, at the hearing on 14 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 March 1996,

gives the following

## Judgment

1 By judgment of 8 March 1995, received at the Court on 14 March 1995, the Nederlandse Raad van State (Netherlands State Council) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the directive') and on the duty of national courts to ensure that a directive having direct effect is complied with although no individual has invoked it.

2 The questions were raised in proceedings brought by Aannemersbedrijf P. K. Kraaijeveld BV and Others (hereinafter 'Kraaijeveld') for annulment of a decision of 18 May 1993 by which the South Holland Provincial Executive approved a zoning plan entitled 'Partial modification of zoning plans in connection with dyke reinforcement' adopted by the Sliedrecht Municipal Council pursuant to the Wet op de ruimtelijke ordening (Regional Development Law).

## Directive 85/337

3 The directive provides that, before certain works or other interventions in the natural surroundings are executed, an environmental impact assessment is to be carried out.

4 According to the sixth, eighth, ninth and eleventh recitals in the preamble to the directive:

'... development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; ... this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

... projects belonging to certain types have significant effects on the environment and these projects must as a rule be subject to systematic assessment;

... projects of other types may not have significant effects on the environment in every case and ... these projects should be assessed where the Member States consider that their characteristics so require;

... the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

5 Article 1(1) of the directive states:

'This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.'

6 Article 1(2) states that for the purposes of the directive 'project' means:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

7 Article 2(1) specifies the types of projects which are to be subject to an assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

8 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

9 Article 4 distinguishes between two different types of projects. The first paragraph provides that an assessment is always required for projects described in Annex I. As regards other projects, Article 4(2) provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

10 Annex II lists a number of projects, including:

'10. Infrastructure projects

...

(e) Canalization and flood-relief works.

...

12. Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year.'

11 The directive contains no specific provision in relation to modifications to projects listed in Annex II.

12 Lastly, the directive provides for the public to be given information and the opportunity to express an opinion. Article 6(3) of the directive provides that the detailed arrangements for such information and consultation are to be determined by the Member States, in particular as regards determination of the public concerned and the way in which the public will be informed.

13 Article 12(1) of the directive provides that 'Member States shall take the measures necessary to comply with this directive within three years of its notification'.

## The provisions of Netherlands law applicable to the facts of the main proceedings

14 In the Netherlands the Deltawet (of 8 May 1958) houdende de afsluiting van de zeearmen tussen de Westerschelde en de Rotterdamse Waterweg en de versterking van de hoogwaterkering ter beveiliging van het land tegen stormvloeden (*Staatsblad 246*, Delta Law providing for the closure of the sea inlets linking the Western Scheldt to the Rotterdam Waterway and consolidating the tide control scheme to protect land against storm tides, hereinafter the 'Delta Law') provides in particular for the construction of works intended to reinforce high-water protection along the Rotterdam Waterway and along the waters communicating with it (Article 1(II)d). Pursuant to that Law, studies were undertaken, mainly in 1987 and 1988, by the Dyke Reinforcement Coordinating Committee responsible to the South Holland Provincial Executive. A new dyke line in the West, Central and East Sliedrecht sector was proposed by the Committee, approved by the South Holland Provincial Executive and adopted by the Minister for Transport and Water Control on 26 April 1990 in accordance with Article 2(4) of the Delta Law. Subsequently the Sliedrecht Municipal Council adopted the zoning plan for that sector on 23 November 1992 under the Regional Development Law.

15 The directive was transposed into national law in the Netherlands by an amendment to the Wet algemene bepalingen milieuhygiëne (Law laying down general provisions on environmental health) of 13 June 1979 (hereinafter 'the 1979 Law'), Article 41b(1) of which provided, at the material time: 'Activities which are likely to have significant adverse effects on the environment shall be designated by a general administrative measure. The same instrument shall designate the decision(s) of the public authorities concerning such activities prior to which an environmental impact assessment must be made.' The 1979 Law was itself implemented by the Besluit milieu-effectrapportage (Environmental Impact Assessment Decision) of 20 May 1987. In Article 2 of the decision and Section C 12.1 of the annex thereto, in the version in force at the material time, defined the 'construction of a dyke' as an activity within the meaning of Article 41(b) of the Law if the dyke was 5 km or more in length, with a cross-section of at least 250 $m^2$. They also characterize as a

decision in respect of which an environmental impact assessment must be made the adoption of an outline plan or a decision made pursuant to Article 2(3) and (4) of the Delta Law.

16 The 1979 Law was amended and became, in 1994, the Wet milieubeheer (Environmental Management Law). A further implementing decision was adopted on 4 July 1994, omitting the criteria in respect of the size of the works. That decision is not applicable, however, to the facts of the case in the main proceedings.

## Procedure before the national court and the questions referred for a preliminary ruling

17 Kraaijeveld contested the zoning plan adopted on 23 November 1992 by the Sliedrecht Municipal Council, in so far as it concerned the Merwede dyke, before the South Holland Provincial Executive which, by decision of 18 May 1993, nevertheless approved the plan. On 20 July 1993 Kraaijeveld brought an action before the Raad van State seeking annulment of that decision.

18 According to the new plan, the waterway to which Kraaijeveld has access will no longer be linked to navigable waterways; the removal of access to navigable waterways would be ruinous to Kraaijeveld's business, whose economic activity is related to waterways ('natte waterbouw').

19 The Nederlandse Raad van State observes that no environment impact assessment was made because the size of the works was less than the minimum laid down by national legislation.

20 By judgment of 8 March 1995 the Nederlandse Raad van State decided to refer to the Court of Justice for a preliminary ruling the following four questions:

'1. Must the expression "canalization and flood-relief works" in Annex II to Directive 85/337/EEC be interpreted as including certain types of work on a dyke running alongside waterways?

2. Having regard in particular to the terms "projects" and "modifications to development projects" employed in the directive, does it make any difference to the answer to Question 1 whether what is involved is:

(a) the construction of a new dyke;

(b) the relocation of an existing dyke;

(c) the reinforcement and/or widening of an existing dyke;

(d) the replacement *in situ* of a dyke whether or not the new dyke is stronger and/or wider than the old one; or

(e) a combination of two or more of (a) to (d) above?

3. Must Article 2(1) and Article 4(2) of the directive be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with Article 4(2) of the directive, but those specifica-

tions, criteria or thresholds are incorrect, Article 2(1) requires that an environmental impact assessment be made if the project is likely to have "significant effects on the environment by virtue *inter alia* of [its] nature, size or location" within the meaning of that provision?

4. If Question 3 is answered in the affirmative, does that obligation have direct effect, that is to say, may it be relied upon by an individual before a national court and must it be applied by the national court even if it was not in fact invoked in the matter pending before that court?'

## Question 1

21 In this question the Nederlandse Raad van State asks whether the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive is to be interpreted as including certain types of work on a dyke running alongside waterways.

22 In view of the wording of the English version of the directive ('canalization and flood-relief works'), the national court considers that projects falling under that heading of Annex II involve activities likely to have significant effects on the environment, so that the expression could encompass certain works relating to a dyke.

23 According to Kraaijeveld, river dyke projects are works which tend to alter the frequency with which river banks and the surrounding areas are submerged and

which thus have a significant effect on the environment. In the regulation of watercourses, dykes are no less important than other canalization and flood-relief works.

24 The Government of the Netherlands contends that there is a distinction between work on a dyke and flood-relief and canalization work. The latter are carried out to regulate water flow or for the benefit of river navigation. They change the character of the watercourse itself, that is to say, the quantity or quality of the water and the riverbanks and riverside, so that they have a considerable impact on aquatic flora and fauna. Dyke reinforcement work, on the other hand, consists in constructing or increasing the height of the embankment with sand or clay. The Rivierenwet (Law on Rivers) ensures that the works now undertaken do not affect the regulated level already achieved for any given river. Such work therefore has little effect on the fauna and flora of a river.

25 As regards the reference to the English version of the directive, the Government of the Netherlands considers that the Dutch version of the directive is, as far as it is concerned, the only authentic language version. It cites the Court's case-law to the effect that the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the principle of legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words (Case 80/76 *North Kerry Milk Products* v *Minister for Agriculture and Fisheries* [1977] ECR 425, paragraph 11). Uniform interpretation cannot be determined by one particular language. The various language versions are equally authentic (Case 283/81 *CILFIT* [1982] ECR 3415).

26 Lastly, the Government of the Netherlands refers to the purpose of the directive, which is to create equal conditions of competition in the various Member States. The work referred to in the directive can therefore only refer to work which can be undertaken in practically all the Member States, not to work which is mainly carried out in only one Member State, such as the construction of dykes. The

Government of the Netherlands therefore concludes that reinforcement work on dykes along waterways in the Netherlands is not covered by the expression 'canalization and flood-relief works'.

27 According to the Commission, canalization of a river has an inevitable effect on its flow rate and water level. It may make it necessary to erect dykes along the river banks in order to prevent floods and safeguard the population. A dyke of that type must therefore be held to be flood-relief works. Moreover, it is necessary to take into account the purpose of the directive, which concerns the effects certain projects may have on the environment, regardless of their social objective. The construction of river dykes affects the environment, whether their purpose is to improve the navigability of a watercourse or to protect the population living on territory liable to flood. Works on a river dyke capable of having significant effects on the environment are therefore covered by the term 'canalization and flood-relief works'.

28 As the case-law of the Court shows, interpretation of a provision of Community law involves a comparison of the language versions (see Case 283/81 *CILFIT*, cited above, paragraph 18). Moreover, the need for a uniform interpretation of those versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28).

29 Examination of the various language versions of point 10(e) of Annex II to the directive shows that they fall into two categories according to whether the terms employed denote the idea of flooding. The English ('canalization and flood-relief works') and Finnish ('kanavointi-ja tulvasuojeluhankkeet') versions are similar, whereas the German, Greek, Spanish, French, Italian, Dutch and Portuguese versions refer to canalization and regulation of watercourses, the Greek version including in addition the French term 'canalisation' in brackets after the Greek

term 'διευθέτησης'. The Danish and Swedish versions contain only a single expression reflecting the idea of regulating watercourses ('anlæg til regulering af vandløb', 'anläggningar för reglering av vattenflöden').

30 Given that divergence, one must go to the purpose and general scheme of the directive. According to Article 1(2) of the directive, 'project' means 'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. According to Article 2(1), the directive is aimed at 'projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location'. Article 3 provides that the environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage.

31 The wording of the directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods — and therefore dyke works — even if not all the linguistic versions are so precise.

32 Even if, as argued by the Government of the Netherlands, dyke works consist in the construction or raising of the height of embankments in order to contain watercourses and avoid flooding, works retaining a static quantity of water, rather than a running watercourse, may have a significant effect on the environment within the meaning of the directive where they are liable permanently to affect the composition of the soil, flora and fauna or the landscape. Such works must therefore fall under the directive.

33 Consequently, the argument of the Government of the Netherlands that dyke work does not alter the course of a waterway is not well founded.

34 Lastly, the submission of the Government of the Netherlands that dykes do not fall within the scope of a Community directive because such work is specific to the Netherlands is irrelevant, since, as explained above, the criterion to be applied is the significance of the effect that a project is likely to have on the environment.

35 The reply to the first question is therefore that the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive must be interpreted as including certain types of work on a dyke running alongside waterways.

## Question 2

36 In this question the Nederlandse Raad van State asks whether, having regard in particular to the expressions 'projects' and 'modifications to development projects' employed in the directive, it makes any difference to the answer to Question 1 whether what is involved is:

(a) the construction of a new dyke;

(b) the relocation of an existing dyke;

(c) the reinforcement and/or widening of an existing dyke;

(d) the replacement *in situ* of a dyke whether or not the new dyke is stronger and/or wider than the old one; or

(e) a combination of two or more of (a) to (d) above.

37 Under the terms of the directive, modifications to development projects included in Annex I are to be subject to the same system as projects included in Annex II, and are thus subject to Article 4(2) of the directive. The lack of any reference to modifications of projects of the classes included in Annex II is construed, in the observations submitted, in different ways as regards their inclusion in the scope of the directive. According to the Italian and United Kingdom Governments, modifications of projects included in Annex II are also covered by that annex, whereas the Government of the Netherlands and the Commission argue that they do not fall within the scope of the directive. The Commission specifies, however, that it depends on the meaning attributed to the expression 'modifications to development projects' and in certain cases modifications may be so significant that they constitute a new project.

38 Since the directive provides no specific definition of 'modifications to development projects', the expression must be interpreted in the light of the general scheme and purpose of the directive.

39 It has already been pointed out in paragraph 31 above that the scope of the directive is wide and its purpose very broad. Its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment.

40 Furthermore, the mere fact that the directive does not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, does not justify the conclusion that they are not covered by the directive. The distinction between a 'project' and a 'modification to a project', where projects included in Annex I are concerned, relates to the different systems to which they are subject under the directive, whereas such a distinction in the case of projects included in Annex II would relate to the general scope of the directive.

41 Moreover, in Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, which concerned the Großkrotzenburg thermal power station, the Court held (paragraph 35) that links with a pre-existing construction of a new block of a thermal power station with a heat output of 500 megawatts did not prevent the project being a 'thermal power station with a heat output of 300 megawatts or more' so as to bring it within the category headed 'Modifications to development projects included in Annex I' mentioned in point 12 of Annex II. In that judgment the Court held that, in order to establish whether the work envisaged should undergo an impact assessment, such projects should be assessed irrespective of whether they were separate constructions, were added to a pre-existing construction, or even had close functional links with a pre-existing construction.

42 In the light of those considerations, the reply to the second question must be that the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke *in situ*, whether or not the new dyke is stronger or wider than the old one, or a combination of such works.

## Questions 3 and 4

43 By these questions, which will be examined together, the national court asks whether Articles 2(1) and 4(2) of the directive should be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with Article 4(2) of the directive, but those specifications, criteria or thresholds are incorrect, Article 2(1) requires that an environmental impact assessment be made if the project is likely to have 'significant effects on the environment by virtue *inter alia* of [its] nature, size or location' within the meaning of that provision. If that question is answered in the affirmative, the national court asks whether that obligation to make an environmental impact assessment of the project has direct effect, so that it may be relied upon by an individual before a national court, and whether it must be applied by the national court even if it was not in fact invoked in the matter pending before that court.

44 Referring to Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, the Nederlandse Raad van State states that it is possible to argue that the measure of discretion which Article 4(2) allows the Member States in establishing the specifications, criteria or thresholds is limited by the expression 'likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location' in Article 2(1).

45 Kraaijeveld and the Commission put forward a similar argument. The Commission states that the specifications, criteria or thresholds established by the Member States are primarily designed to facilitate examination of projects in order to determine whether they should undergo an impact assessment, but that the existence of those specifications, criteria or thresholds does not exempt the Member States from undertaking an actual examination of the project in order to verify that it satisfies the criteria in Article 2(1) of the directive. Both consider that the Kingdom of the Netherlands has not properly performed its obligation to implement the directive since the minimum size criteria laid down by the national legislation on

dykes was fixed at a level such that no river dyke projects met the criteria and hence all dyke reinforcement projects remained outside the ambit of impact assessments. On this issue Kraaijeveld produced a decision of a Netherlands court supporting its argument.

46 According to the Government of the Netherlands, however, the discretion allowed to the Member States is not limited in a precise manner in the directive. Moreover, the choice of thresholds for dyke length and cross-section measurements was made with due account taken of the impact of such work on the environment. The fact that, in practice, the Netherlands legislation transposing the directive left numerous projects free of the requirement of an assessment is wholly immaterial, since those projects had no harmful effects. It therefore considers that it did not go beyond the limits of its discretion in establishing those thresholds.

47 As regards the direct effect of the obligation to make impact assessments for some projects, the national court considers that that obligation may be regarded as resulting from a precise and unconditional provision of the directive. Kraaijeveld and the Commission have submitted observations to that effect, and the Commission adds that since the rules are of a procedural nature they leave no latitude as far as the result to be achieved is concerned. Conversely, the Netherlands and United Kingdom Governments consider that Article 2(1), read in conjunction with Article 4(2), of the directive is not sufficiently precise and unconditional to have direct effect, in view of the discretion conferred on Member States with regard to establishing thresholds and criteria or the procedure for consulting the public.

48 It should be noted that Article 2(1) of the directive refers to Article 4 for the definition of projects which must undergo an assessment of their effects. Article 4(2) allows Member States a certain discretion, since it states that projects of the classes listed in Annex II are to be subject to an assessment 'where Member States consider that their characteristics so require' and that, to that end, Member States may *inter alia* specify certain types of projects as being subject to an assessment or may

establish the criteria or thresholds necessary to determine which projects are to be subject to an assesment.

49 The interpretation put forward by the Commission — namely that the existence of specifications, criteria and thresholds does not remove the need for an actual examination of each project in order to verify that it fulfils the criteria of Article 2(1) — would deprive Article 4(2) of any point. A Member State would have no interest in fixing specifications, thresholds and criteria if, in any case, every project had to undergo an individual examination with respect to the criteria in Article 2(1).

50 However, although the second paragraph of Article 4(2) of the directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

51 Thus, ruling on the legislation of a Member State in terms of which certain entire classes of projects included in Annex II were excluded from the obligation of an impact assessment, the Court held in its judgment of 2 May 1996, in Case C-133/94 *Commission* v *Belgium*, [1996] ECR I-2323, at paragraph 42, that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement of assessment, not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged as taking place on the territory of a Member State.

52 In a situation such as the present, it must be accepted that the Member State concerned was entitled to fix criteria relating to the size of dykes in order to establish

which dyke projects had to undergo an impact assessment. The question whether, in laying down such criteria, the Member State went beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.

53 Thus a Member State which established criteria or thresholds at a level such that, in practice, all projects relating to dykes would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

54 Lastly, as regards more particularly the fourth question, it appears from the order for reference that in its action Kraaijeveld did not raise the question whether an environmental impact assessment ought to have been made. In order to reply to the question, it must therefore be considered whether the national court hearing an action for annulment of a decision approving a zoning plan is required to raise of its own motion the question whether an environmental impact assessment should have been carried out pursuant to Article 2(1) and Article 4(2) of the directive.

55 First of all it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the EC Treaty and by the directive itself (see Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 22, and Case 152/84 *Marshall* [1986] ECR 723,

paragraph 48). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

56 As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive (*Verbond van Nederlandse Ondernemingen*, paragraphs 22 to 24).

57 Secondly, where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705, paragraph 13).

58 The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provi-

sions of Community law (see, in particular, Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19, and *Van Schijndel and Van Veen* v *SPF*, cited above, at paragraph 14).

59 The fact that in this case the Member States have a discretion under Articles 2(1) and 4(2) of the directive does not preclude judicial review of the question whether the national authorities exceeded their discretion (see, in particular, *Verbond van Nederlandse Ondernemingen*, paragraphs 27 to 29).

60 Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.

61 If that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

62 Consequently, the replies to the third and fourth questions must be that:

— Article 4(2) of the directive and point 10(e) of Annex II must be interpreted as meaning that a Member State which establishes the criteria or thresholds neces-

sary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact assessment exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

— Where under national law a court must or may raise of its own motion pleas in law based on a binding national rule which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.

— Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

## Costs

63 The costs incurred by the Netherlands, Italian and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Nederlandse Raad van State, by judgment of 8 March 1995, hereby rules:

1. The expression 'canalization and flood-relief works' in point 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as including certain types of work on a dyke running alongside waterways.

2. The expression 'canalization and flood-relief works' in point 10(e) of Annex II to Directive 85/337 is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke *in situ*, whether or not the new dyke is stronger or wider than the old one, or a combination of such works.

3. Article 4(2) of Directive 85/337 and point 10(e) of Annex II must be interpreted as meaning that a Member State which establishes the criteria or thresholds necessary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact assessment exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

**Where under national law a court must or may raise of its own motion pleas in law based on a binding national rule which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.**

**Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.**

Rodríguez Iglesias Mancini Murray

Sevón Kakouris Kapteyn

Gulmann Edward Puissochet

Hirsch Wathelet

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President

# Case C-113/94

## Elisabeth Jacquier, née Casarin
## v
## Directeur Général des Impôts

(Reference for a preliminary ruling
from the French Cour de Cassation)

(Article 95 of the Treaty — Differential tax on motor vehicles)

Opinion of Advocate General Jacobs delivered on 12 October 1995 ..... I - 4205
Judgment of the Court (Second Chamber), 30 November 1995 ..... I - 4214

## Summary of the Judgment

1. *Tax provisions — Internal taxation — Graduated system of taxation — Most heavily taxed category containing only imported products — Whether permissible — Conditions — No encouragement to purchase domestic products*
   *(EC Treaty, Art. 95)*

2. *Tax provisions — Internal taxation — Graduated system of taxation on motor vehicles — Increased progression above a threshold of a specified cylinder capacity exceeded solely by imported vehicles — Whether permissible — No effect of favouring the sale of vehicles of domestic manufacture*
   *(EC Treaty, Art. 95)*

1. A system of tax on products in which the tax increases progressively in amount depending on an objective criterion is not as such prohibited by Community law, and cannot be regarded as discriminatory solely because only imported products, in particular those from other Member States, come within the most heavily taxed category. It breaches the prohibition in Article 95 of the Treaty only if it may deter consumers from purchasing the more heavily taxed imported products, to the benefit of products of domestic manufacture.

2. Article 95 of the Treaty does not preclude the application of national rules establishing a differential tax on motor vehicles in which the factor of progression from one tax band to the next is higher for the tax bands above a threshold of a specified cylinder capacity, which include only imported vehicles, *inter alia* from other Member States, than for the lower tax bands, where even if that increased progression deters some customers from purchasing the vehicles affected, it does not encourage the purchase of a vehicle of domestic manufacture, in that the vehicles in the tax band immediately below are nearly all of foreign manufacture, while the tax band below that includes, alongside a majority of vehicles of domestic manufacture, a large number of imported vehicles.

# JUDGMENT OF THE COURT
11 August 1995 *

In Case C-431/92,

**Commission of the European Communities**, represented initially by Ingolf Pernice, of the Legal Service, acting as Agent, and then by Rolf Wägenbaur, Principal Legal Adviser, acting as Agent, assisted by Alexander Böhlke, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Federal Republic of Germany**, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, Villemomblerstraße 76, D-5300 Bonn 1, acting as Agent, assisted by Dieter Sellner, Rechtsanwalt, Oxfordstraße 24, D-5300 Bonn 1,

defendant,

supported by

**United Kingdom of Great Britain and Norther Ireland**, represented by S. Lucinda Hudson, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the embassy of the United Kingdom, 14 Boulevard Roosevelt,

* Language of the case: German.

intervener,

APPLICATION for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of that directive,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris (Rapporteur), J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and J.-P. Puissochet, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 November 1994 at which the Commission was represented by Rolf Wägenbaur, assisted by Alexander Böhlke, the Federal Republic of Germany by Dieter Sellner and the United Kingdom by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt, Barrister,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

## Judgment

1 By application lodged at the Court Registry on 23 December 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of the directive.

2 The directive was adopted on the basis of Articles 100 and 235 of the Treaty. According to the first recital in the preamble, 'the ... action programmes of the European Communities on the environment ... affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes ...' The eleventh recital states further that 'the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

3 Article 1 of the directive provides:

'1. This directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this directive:

"project" means:

— the execution of construction works or of other installations or schemes,

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this directive.

...'

4 Article 2 provides:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment

by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive.

...'

5 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

6 Article 4 provides:

'1. ... projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

7 Paragraph 2 of Annex I refers in particular to 'Thermal power stations ... with a heat output of 300 megawatts or more'. Paragraph 12 of Annex II refers in particular to 'Modifications to development projects included in Annex I'.

8 Article 5 concerns the measures which the Member States must adopt to ensure that the developer supplies certain information specified in Annex III to the directive. Article 6 refers to the measures which the Member States must take to ensure that the national authorities likely to be concerned by the project in question are consulted and that the public concerned is informed and has the opportunity to express an opinion. Article 8 provides that 'Information gathered ... must be taken into consideration in the development consent procedure.'

9 Pursuant to Article 12(1) of the directive, the Member States were required to take the measures necessary to comply with the directive within three years of its notification. Since the directive was notified on 3 July 1985, that period expired on 3 July 1988.

10 According to the documents before the Court, in Germany the directive was belatedly transposed into national law by the Law of 12 February 1990 which came into force on 1 August 1990 (BGBl. I, p. 205).

11 Following a complaint that the Regierungspräsidium (District Office) Darmstadt as competent authority had granted consent on 31 August 1989 for the construction of a new block with a heat output of 500 megawatts at the Großkrotzenburg thermal power station without carrying out the preliminary environmental impact assessment required by the directive, the Commission on 15 May 1990 sent Germany a letter before action under Article 169 of the Treaty. In that letter it observed that the consent concerned a project for the construction of a thermal power station within the meaning of paragraph 2 of Annex I to the directive and that an assessment of its effects on the environment was therefore mandatory by virtue of Article 4(1) of the directive.

12 The Commission's reservations were not dispelled by the information given in Germany's letters in response of 16 and 17 August 1990. It therefore delivered a reasoned opinion on 25 September 1991 to which Germany replied by letter of 27 January 1992. Not content with Germany's reply, the Commission accordingly brought the present action.

## Admissibility

13 Germany raises a preliminary plea that the action is inadmissible on the ground that the form of order sought in the application is too imprecise since what is sought is a declaration that the directive and 'in particular' Articles 2, 3 and 8 thereof have been infringed. Germany considers that only the infringement of the provisions of the directive expressly referred to, and not a general complaint that the directive has been breached, may be taken into account.

14 That plea cannot be accepted.

15 The express reference to Articles 2, 3 and 8 of the directive in the form of order sought in the application enabled Germany to understand unequivocally that an infringement of those specific provisions was alleged. In its context, the adverbial phrase 'in particular' was used in the sense of 'specifically' in order to designate precisely those articles of the directive which had been infringed. It could not therefore have led Germany to believe that the application also concerned infringements of other unspecified provisions of the directive and thus have given rise to uncertainty as to the scope of the proceedings.

16 Secondly, Germany submitted at the hearing before the Court that the infringement of Article 2 of the directive is not referred to in the conclusions arrived at in the reasoned opinion and was raised for the first time in the application. Since the subject-matter of the action is determined, according to settled case-law, by the pre-litigation procedure, Germany considers that the complaint concerning the infringement of that provision is inadmissible.

17 That plea must be rejected.

18 Although Article 2 of the directive is not formally referred to in the conclusions arrived at in the reasoned opinion, it is none the less mentioned in the body of the opinion among the provisions invoked by the Commission.

19 Thirdly, Germany submits that the action is inadmissible on the ground that proceedings can be initiated under Article 169 of the Treaty only in respect of failure to implement or incorrect implementation of a directive and not simply, as in this case, in respect of failure in a specific case to apply a directive which has not yet been implemented. The object of proceedings for a declaration of failure by a Member State to fulfil its obligations is to encourage the Member State concerned to put an end to existing infringements of the Treaty. Since Germany has implemented the directive in the meantime, it considers that the Commission no longer has any legal interest in bringing proceedings, particularly since the procedure which the Commission initiated simultaneously for a declaration that Germany has incorrectly implemented the directive is not yet before the Court.

20 That plea of inadmissibility must also be rejected.

21 In exercising its powers under Articles 155 and 169 of the Treaty, the Commission does not have to show that there is a specific interest in bringing an action. Article 169 is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 16).

22 Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct

or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations.

23 In this case, Germany's submissions as to the inadmissibility of the action essentially come down to the fact that at the material time it had not yet implemented the directive. A Member State may not, however, plead the fact that it has not taken the necessary measures to implement a directive in order to prevent the Court from dealing with an application for a declaration that it has failed to fulfil a specific obligation flowing from that directive.

24 Finally, Germany submits that the case-law of the Court of Justice recognizes the direct effect of the provisions of a directive only where they confer specific rights on individuals. Articles 2, 3 and 8 of the directive, however, do not confer such rights. Since the Commission itself does not argue that the contested decision granting development consent failed to take account of the legal position of individuals protected by the directive, the latter's provisions cannot have direct effect irrespective of whether they are unconditional and sufficiently precise. The German authorities were not therefore required to apply them directly before implementing the directive. In their view, the action is consequently inadmissible.

25 That argument cannot be accepted either.

26 In its application, the Commission complains that Germany has not observed, in a specific case, the obligation flowing directly from the directive to assess the environmental impact of the project concerned. The question which arises is thus whether the directive is to be construed as imposing that obligation. That question is quite separate from the question whether individuals may rely as against the

State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice.

27 Since none of the pleas of inadmissibility has been accepted, the action must be held to be admissible.

## Substance

### *Application of the directive in time*

28 In Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, paragraphs 19 and 20, the Court of Justice ruled that, regardless of whether the directive permits a Member State to waive the obligations concerning the environmental impact assessment in respect of consent procedures already initiated before the deadline for implementation, namely 3 July 1988, the directive in any case precludes such a waiver for procedures initiated after that date.

29 In this case, the documents before the Court show that the application for consent for the project at issue was lodged with the Regierungspräsidium Darmstadt by PreußenElektra AG, the developer, on 26 July 1988, and thus after 3 July 1988. Consequently, the obligation imposed by the directive to carry out an environmental impact assessment could not in principle be waived in respect of the consent procedure for the project at issue.

30 The German Government argues, however, that the formal application for consent of 26 July 1988, accompanied by the complete file on the project, had been preceded by a preliminary stage which was a significant part of the consent procedure. During that preliminary stage, which was initiated on 18 May 1987, the competent authority was to advise the developer on the content and lodging of the application for consent. A series of meetings took place at which specialist departments were also represented. In addition the project is said to have been notified on 7 March 1988 to the competent authority in accordance with the Landesplanungsgesetz (Law of the *Land* of Hesse on planning).

31 That argument cannot be accepted.

32 Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in *Bund Naturschutz*, cited above (paragraph 16).

33 The consent procedure for the project at issue must accordingly be regarded as having been initiated after the deadline of 3 July 1988, with the result that the project was required to undergo an assessment of its effects on the environment in accordance with the directive.

*Categorization of the project at issue*

34 Germany, supported by the United Kingdom, submits that the new block at the Großkrotzenburg thermal power station is not a project within the meaning of Article 4(1) of the directive but a modification to a project. It cannot be regarded as in any way self-contained, but at a functional level is part of the power station as a whole. The consent at issue accordingly concerns a modification to a pre-existing power station. What is at issue is a modification to a project within the meaning of paragraph 12 of Annex II to the directive, a modification which in accordance with Article 4(2) of the directive the Member States may, rather than must, make subject to an environmental impact assessment.

35 By virtue of paragraph 2 of Annex I to the directive, projects for thermal power stations with a heat output of 300 megawatts or more must undergo a systematic assessment. For the purposes of that provision, such projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. Links with an existing construction do not prevent the project from being a 'thermal power station with a heat output of 300 megawatts or more' so as to bring it within the category headed 'Modifications to development projects included in Annex I', mentioned in paragraph 12 of Annex II.

36 In this case, it is common ground that the construction at issue is a block of a thermal power station with a heat output of 500 megawatts. It is therefore a project within the meaning of Article 4(1) of, and Annex I to, the directive. That project was required to undergo an assessment of its effects on the environment in accordance with the directive.

*Obligation to carry out an assessment in accordance with the directive*

37 Germany submits that Articles 2, 3 and 8 of the directive, which it is alleged to have infringed, are not so clear and precise as unequivocally to lay down a specific obligation and thus for their application by the national authorities to be mandatory.

38 That argument cannot be accepted.

39 Article 2 of the directive lays down an unequivocal obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the content of the assessment, lists the factors which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 furthermore requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment.

40 Regardless of their details, those provisions therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of certain projects on the environment.

*The question whether there has been a failure to fulfil the obligation to carry out an assessment*

41 Germany submits, finally, that an assessment of the effects of the project at issue on the environment was carried out by the competent authority on the basis of the national legislation then in force, namely the Bundesimmissionsschutzgesetz of 15 March 1974 (German Federal Law on the protection of the environment). Although that assessment was not formally based on the directive, it is said by Germany to have complied with all its requirements.

42 The Commission does not deny that there was an assessment of the effects on the environment of the project at issue. However, that assessment does not satisfy the present requirements of the directive, which are stricter than the national legislation then in force. In particular, it did not comply with the obligation to take account of the interaction between the factors referred to in the first and second indents of Article 3 of the directive (human beings, fauna, flora, soil, water, air, climate and the landscape), an obligation which requires an overall assessment of those factors.

43 According to the documents before the Court, an environmental impact assessment was carried out in the course of the procedure for the grant of consent for the project by the Regierungspräsidium Darmstadt. The developer provided in particular information on the environmental impact of the project which was considered by the Commission itself as sufficient from the point of view of the requirements of Article 5 of, and Annex III to, the directive. That information also concerned the interrelationship between the factors referred to in Article 3 of the directive. Finally, it is common ground that the infor-

mation was made available to the public concerned who had the opportunity to express an opinion. In those circumstances, the objective of making the public aware of the environmental implications of a project on the basis of specific information provided by the developer was attained.

44 It is also apparent from the disputed decision of the Regierungspräsidium Darmstadt of 31 August 1989 and its report of 11 November 1991 drawn up in response to the reasoned opinion that the authority in question integrated the information gathered and the reactions of the sectors concerned in the consent procedure, and took that into account in its decision approving the project.

45 In the light of those considerations, the Commission should have specified on what specific points the requirements of the directive were not complied with during the procedure for consent for the project at issue and should have provided appropriate evidence of non-compliance. Its application does not include such details backed by specific evidence. It must therefore be dismissed as unfounded.

## Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Germany has not asked for the Commission to be ordered to pay the costs, the two parties must be ordered to bear their own costs. The United Kingdom, as intervener, is also to bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the parties, including the intervener, to bear their own costs.**

Rodríguez Iglesias Schockweiler Kapteyn Mancini

Kakouris Moitinho de Almeida

Murray Edward Puissochet

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President

# JUDGMENT OF THE COURT
28 February 1991 *

In Case C-360/87,

**Commission of the European Communities,** represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at his office, Wagner Centre, Kirchberg,

applicant,

v

**Italian Republic,** represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, assisted by Pier Giorgio Ferri, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary for the full and correct implementation in its national law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43), the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

## THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho Almeida and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, F. Grévisse and M. Zuleeg, Judges,

* Language of the case: Italian.

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing and further to the hearing on 4 July 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 September 1990,

gives the following

## Judgment

1 By an application lodged at the Court Registry on 2 December 1987 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary for the full and correct implementation in its national law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43) (hereinafter referred to as 'the Directive'), the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

2 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community and national provisions at issue, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### The subject-matter of the dispute

3 In the course of the pre-litigation procedure and the written procedure before the Court the Italian Republic stated *inter alia* that Italian water was protected against pollution by Law No 319 of 10 May 1976, entitled 'Norme per la tutela delle

acque dall'inquinamento' (the 'Legge Merli I', Official Gazette of the Italian Republic No 141 of 29 May 1976, p. 4125), by Law No 650 of 24 December 1979, entitled 'Integrazioni e modifiche delle leggi 16 aprile 1973, No 171, e 10 maggio 1976, No 319, in materia di tutela delle acque dall'inquinamento' (the 'Legge Merli II', Official Gazette of the Italian Republic No 352 of 29 December 1979, p. 10533) and by the Decision of 4 February 1977 of the Interministerial Committee for the protection of water against pollution (Official Gazette of the Italian Republic, Ordinary Supplement No 48 of 21 February 1977, p. 2). However, at the hearing the Italian Republic stated that on certain points its legislation was not entirely in conformity with the Directive and indicated that the legislative procedure intended to bring about full conformity was in progress.

4 During the pre-litigation procedure the Italian Republic maintained that according to the legislation in force in Italy all direct discharges of waste water into groundwater were prohibited. The Italian legislation thus fulfilled the requirements of the first indent of Article 4(1) and the first indent of Article 5(1) of the Directive.

5 In its application the Commission stated that it took note of the statements made by the Italian Republic concerning the prohibition of direct discharges. At the hearing it stated that it had been established that the Italian legislation provided indirectly for the prohibition of any direct discharge and it accepted that on that point the absolute prohibition of direct discharge was in conformity with the Directive.

6 Having regard to those statements of the parties' respective positions, the specific complaints made by the Commission regarding the conformity of the Italian legislation with the Directive remain to be examined.

7 It should be observed as a preliminary point that the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it does ensure the full application of the Directive in a sufficiently clear and precise manner (see the judgment in Case 252/85 *Commission* v *France* [1988] ECR 2243). Each of the Commission's complaints must therefore be examined on that basis.

**The distinction between the substances in list I and those in list II**

8 The Commission argues first that the Italian legislation on discharges makes no distinction between substances in list I and those in list II. That distinction is important in relation to the objective of the Directive, that is to say the effective protection of groundwater against pollution, because discharges of substances in list I must be prevented whereas discharges of substances in list II must merely be limited.

9 The Italian Republic did not take any position on that complaint in its defence or in its rejoinder; in its reply to the written question addressed to it by the Court, it referred to point 1 of Annex 5 to the Decision of 4 February 1977 of the Interministerial Committee, referred to above, and stated that under that Decision the direct discharge of substances in list I is absolutely precluded and the risk of indirect discharge is practically eliminated.

10 The Italian Republic also admitted at the hearing that the Italian legislation made no distinction between direct and indirect discharges, but it submits that the Decision of 4 February 1977 ensures that discharges cannot reach groundwater since that Decision authorizes discharge on the ground only where there is natural purification and discharges in the subsoil only where the discharge is carried out in deep and impermeable strata. The Italian Republic states, however, that through the distinction it makes between substances in lists I and II the Directive authorizes a certain degree of pollution in respect of substances in list II, contrary to the legislation in force in Italy, which is more rigorous on this point.

11 As is clear from the statements of the Italian Republic, it admits that its legislation makes no distinction between the substances in lists I and II. Article 3 of the Directive treats differently discharges of substances in list I, which must always be prohibited in the case of direct discharges and are subject to authorization, after an investigation, in the case of indirect discharges, and discharges of substances in list II, which are subject to other rules. Consequently, the distinction between the two types of substances is mandatory in view of the objective of the Directive. It

follows that it must be incorporated in national legislation with the requisite precision and clarity in order to meet the requirement of certainty.

12 Legislation which leaves the persons subject to it in a state of uncertainty as to the extent to which they may rely on Community law does not fulfil the obligation to transpose a directive into national law (see the judgment in Case 116/86 *Commission* v *Italy* [1988] ECR 1323).

13 As regards the argument of the Italian Republic to the effect that its legislation in practice eliminates the risk of indirect discharge, it should be observed that, as the Court held in its judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, at paragraph 25, in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.

14 Consequently, this complaint of the Commission must be upheld.

**Substances omitted by the Italian legislation**

15 The Commission submits that the Italian legislation omits several of the substances included in lists I and II in the Annex to the Directive.

16 With regard to list I, the Commission submits that there is no mention in the Italian legislation of 'organotin compounds' (list I, point 3) or of most substances which 'possess carcinogenic, mutagenic or teratogenic properties in or via the aquatic environment' (list I, point 4), and that among the organohalogen compounds and substances which may form such compounds in the aquatic environment and organophosphorus compounds (list I, points 1 and 2), the Italian legislation refers only to chlorine-based pesticides, chlorine-based solvents and phosphor-based pesticides.

17 With regard to substances in list II, the Commission submits that the Italian legislation does not take into account the following chemical substances: antimony, molybdenum, titanium, beryllium, uranium, vanadium, cobalt, thallium, tellurium and silver, and that it does not cover several compounds which may be classed as 'biocides and their derivatives not appearing in list I'. It refers in that regard to examples such as carbamates, dithiocarbamates, organosulphate fungicides, quaternary ammonium derivatives etc., and the group of 'toxic or persistent organic compounds of silicon, and substances which may cause the formation of such compounds in water, excluding those which are biologically harmless or are rapidly converted in water into harmless substances' (points 1, 2 and 4 of list II).

18 In reply to a question in this regard from the Court, the Italian Republic admitted that the complaint concerning all those substances was well founded, and it confirmed that admission at the hearing. It observes, however, that with regard in particular to the substances referred to in point 4 of list I, that is to say those which possess carcinogenic, mutagenic or teratogenic properties, it has experienced some difficulty as a result of the fact that the Directive does not state what these substances are and that although it has asked the Commission for clarification on that point it has received no reply.

19 It is true that the Directive does not identify the substances which possess carcinogenic, mutagenic or teratogenic properties and that, as the Commission rightly stated, its silence is due to the constant developments in scientific knowledge in that regard. However, that difficulty does not justify the absence of any general mention of those substances in national legislation.

20 Consequently, this complaint of the Commission must be upheld.

**The procedure for the issue of discharge authorizations**

21 The Commission submits that the Italian Republic has not transposed Article 7 of the Directive, which specifies the nature of the prior scientific investigation, or Article 8, which lays down the condition that a discharge authorization cannot be issued before it has been checked that the groundwater, and in particular its quality, will undergo the requisite surveillance.

22 The Italian Republic submits that Law No 62 of 5 March 1982 (Official Gazette of the Italian Republic No 63 of 5 March 1982, p. 1713) meets the requirements of Article 7 of the Directive inasmuch as it provides that the regions are required to identify, by means of an appropriate plan, zones suitable for discharges of waste water and sludge, in accordance with the criteria laid down in Annex 5 of the Decision of the Interministerial Committee of 4 February 1977, which establishes very detailed rules concerning prior verifications. According to the Italian Republic those rules serve to predetermine the conditions under which any discharges are carried out.

23 That argument cannot be upheld. Article 7 of the Directive requires, having regard to the specific nature of the subject-matter of the investigation, that is to say the environment into which the discharge is to be made, that the investigation should have a specific objective, that is to say the study of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and other factors; indeed, it is for that reason that the provision gives a precise indication of the factors which must be covered by the prior investigation. It thus makes the grant of authorization subject to precise and detailed conditions which must be regarded as mandatory in order to achieve the aim of the Directive. It follows that national legislation which defines in a vague and general manner a number of criteria and technical standards for the use of water cannot be regarded as complying with the requirements of the Directive.

24 With regard to the transposition of Article 8 of the Directive, the Italian Republic submits that the surveillance of water required by that article is ensured by point 2.8 of Annex 5 to the Decision of the Interministerial Committee of 4 February 1977, under which provision must be made for all the necessary verifications in order to assess the environmental impact of the discharge system and which indicates a number of checks to be carried out.

25 That argument cannot be upheld either. Article 8 of the Directive makes the grant of authorizations provided for in Articles 4, 5 and 6 subject in mandatory terms to prior specific checks of a well-defined nature.

26 The provisions relied on by the Italian Republic provide only for vague and general measures which cannot be regarded as implementing the article in question

with the requisite precision and clarity to satisfy fully the demands of legal certainty (see the judgment in Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, at paragraph 15).

27 Consequently, this complaint on the part of the Commission must also be upheld.

**The tacit 'provisional authorization'**

28 The Commission also submits that the Italian Republic has not transposed Articles 9 and 10 of the Directive, which indicate the matters which must be specified in authorizations, or Article 12 of the Directive, which sets out the circumstances in which authorization must be refused or withdrawn. The Commission submits that Article 15 of Law No 319 of 10 May 1976, cited above, makes the issue of authorization subject to no condition other than the obligation for the applicant to submit an application accompanied by a precise description of the discharge. The Commission further states that in accordance with that article provisional authorization is deemed to be granted when the application for grant of authorization has not been rejected within six months. According to the Commission, that provision establishes a system of authorization on demand and a 'tacit agreement' procedure which has repercussions as regards both authorization and verification, since in the event of tacit authorization it is not certain whether any verification has taken place, and where it has not the authorization is granted without compliance with the conditions laid down in Articles 9, 10 and 12 of the Directive.

29 The Italian Republic argues that the fact that the Italian legislation provides for tacit authorization does not mean that the system is incompatible in itself with the aim of the Directive, since the Member States are entitled to choose the manner in which they implement it. According to the Italian Republic, the competent authority must in any event verify, as regards tacit authorizations, that the area chosen for the discharge falls within that previously defined by the regional authority. Consequently Italian law ensures preventive and effective monitoring in accordance with the Directive.

30 The Directive provides that the refusal, grant or withdrawal of authorizations must take place by way of an express measure in accordance with precise rules of procedure which comply with a number of necessary conditions, conditions which create rights and obligations on the part of individuals.

31 Consequently, tacit authorization cannot be considered compatible with the requirements of the Directive, since in addition, as the Commission has stated, such authorization does not make it possible to carry out prior inquiries, subsequent inquiries or checks. It follows that the national legislation does not transpose the Directive with the requisite precision and clarity to satisfy fully the requirements of legal certainty.

32 Consequently, this complaint by the Commission must also be upheld.

**The duration of authorization**

33 According to the Commission, the Italian legislation, in particular Article 15 of Law No 319 of 10 May 1976, cited above, provides for definitive authorization, which, even if it can be withdrawn or amended at any time, is incompatible with Article 11 of the Directive, which requires the Member States to grant authorizations for a limited period which must be reviewed at least every four years.

34 The Italian Republic did not take any position on this issue in its written pleadings, but in reply to a question from the Court it admitted that the provisions of Italian legislation in force do not regulate the duration of authorization.

35 Consequently, this complaint of the Commission must be upheld.

**Monitoring of compliance with the conditions laid down in authorizations and the effects of discharges**

36 The Commission submits that Article 13 of the Directive, which requires Member States to monitor compliance with the conditions laid down in each authorization and the effects of discharges on groundwater, has not been correctly transposed since the sixth paragraph of Article 15 of Law No 319 of 10 May 1976, as amended by Law No 650 of 24 December 1979, cited above, gives the Italian authorities powers of supervision and monitoring which are vague in nature and

are restricted to monitoring compliance within the limits of acceptability laid down by the legislation.

37 With regard to the complaint concerning the monitoring of compliance with the conditions laid down in the authorization, the Italian Republic, in reply to a written question from the Court, states that Article 9 of Law No 650 of 24 December 1979 meets the requirements of the Directive since municipalities and mountain local authorities are required to monitor discharges and Article 22 of Law No 319 of 10 March 1976 lays down criminal penalties for persons who fail to observe the conditions laid down in authorizations. It points out that Article 8(4) of Law No 349 of 15 July 1986 (Official Gazette of the Italian Republic No 162 of 8 July 1986) established an environmental unit of *carabinieri*. According to the Italian Republic, the fact that failure to observe the conditions laid down in authorizations constitutes a criminal offence automatically entails a duty of surveillance and monitoring on the part of the authorities responsible for investigating offences.

38 With regard to the complaint concerning the monitoring of the effects of discharges, the Italian Republic, in reply to a question from the Court, states that such monitoring is ensured by point 2.8 of the Decision of the Interministerial Committee of 4 February 1977.

39 In reply to those arguments, the Commission maintains that the Italian legislation is vague and that the criminal penalties provided for in Article 22 of Law No 319 of 10 May 1976 are insufficient to ensure compliance with the Directive, because the Law itself does not take account of the precise and detailed provisions of the Directive. Furthermore, the Commission considers that the *carabinieri* unit, composed of some 20 men, cannot ensure effective protection against all offences concerning the environment.

40 Article 13 of the Directive places on the authorities of the Member States a specific duty to monitor all the conditions laid down in authorizations which have been issued and all the effects of discharges on groundwater.

41 The Italian legislation establishes a general criminal offence intended to penalize failure to comply with the conditions laid down in authorizations which are issued, but does not require any specific monitoring of compliance with those provisions. Nor does it provide for monitoring of the effects of discharges on groundwater.

42 It follows that the measures taken by the Italian Republic are not sufficient to meet the specific requirements of the Directive as regards both the monitoring of compliance with the conditions laid down in authorizations which are issued and the monitoring of the effects of discharges on groundwater.

43 Consequently, this complaint of the Commission must also be upheld.

**The obligation to keep an inventory of authorizations.**

44 The Commission submits that the Italian legislation does not comply with Article 15 of the Directive, which requires Member States to keep an inventory of authorizations. At present there is no such inventory in Italy, and even if there was one it would necessarily be incomplete at least in respect of tacit authorizations.

45 The Italian Republic replies that the fact that national legislation permits tacit authorization does not preclude the possibility of drawing up the inventory required by the Directive, because every application for authorization lodged with the competent department is accompanied by documentation containing all the information on the discharge.

46 That argument cannot be upheld, because the documentation referred to does not satisfy the obligation laid down by the Directive to keep an inventory of authorizations.

47 Consequently, this complaint of the Commission must also be upheld.

48 Having regard to all the foregoing considerations, it must be held that by not adopting within the prescribed period all the measures necessary to comply with Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

## Costs

49 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

**(1) Declares that by not adopting within the prescribed period all the measures necessary to comply with Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances the Italian Republic has failed to fulfil its obligations under the EEC Treaty;**

**(2) Orders the Italian Republic to pay the costs.**

Due Mancini Moitinho de Almeida

Díez de Velasco Kakouris Grévisse Zuleeg

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President

provisions of a binding nature. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from the directive in question.

In Case 96/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Robert Caspar Fischer, acting as Agent, assisted by Auke Haagsma, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF THE NETHERLANDS, represented by Adriaan Bos, acting as Agent, Assistant Legal Adviser at the Ministry of Foreign Affairs, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands, 5 Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that the Kingdom of the Netherlands has failed to fulfil an obligation imposed on it by the EEC Treaty, by not adopting within the period prescribed the laws, regulations and administrative provisions needed in order to comply with Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco and A. Touffait (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans and U. Everling, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

# JUDGMENT

## Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

### I — Summary of the facts

1. Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1) provides that Member States are to take certain measures in order to reduce the pollution of bathing water and to protect such water against further deterioration. To that end, the directive lays down the physical, chemical and microbiological parameters applicable to bathing water and provides that Member States shall set, for all bathing areas or for each individual bathing area, the values applicable to bathing water as regards those parameters. Members States are obliged, by virtue of the directive, to take all necessary measures to ensure that, within a period of 10 years, the quality of bathing waters conforms with those values and to ensure that those values are observed in newly-created bathing areas. The competent authorities in the Member States are obliged to carry out sampling operations in accordance with the detailed rules laid down in the directive. Member States are obliged, four years following the notification of the directive and regular intervals thereafter, to submit a comprehensive report to the Commission on their bathing water and the most significant characteristics thereof.

Article 12 (1) of the directive provides as follows:

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification. They shall forthwith inform the Commission thereof."

Notification of the directive to the Netherlands took place on 10 December 1975. Thus the period specified in Article 12 expired on 10 December 1977.

2. By letters of 24 February 1976 and 13 October 1977 the Commission requested the Netherlands Government to inform the Commission of the measures taken by the Netherlands to implement the directive.

In reply to those letters the Ministerie van Verkeer en Waterstaat [Ministry of Transport, Water Control and Construction] of the Netherlands informed the Commission, by letter of 28 March 1978, that an amendment to the Wet Verontreiniging Oppervlaktewateren [Law relating to the pollution of surface water] was in preparation. That amendment would *inter alia* enable national standards to be set concerning the discharge of certain substances and to maintain everywhere a general minimum quality level required for the various uses of surface water. That amendment therefore had great significance in connection with the implementation of the directive.

Moreover, an amendment to the Wet Hygiëne en Veiligheid Zweminrichtingen [Law relating to hygiene and safety in bathing establishments] would enable the use of surface water in bathing water to be prohibited where the former did not satisfy the requirements laid down in the directive.

Furthermore the competent authorities were in the process of taking concerted action to extend the sampling programme in order to adapt it to the provisions of the directive.

Finally, the Netherlands Government remarked that certain requirements, based on an opinion of the Gezondheidsraad [Health Council] and contained in a report entitled "Interimrapport Zwemwater" ["Interim report on bathing water"] dated 25 June 1973, had been imposed for a long time in the Netherlands on the use of surface water for recreational purposes. That report was attached to the letter.

The Ministerie van Verkeer en Waterstaat concluded its letter of 28 March 1978 by stating its willingness to supply the Commission with any further information which it might require.

3. By letter of 8 February 1979 the Commission informed the Netherlands Government that it was of the opinion that the Kingdom of the Netherlands had failed to fulfil its obligations under the directive since the Netherlands authorities had still not adopted the measures needed to give effect to the directive under its internal law and since, notwithstanding the provisions of Article 12 (1) of the directive, the Commission had not yet received any communication regarding such measures. The Commission therefore invited the Netherlands Government, pursuant to Article 169 of the EEC Treaty, to submit its observations on the matter within two months.

The Netherlands Government replied to that letter by a letter dated 23 May 1979 from its Permanent Representation to the European Communities.

In that letter the Netherlands Government supplied a number of further details concerning the content of the law relating to the pollution of surface water accompanied by certain extracts of that law. It stated that that legislation provided for a certain number of methods of controlling the quality of surface water. A prospective multiennial programme drawn up every five years for the purposes of the campaign against water pollution, and determining the policy to be pursued in practice by the authorities responsible for the quality of water contained, in the annexes thereto, the norms laid down in the directive. The programme was attached to the letter. The Netherlands Government emphasized that whilst the preamble to and the explanatory statement accompanying the draft law designed to amend the law relating to the pollution of surface water referred to the directive that did not mean that the directive was not being applied in the Netherlands in the absence of such amendment since for that purpose the present law already provided for a number of methods and laid down certain administrative provisions enabling the directive to be implemented to a considerable extent.

The Netherlands Government also forwarded to the Commission a copy of the law relating to hygiene and safety in bathing establishments, which enabled certain measures to be taken, in respect of bathing establishments, concerning the quality of bathing water. The proposed amendment to that law would have the effect of extending still further the scope of its application.

In that connection the Netherlands Government also referred to the Wet bestrijding Infectieziekten en Opsporing Ziekteoorzaken [Law to combat infectious diseases and to detect the causes of disease] which compels the mayor of any municipality to order the total or partial closure of a bathing establishment if the department responsible for the inspection of public health makes a request to that effect.

The Netherlands Government annexed to that letter a report on bathing areas in respect of 1978 and on the most significant characterisitics of their bathing water.

The Netherlands Government concluded its letter by stating that it believed it had shown by the contents of the letter that it was in practice already implementing the directive as the basis of existing legislation. It added that it was prepared to supply the Commission with any further information which it might require.

4. By letter of 27 July 1979 the Commission delivered to the Netherlands Government a reasoned opinion within the meaning of Article 169 of the EEC Treaty stating that the Kingdom of the Netherlands had failed to fulfil an obligation imposed on it by the directive by not adopting the laws, regulations and administrative provisions needed to comply with its terms.

The Commission stated in its reasoned opinion that the Kingdom of the Netherlands had not informed the Commission of the measures taken to comply with the directive and the Commission must therefore assume that the Kingdom of the Netherlands had not yet taken such measures. The provisions of the existing legislation to which the Netherlands Permanent Representation had referred in its letter of 23 May 1979 and the report on bathing areas did not constitute implementation of the directive for the purposes of Article 12. The Commission had still not been informed that the proposed amendments to that legislation had been enacted.

In its reply to that reasoned opinion, by letter of 26 November 1979 from its Permanent Representation to the European Communities, the Netherlands Government reaffirmed that existing legislation already provided mechanisms making it possible to pursue a policy aimed at meeting or continuing to observe the quality requirements which surface water intended for bathing must satisfy. Although, for the purpose of implementing the directive, it was necessary to adapt the law relating to the pollution of surface water in order to create a legal instrument by which general and binding instructions might be issued to all the authorities responsible for the quality of water, that did not mean, contrary to the belief of the Commission, that it was impossible for the Netherlands to implement the directive without such adaptation. The amendments which were being made to the legislation on the subject were considered desirable and the Netherlands Government attached great importance to them. The Netherlands was already implementing the directive by means of existing legislative instruments. In that letter, the Netherlands Government supplied further details of the existing legislation and added that it was prepared to engage in any further consultations with the Commission.

By letter of 24 March 1981 the Permanent Representation of the Kingdom of the Netherlands to the European Communities informed the Commission as to the stage reached in the legislative procedure relating to the aforementioned amendments to the relevant Netherlands legislation.

## II — Conclusion and written procedure

1. By an application registered at the Court on 24 April 1981, the *Commission* brought an action against the Kingdom of the Netherlands claiming that the Court should:

Declare that the Kingdom of the Netherlands, by not adopting within the period prescribed the laws, regulations and administrative provisions needed in order to comply with the requirements of Council Directive No 76/160/EEC of 8 December 1975, has failed to fulfil an obligation imposed upon it by the Treaty;

Order the Kingdom of the Netherlands to pay the costs.

The *Government of the Kingdom of the Netherlands* contends that the Court should:

Dismiss the application as unfounded;

Order the Commission to pay the costs.

2. At the conclusion of the written procedure, which followed normal course, the Court, upon hearing the views of the Advocate General, decided to request the Commission to reply in writing to a number of questions and decided to invite the Government of the Netherlands to submit in writing its observations on those replies.

The Court, upon hearing the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

## III — Submissions and arguments of the parties put forward during the written procedure.

1. The *Commission* contends in its *application* that the Netherlands Government did not deny, in its reply to the Commission or in its subsequent letters, that the directive required an amendment to the legislation in force in the Netherlands. It was apparent from the contents of those letters that that amendment to its legislation had still not been enacted and that therefore, contrary to Article 12 of the directive, the Netherlands still had not adopted all the laws, regulations and administrative provisions needed in order to implement the directive.

The statement, contained in the letter of 26 November 1979, that the Netherlands was implementing the directive by means of existing legilsative provisions, through administrative channels, as well as by means of guidelines at the practical level, is contradicted by certain statements also contained in that letter to the effect that it was "necessary to adapt that law for the purpose of implementing the directive". That notion also conflicts with the viewpoint expressed by the Netherlands Government in its reply of 28 March 1978.

The need for certain laws, regulations or administrative provisions also emerges clearly from a comparison of the directive with the existing legislation. It is not however necessary at this stage systematically to examine the differences between the Netherlands legislation and

the directive but the Commission expressly reserves the right to present further argument on this point if that should prove necessary during the course of the procedure.

In the Commission's view, the Netherlands Government wishes to give the impression that the quality of bathing water in the Netherlands is in fact largely the same as that prescribed by the directive without, however, denying that this situation derives only to an insufficient degree from the powers, and the mandatory statements and task-descriptions stipulated in the directive. What is important in the present case is not the practical result brought about by the policy pursued by the Government and by the various subordinate authorities in the Netherlands but the fact that the Netherlands legislation does not make provision for all the instruments prescribed in the directive.

2. In its *defence* the *Netherlands Government* points out that the Commission did not respond to the observations submitted on the reasoned opinion as to the manner in which the directive was already being implemented and that the Commission did not state which provisions of the directive had not been implemented in the Netherlands.

The Netherlands Government, by a letter of 23 May 1979 from its Permanent Representation, had already informed the Commission that its programme for sampling bathing water had been made to comply with the directive. The Commission had received reports concerning the most significant characteristics of the bathing water. In addition in an annex to its defence, the Netherlands Government gives the results of a quarterly bacteriological survey concerning the quality of bathing water.

Moreover, the Netherlands Government recalls that, according to Article 4 of the directive, it is only within a period of 10 years that the quality of bathing water must be made to conform to the limit values set in accordance with Article 3 of the directive.

The draft law amending the law relating to the pollution of surface water was considered desirable for the purpose of creating a uniform scheme in a system under which managerial responsibility for the quality of water rested with decentralized administrative authorities and under which central government did not have the power to regulate directly the management by those subordinate authorities as regards the grant of authorizations or the laying down of quality standards for surface water.

Nevertheless, the existing instruments taken, as a whole, could be used to implement the directive. The subordinate authorities, which are obliged to put into effect the terms of the directive, are aided in their management by all the instruments put at their disposal by the law relating to the pollution of surface water, in particular prohibitions, declarations of inadequacy, the provisions governing authorizations, the levying of a tax and the components of the general

improvement policy. Existing legislation confers, on every authority responsible for the quality of water, the necessary instruments for pursuing a policy aimed at ensuring that the quality of water satisfies requirements which are essential for its recognized use or function. It is not possible to conclude from the existence of a draft amendment to the law, intended to supplement the existing provisions, that the directive had not been implemented. The legislative amendment is designed to impose more stringent rules that those laid down in the directive. The instruments to be created within the framework of the law relating to the pollution of surface water are, moreover, based on Council Directive No 76/464/EEC of 4 May 1976 which is subsequent in time to the directive at issue and places that directive in a general context.

By their nature, the provisions of the directive at issue are primarily addressed to the national authorities. The Member States are free to choose the form and methods of implementing the directive. The Commission has not shown that the Netherlands did not have at its disposal the instruments needed for implementing the directive. The directive has hitherto been adequately implemented in the Netherlands.

3. In its *reply* the *Commission* maintains that the Netherlands Government fails to realize the true scope of the application and is basing itself on misconceptions as regards the nature of directives in general and of the directive at issue in particular.

The duty to inform the Commission under Article 12 (1) of the directive, on which the application is based, is for the Commission an indispensable instrument in its task of supervising the implementation of directives and constitutes a specific instance of the general duty, imposed on the Member States by Article 5 of the EEC Treaty, of facilitating the achievement of the Commission's tasks. A general communication stating that, for the purpose of its implementation the directive was the subject of a certain legislative amendment or that its implementation was already effected within the context of existing legislation, may not be considered as sufficient.

As with many other directives, under the system laid down by Article 12 (1) of the directive, the supervision by the Commission of the correct implementation of the directive is generally carried out in two stages.

During the first stage, which involves a general and formal examination, the Commission verifies whether the Member States have informed it of the provisions, whether existing or newly enacted, which they consider to be necessary for the implementation of the directive, and whether those provisions have entered into force within the prescribed period. During the second stage which involves a close and lengthy examination and a scrupulous comparison of the national provisions with the various provisions of the directive, the Commission verifies, on the basis of information supplied by the Member States pursuant to Article 12 (1) of the directive, whether the Member States have satisfactorily implemented the provisions of the directive.

The duty to supply information and the supervision, in two stages, of the implementation of the directive entails consequences as regards the procedure laid down in Article 169 of the EEC Treaty in the event of failure by a Member State to fulfil its obligations. An incomplete or delayed communication of the implementing provisions constitutes a failure to comply with the terms of the second sentence of Article 12 (1) of the directive which is sufficient of itself to justify the initiation of the procedure laid down in Article 169 of the EEC Treaty.

Failure to comply with the second sentence of Article 12 (1) of the directive also gives rise to the presumption that the Member State has not complied with its obligation to bring into force the necessary provisions as laid down in the first sentence of Article 12 (1). Where the Member State has informed the Commission of the implementing measures which it considered necessary but did not bring them into force within the prescribed period the Member State is not entitled to rebut that presumption by evidence to the contrary, thus contradicting the previous communication to the Commission.

On the basis of that presumption the Commission may also incorporate, in the default procedure which it initiates, a failure to fulfil the obligation to bring into force the provisions referred to in the first sentence of Article 12 (1), on the basis that the Member State had not brought into force within the prescribed period *all* the necessary implementing measures. There is no need for the Commission to state or demonstrate that the Member State has failed to comply with certain specific obligations laid down in the directive. Verification in regard to such matters takes place during the second stage of the procedure. In any event it is sufficient for the Commission to show that at least *one* of the provisions of the directive has not been implemented or has been implemented incorrectly.

The Commission brought this action during the first stage of its supervision of the implementation of the directive since, as it stated in its application, and that statement has not been contradicted, the Netherlands had not communicated to it, within the prescribed period, and pursuant to the second sentence of Article 12 (1), the implementing measures adopted. Both parties admit that the Netherlands has not complied with that provision of the directive. The Commission has confined the present case to the fact that the Netherlands had not brought into force, within the prescribed period, all the laws, regulations and administrative provisions necessary. On that narrow issue, the burden of proof on the Commission is clearly much less onerous and, in addition the aforementioned presumption applies.

The presumption of belated or incomplete implementation is confirmed by the letter of the Netherlands Government dated 28 March 1978 which shows that the Netherlands Government was, at that time, convinced that the implementation of the directive required the enactment of a certain number of provisions, indicated in outline. That letter therefore did not constitute the information stipulated by the second sentence of Article 12 (1). Whilst the more detailed information, contained in subsequent letters from the Netherlands Government, on the means available under existing Netherlands legislation constituted valuble material for the purpose of verifying the correct implementation of the directive during the second stage of the Commission's examination, it is of no significance in the present case which is concerned with the first stage of that examination.

The Netherlands Government stated for the first time, in its defence, explicitly and unequivocally, that adequate implementing measures had been adopted, ensuring, for the time being, the adequate implementation of the directive in the Netherlands. Such a viewpoint is unacceptable since it repudiates the earlier attitude adopted by the Netherlands and undermines the confidence with which that attitude

had inspired the Commission. The Commission continues therefore to rely on the presumption that the Netherlands has not adopted all the implementing measures and it need not reply in detail to all the arguments put forward by the Netherlands Government as regards the present state of the implementation of the directive.

In any event, the presumption that the directive has not been fully implemented has not been rebutted by the Netherlands Government even if it were accepted that that possibility is open to the Government. For that purpose, it would have had to demonstrate, in respect of each provision of the directive, that equivalent mandatory provisions already exist in Netherlands law and its defence does not contain any such demonstration.

Moreover, even supposing that no such presumption existed, the Commission has clearly shown that the Netherlands has not brought into force, within the prescribed period, all the necessary implementing provisions. Merely to bring into force some of the provisions of the directive is not sufficient to comply with Article 12 (1). It is clear that the implementation of the obligations contained in the directive requires a certain number of laws, regulations and administrative provisions and that such implementation could not be left to the discretion of the various authorities responsible for the quality of water. The Member States must adopt the implementing measures needed to incorporate in their legal system the terms of the directive and they are not at liberty to exempt themselves from the obligation to enact mandatory implementing rules by maintaining that the directive itself is directly binding on their authorities and that the practical result sought by the directive can already be achieved. The contents of the letters written by the Netherlands Government before this action was brought show sufficiently clearly that the implementation of the directive in the Netherlands was governed, at least in part, by means of non-mandatory provisions and that the existing legislation does not lay down all the measures prescribed by the directive.

4. In its *rejoinder* the *Netherlands Government* denies that it is agreed between the parties that the Netherlands is in breach of its duty in regard to the information to be given to the Commission by virtue of the second sentence of Article 12 (1) of the directive.

It is necessary to make a distinction between, on the one hand, information supplied by way of a general information procedure such as that instituted by the Council on 5 March 1973 concerning legal measures relating to the protection of the environment (Official Journal, C 9, 15. 3. 1973) under which all those measures designed for the protection and improvement of the environment were brought to the knowledge of the Commission, and, on the other hand, information concerning the implementation of the directive.

The directive is not merely binding on central government but also on the other administrative authorities responsible for ensuring the quality of water and it can in fact be implemented by those authorities. Among the rules issued by the provinces there are provisions relating to authorizations, to planning and to the

taking of samples etc., which require the approval of the State whose influence is thus ensured. The Netherlands Government has shown from the information supplied that it was not necessary, merely in order to implement the directive, to enact amending legislation.

The Netherlands Government acknowledges that the general information contained in its letter of 28 March 1978 concerning the new laws, regulations and administrative provisions, supplied in accordance with the Council Agreement of 5 March 1973, became intermingled with the information supplied concerning the implementation of the directive. However, in its letter of 23 March 1979 it supplied more detailed information relating to the system of Netherlands legislation and stressed the fact that the existing law relating to the pollution of surface water already provided the means needed for implementing the directive. The Netherlands Government considers that it has satisfied, albeit after a certain delay, its obligation in regard to the information to be given to the Commission and reserves the right to submit further observations during the course of the second stage relating to the allegation that the implementation of the directive has been inadequate.

## IV — Answers to questions put by the Court

In reply to the questions put by the Court at the close of the written procedure, the *Commission* stated in particular that the legislative framework now existing in the Netherlands for the implementation of the directive was still incomplete since, as indicated in the first page of the explanatory memorandum to the draft law amending the Wet Hygiëne en Veiligheit Zweminrichtingen, no provisions yet existed determining the desired quality for bathing water by means of values for the parameters mentioned in the annex to the directive, as provided for in Article 3 of the directive or provisions prescribing the measures necessary to achieve the quality laid down for bathing water, as provided for in Article 4 (1) of the directive, measures which had to be brought into force within the period laid down in Article 12 of the directive, even though a period of 10 years was granted for achievement of the desired water quality. Moreover, the sampling and checking operations provided for in the directive were carried out only partially, the minimum frequency not always being observed, and then only on the basis of programmes and reports which could not be regarded as the "laws, regulations and administrative provisions" referred to in the directive.

The *Netherlands Government* observed that the law amending the Wet Verontreiniging Oppervlaktewateren had entered into force on 1 January 1982 and notice of that fact had been given to the Commission by letter of 14 January 1982. Therefore, in view of the present state of the Netherlands legislation, there was no reason to proceed with the action.

## V — Oral procedure

At the sitting on 2 March 1982 oral argument was presented for the Commission by Auke Haagsma, a member of its Legal Department, and for the Government of the Kingdom of the

Netherlands, represented by Adriaan Bos, Assistant Legal Adviser, Ministry for Foreign Affairs.

The Advocate General delivered his opinion at the sitting on 31 March 1982.

## Decision

1 By application received at the Court Registry on 24 April 1981, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not introducing within the period prescribed the laws, regulations and administrative provisions needed to comply with Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1) the Kingdom of the Netherlands had failed to fulfil its obligation under the Treaty.

2 By virtue of that directive, which was adopted pursuant to Articles 100 and 235 of the EEC Treaty, Member States are obliged to set, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the physical, chemical and microbiological parameters laid down in the directive, to adopt the necessary measures to ensure that, within a period of 10 years, the quality of bathing water conforms with those values, to ensure that those values are observed in newly-created bathing areas, to carry out sampling operations in accordance with the detailed rules laid down in the directive and, four years following the notification of the directive, to submit a first comprehensive report to the Commission on their bathing water and the most significant characteristics thereof.

3 Article 12 (1) of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification, a period which expired on 10 December 1977, and forthwith to inform the Commission thereof.

4 The Commission considers that the Netherlands Government has failed to fulfil its obligation to provide information pursuant to the above-mentioned

provision. In view of that failure the Commission considers that it is entitled to presume, during the first phase of its verification of the implementation of the directive, which is confined to establishing in general whether the necessary implementing measures have been brought into force within the prescribed period, without any detailed examination of such measures, that the defendant has failed to fulfil the obligation to put into effect the necessary measures.

5 The subject-matter of these proceedings is not, however, failure to comply with the duty to provide information but failure to fulfil the obligation to bring into force the laws, regulations and administrative provisions needed to ensure compliance with the directive.

6 It should be emphasized that, in proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.

7 It should nevertheless also be emphasized that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied. It is for those reasons that Article 12 of the directive in question, like other directives, imposes upon the Member States an obligation to provide information.

8 The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has effectively and completely implemented the directive. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation.

9 In view of the purpose of this action and in order to examine whether it is well founded, those provisions must be compared with the laws, regulations and administrative provisions existing in the Netherlands by means of which the Netherlands Government considers it has implemented the directive.

10 In that respect, it must be recorded that in reply to a question put by the Court at the close of the written procedure, the Commission stated that, as appears from the explanatory memorandum to the draft Netherlands law amending the Wet Hygiëne en Veiligheid Zweminrichtingen [Law relating to hygiene and safety in bathing establishments], at the present time no provisions exist in the Netherlands determining the desired quality for bathing water by means of values for the parameters mentioned in the annex to the directive, as provided for in Article 3 of the directive, nor are there any provisions prescribing the measures necessary to achieve the quality laid down for bathing water, as provided for in Article 4 (1). The Netherlands Government did not deny that fact either in its observations on the Commission's reply or during the oral procedure and it has adduced no evidence from which it might be inferred that such provisions already exist in the Netherlands.

11 The Netherlands Government referred to the fact that the supervision of the quality of water is carried out in the Netherlands within the framework of a decentralized system. The regional and local authorities are directly bound by the provisions of the directive and they implement it in the practical management of water quality, under the control of the national authorities.

12 It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities. That does not however release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature. The directive in question, adopted *inter alia* pursuant to Article 100 of the EEC Treaty, is intended to approximate the applicable laws, regulations and administrative provisions in the Member States. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be

considered as constituting the proper fulfilment of the obligation deriving from that directive.

13 None of the matters put forward by the Netherlands Government justifies the conclusion that provisions of a binding nature have actually been adopted either by the national authorities or by regional or local authorities in order to determine for all bathing areas or for each of them the values applicable to bathing water for all the parameters indicated in the annex to the directive and in order to ensure that the quality of bathing conforms with the values thus determined. In particular, the prospective multiennial programme to which the Netherlands Government referred in its correspondence with the Commission prior to the commencement of these proceedings, affirming that that programme adopted the rules contained in the directive, constituted, at that time, nothing more than a set of guidelines for those responsible for the supervision of water quality and had no legally binding force. That programme could not therefore be considered as sufficient for the purpose of implementation of the directive.

14 In its observations on the Commission's reply to the questions put by the Court before the oral procedure and also during the oral procedure, the Netherlands Government again referred to an amendment of the Wet Verontreiniging Oppervlaktewateren [Law relating to the pollution of surface water], which entered into force on 1 January 1982, claiming that by virtue of that amendment the prospective multiennial programme would enable the directive to be fully implemented. At the hearing, the Commission, whilst not departing from its views, declared that that amendment to the law would, if supplemented by certain administrative measures, make it possible for the directive to be implemented properly. In that regard it must be pointed out, without its being necessary to consider whether, merely by reason of that amendment, the failure to fulfil the obligation might have been wholly remedied, that the measures needed to ensure the full implementation of the directive were not adopted within the prescribed periods and in any case did not exist when this action was brought.

15 It follows from the foregoing that the Kingdom of the Netherlands did not adopt within the prescribed periods the provisions needed to ensure the full implementation of the directive in question and must be declared to have failed to fulfil its obligations under the Treaty.

## Costs

16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleading. As the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by not bringing into force within the periods prescribed the provisions needed to ensure the full implementation of Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Mertens de Wilmars Bosco Touffait

Mackenzie Stuart O'Keeffe Koopmans Everling

Delivered in open court in Luxemburg on 25 May 1982.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

# JUDGMENT OF THE COURT
22 June 1989 *

In Case 103/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Tribunal for Lombardy) for a preliminary ruling in the proceedings before that court between

**Fratelli Costanzo SpA,** a company incorporated under Italian law, whose registered office is at Misterbianco,

and

**Comune di Milano** (Municipality of Milan)

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty,

## THE COURT

composed of: O. Due, President, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F. A. Schockweiler and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Fratelli Costanzo SpA, the plaintiff in the main proceedings, by L. Acquarone, M. Alì, F. P. Pugliese, M. Annoni and G. Ciampoli, avvocati, in the written procedure and by L. Acquarone in the oral procedure,

* Language of the case: Italian

the Comune di Milano, the defendant in the main proceedings, by P. Marchese, C. Lopopolo and S. Ammendola, avvocati, in the written procedure and by P. Marchese in the oral procedure,

Ing. Lodigiani SpA, the intervener in the main proceedings, by E. Zauli and G. Pericu, avvocati, in the written procedure and by G. Pericu in the oral procedure,

the Government of the Kingdom of Spain, by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, in the written procedure and by R. Silva de Lapuerta, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I. M. Braguglia, avvocato dello Stato,

the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 7 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 April 1989,

gives the following

## Judgment

1 By order of 16 December 1987, which was received at the Court Registry on 30 March 1988, the Tribunale amministrativo regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the

award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty.

2 The questions were raised in proceedings brought by Fratelli Costanzo SpA (hereinafter referred to as 'Costanzo'), the plaintiff in the main proceedings, for the annulment of a decision of the Giunta municipale (Municipal Executive Board) of Milan eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to Ing. Lodigiani SpA (hereinafter: 'Lodigiani').

3 Article 29(5) of Council Directive 71/305/EEC provides as follows:

'If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low.'

4 Article 29(5) of Directive 71/305 was implemented in Italy by the third paragraph of Article 24 of Law No 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the European Economic Community (*Gazzetta ufficiale della Repubblica italiana* (Official Journal of the Italian Republic) No 232, 26.8.1977, p. 6272). That provision is worded as follows:

'If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and after indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them

if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law.'

5 Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No 584 (Decree Law No 206 of 25 May 1987, Gazzetta ufficiale No 120, 26.5.1987, p. 5; Decree Law No 302 of 27 July 1987, Gazzetta ufficiale No 174, 28.7.1987, p. 3; and Decree Law No 393 of 25 September 1987, Gazzetta ufficiale No 225, 26.9.1987, p. 3).

6 The three decree laws each contain an Article 4 worded in identical terms, as follows:

'In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No 584 of 8 August 1977 and shall be excluded from the tendering procedure.'

7 The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian Constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant to them were to remain valid (Article 1(2) of Law No 478 of 25 November 1987, Gazzetta ufficiale No 277, 26.11.1987, p. 3).

8 In preparation for the 1990 World Cup for football, to be held in Italy, the Comune di Milano issued a restricted call for tenders for alteration work on a football stadium. The criterion chosen for awarding the contract was that of the lowest price.

9 The call for tenders stated that in accordance with Article 4 of Decree Law No 206 of 25 May 1987 tenders which exceeded the basic amount fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated.

10 The tenders admitted to the procedure exceeded the basic amount fixed for the price of the work by an average of 19.48%. In accordance with the call for tenders any tender which did not exceed the basic amount by at least 9.48% was to be automatically eliminated.

11 The tender submitted by Costanzo was less than the basic amount. Accordingly, on 6 October 1987 the Giunta Municipale, on the basis of Article 4 of Decree Law No 393 of 25 September 1987, which in the mean time had replaced the decree law cited in the call for tenders, decided to exclude Costanzo's bid from the tendering procedure and to award the contract to Lodigiani, which had submitted the lowest tender of those which fulfilled the condition set out in the call for tenders.

12 Costanzo challenged that decision in proceedings before the Tribunale amministrativo regionale per la Lombardia, claiming *inter alia* that it was illegal on the ground that it was based on a decree law which was itself incompatible with Article 29(5) of Council Directive 71/305.

13 The national court therefore referred the following questions to the Court of Justice for a preliminary ruling:

'A — Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the "result to be achieved" (hereinafter referred to as "provisions as to results") or else be concerned with the "form and methods" required to achieve a given result (hereinafter referred to as "provisions as to form and methods"), is the rule contained in Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that — should a tender be obviously abnormally low — the authority must "examine the details" of the

tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts it finds unacceptable) a "provision as to results" and therefore of such a nature that the Italian Republic was obliged to "transpose" it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 of Law No 584 of 8 August 1977) or is it a "provision as to form and methods", with the result that the Italian Republic could derogate from it by providing that where a tender is abnormally low the tenderer must *automatically* be eliminated from the tendering procedure, without any "examination of the details" and without any request to the tenderer to furnish "explanations" for the "abnormal tender"?

B — If the reply to Question A is negative (in the sense that Article 29(5) of Council Directive 71/305/EEC is to be held to be a "provision as to form and methods"):

B — 1. Did the Italian Republic (after "transposing" the aforesaid provision by way of Law No 584 of 8 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No 206 of 25 May 1987, Decree Law No 302 of 27 July 1987 and Decree Law No 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No 584 of 8 August 1977?

B — 2. Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29(5) of Council Directive 71/305/EEC, as implemented by Law No 584 of 8 August 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons — which is necessary for Community legislation (see Article 190 of the EEC Treaty) — appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore "sub-primary" legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires "primary" legislation to state reasons)?

C — Is there, in any event, a conflict between Article 29(5) of Council Directive 71/305/EEC and the following provisions:

(a) the third paragraph of Article 24 of Law No 584 of 8 August 1977 (which refers to "abnormally low" tenders, whereas the directive is concerned with tenders which are "obviously" abnormally low and provides for examination of the details only in cases of "obvious" abnormality);

(b) Article 4 of Decree Laws Nos 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29(5) of the Directive; furthermore, the decree laws mentioned above do *not* refer to "obviously" abnormal tenders and to that extent appear to be invalid, as does Law No 584 of 8 August 1977)?

D — If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29(5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?'

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the applicable legislation, the course of the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**The second part of the third question and the first question**

15 In the second part of the third question the Tribunale amministrativo regionale seeks in essence to establish whether Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. In its first question it asks whether the Member States may, when implementing Council Directive 71/305, depart to any material extent from Article 29(5) thereof.

16 With regard to the second part of the third question it should be noted that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges the authority to request the tenderer to furnish the necessary explanations. Article 29(5) further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable. Finally, if the criterion adopted for the award of the contract is the lowest price tendered, the awarding authority must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 693) the rejection of tenders which it considers to be too low.

17 The Comune di Milano and the Italian Government maintain that it is in keeping with the aim of Article 29(5) to replace the examination procedure which it envisages, giving the tenderer an opportunity to state its views, with a mathematical criterion for exclusion. They point out that the aim of that provision is, as the Court ruled in its judgment of 10 February 1982 in Case 76/81 *Transporoute* v *Minister for Public Works* [1982] ECR 417, at p. 428, to protect tenderers against arbitrariness on the part of the authority awarding the contract. A mathematical criterion for exclusion affords an absolute safeguard. It has the further advantage of being faster in its application than the procedure laid down by the Directive.

18 That argument cannot be upheld. A mathematical criterion for exclusion deprives tenderers who have submitted exceptionally low tenders of the opportunity of demonstrating that those tenders are genuine ones. The application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts.

19 The answer to the second part of the third question must therefore be that Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

20 With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those

tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low. That aim would be jeopardized if Member States were able, when implementing Article 29(5) of the Directive, to depart from it to any material extent.

21 The answer to the first question must therefore be that when implementing Council Directive 71/305 Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

**The second question**

22 In its second question the national court asks whether, after implementing Article 29(5) of Council Directive 71/305 without departing from it to any material extent, Member States may subsequently amend the domestic implementing provision, and if so whether they must give reasons for doing so.

23 The national court raised this question only in the event that the answer to the first question should be that Member States could, when implementing Article 29(5) of Directive 71/305, depart materially from it.

24 In the light of the answer given to the first question the second question is devoid of purpose.

**The first part of the third question**

25 In the first part of its third question the national court seeks to establish whether Article 29(5) of Council Directive 71/305 allows Member States to require the examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders.

27 It follows that the answer to be given to the first part of the third question is that Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

## The fourth question

28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29 In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, at p. 71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, at p. 748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

## Costs

34 The costs incurred by the Spanish Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia, by order of 16 December 1987, hereby rules:

**(1) Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.**

**(2) When implementing Council Directive 71/305/EEC, Member States may not depart to any material extent from the provisions of Article 29(5) thereof.**

**(3) Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.**

**(4) Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.**

Due Joliet Grévisse

Slynn Mancini Schockweiler Moitinho de Almeida

Delivered in open court in Luxembourg on 22 June 1989.

J.-G. Giraud
Registrar

O. Due
President

JUDGMENT OF THE COURT (Second Chamber)

16 July 2009 (*)

(Failure of a Member State to fulfil obligations – Assessment of the effects of projects on the environment – Directive 85/337/EEC – Access to justice – Directive 2003/35/EC)

In Case C-427/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2007,

**Commission of the European Communities,** represented by D. Recchia, P. Oliver and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Ireland,** represented by D. O'Hagan, acting as Agent, and M. Collins SC, and D. McGrath BL, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2009,

gives the following

## Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337 as amended by Directive 97/11'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and

– by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(1) and (3) to (7) and 4(1) to (6) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17) or, in any event, by failing to adequately notify such provisions to the Commission,

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

## Legal context

*Community legislation*

Directive 2003/35

2 Article 1 of Directive 2003/35 provides:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on access to information, public participation in decision-making and access to justice in environmental matters], in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directive 85/337… and 96/61/EC.'

3 Article 6 of Directive 2003/35 states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.'

Directive 85/337

4 In accordance with Article 1(2) of Directive 85/337, as amended by Article 3(1) of Directive 2003/35, for the purposes of that directive:

'…

"the public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5 Article 2(1) and (3) of Directive 85/337, as amended by Article 3(3) of Directive 2003/35, states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;

…'

6 Article 4 of Directive 85/337 as amended by Directive 97/11 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

7 Article 5 of Directive 85/337 as amended by Directive 97/11 provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

…

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

– a non-technical summary of the information mentioned in the previous indents.

…'

8 Article 6(2) to (6) of Directive 85/337, as amended by Article 3(4) of Directive 2003/35, states as follows:

'2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information …, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

9 Article 7 of Directive 85/337, as amended by Article 3(5) of Directive 2003/35, provides:

‘1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).

…

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.’

10 Article 9 of Directive 85/337, as amended by Article 3(6) of Directive 2003/35, provides:

‘1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

11 Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, states as follows:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

12 Annex II to Directive 85/337 as amended by Directive 97/11 lists the projects subject to Article 4(2) of that amended directive. Under the heading 'Infrastructure projects', point 10(e) of that annex covers the construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I).

Directive 96/61/EC

13 In accordance with Article 2(13) and (14) of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Article 4(1) of Directive 2003/35:

'13. "the public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

14. "the public concerned" shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

14 Article 15(1) and (5) of Directive 96/61, as amended by Article 4(3) of Directive 2003/35, states as follows:

'1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

– issuing a permit for new installations,

– issuing a permit for any substantial change in the operation of an installation,

– updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.

…

5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and

(b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.'

15 Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

*National legislation*

16 According to the combined provisions of section 176 of the Planning and Development Act 2000 (No 30/2000), as amended by the Planning and Development (Strategic Infrastructure) Act 2006 (No 27/2006, S.I. No 525/2006) ('the PDA'), and Schedule 5 to the Planning and Development Regulations 2001 (S.I. No 600/2001), an environmental impact statement and an environmental impact assessment are mandatory in respect of certain projects where the thresholds specified are exceeded, but private roads development is not identified as a discrete category of project.

17 Judicial review is governed by Order 84 of the Rules of the Superior Courts. Those courts have jurisdiction to review, subject to certain conditions, the decisions of lower courts and administrative bodies.

18 Both public-law and private-law remedies are available in judicial review proceedings. The traditional public law remedies relate to review of whether those lower courts or bodies have acted in excess or abuse of jurisdiction and to supervision of the exercise of their jurisdiction.

19 Judicial review is a two-stage process. An application for leave to bring judicial review proceedings must be made to the court, accompanied by a statement of grounds identifying the relief sought and an affidavit setting out the facts relied on. If leave is granted, the applicant can bring judicial review proceedings.

20 A specific statutory procedure applies to applications for judicial review of decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

21 Section 50A(3) of the PDA states:

'The Court shall not grant section 50 leave unless it is satisfied that –

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant —

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).'

22 Section 50A(4) of the PDA specifies that the substantial interest required is not limited to an interest in land or other financial interest.

23 Section 50A(10) and (11)(b) of the PDA require the court, in determining applications, to act as expeditiously as possible consistent with the administration of justice. Section 50A(12) of the PDA allows for additional rules to be adopted to expedite the procedure.

**The pre-litigation procedure**

24 The Commission has combined, in the present action, complaints raised in two pre-litigation procedures.

25 First, in 2001 the Commission registered a complaint against Ireland concerning damage to a coastal wetland at Commogue Marsh, Kinsale, County Cork caused by a private road project. On 18 October 2002, the Commission sent a letter of formal notice to Ireland, indicating that it appeared that no consent for the project in question had been granted and that no prior environmental impact assessment had been carried out despite the sensitivity of the site, contrary to the requirements of Directive 85/337 as amended by Directive 97/11.

26 Ireland replied to that letter of formal notice on 5 March 2003, pointing out that the project at issue was a part of a development for which consent had been given.

27 As the Commission was not satisfied with that reply, it issued a reasoned opinion on 11 July 2003, calling on Ireland to take the necessary measures to comply with Directive 85/337 as amended by Directive 97/11 within two months of receipt of that opinion.

28 By letter of 9 September 2003, Ireland requested an extension of the two-month time-limit for reply to the reasoned opinion. Ireland replied to the reasoned opinion by letter of 10 November 2003.

29 Secondly, the Commission sent a letter of formal notice to Ireland on 28 July 2005 concerning the transposition of Directive 2003/35, inviting Ireland to submit its observations within two months of receipt of that letter.

30 Ireland replied by letter of 7 September 2005, in which it admitted that it had only partially transposed Directive 2003/35.

31 The Commission issued a reasoned opinion on 19 December 2005, calling on Ireland to take the necessary measures to comply with that directive within two months of receipt of that opinion.

32 By letter of 14 February 2006, Ireland indicated that transposition measures were in preparation.

33 On 18 October 2006, the Commission issued an additional reasoned opinion calling on Ireland to adopt the necessary measures to comply with that opinion within two months of receipt. Ireland replied on 27 February 2007, outside the time-limit prescribed by the Commission.

34 As it was not satisfied with Ireland's replies in the course of those two pre-litigation procedures, the Commission brought the present action pursuant to the second paragraph of Article 226 EC.

## The action

35 The Commission's action is based on two complaints.

*The first complaint*

Arguments of the parties

36 The Commission considers that the construction of a private road constitutes an infrastructure project that falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 and that, as a consequence, the Irish authorities are bound, in accordance with Article 2 of that amended directive, to ensure that, before consent is given, such projects are made subject to an assessment with regard to their effects on the environment if it is considered that they are likely to have significant effects on the environment.

37 In limiting the need to carry out an environmental impact assessment to public road projects proposed by public authorities, the Irish legislation thus fails to take account of Community requirements.

38 Ireland contends that private road construction development which, it does not dispute, falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11, almost invariably forms an integral part of other developments which, for their part, are subject to the requirement of an environmental impact assessment under the combined provisions of Article 176 of the PDA and Schedule 5 to the Planning and Development Regulations 2001 if they are likely to have significant effects on the environment.

39 Ireland accepts, moreover, that Directive 85/337 as amended by Directive 97/11 makes no distinction between public and private road projects, and it indicates its intention to amend its legislation so as to include road development as a stand-alone category subject to an environmental impact assessment if the road development is likely to have significant effects on the environment.

Findings of the Court

40 Pursuant to Article 4(2) of Directive 85/337 as amended by Directive 97/11, the Member States are to determine, for projects in the classes listed in Annex II to that amended directive, through a case-by-case examination, or thresholds or criteria, whether those projects are to be made subject to an environmental impact assessment in accordance with Articles 5 to 10 of that directive. According to that same provision, the Member States may also decide to apply both procedures.

41 Although the Member States have thus been allowed a measure of discretion in specifying certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of Directive 85/337 as amended by Directive 97/11 that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95 *Kraaijeveld and Others*[1996] ECR I-5403, paragraph 50; Case C-2/07 *Abraham and*

*Others* [2008] ECR I-1197, paragraph 37; and Case C-75/08 *Mellor* [2009] ECR I-0000, paragraph 50).

42 In that regard, the Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of that amended directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see *Kraaijeveld and Others*, paragraph 53, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

43 Among the projects subject to Article 4(2) of Directive 85/337 as amended by Directive 97/11, point 10(e) of Annex II to that amended directive refers to 'construction of roads'.

44 In that regard, by subjecting private road construction development to an environmental impact assessment only if that development formed part of other developments coming within the scope of Directive 85/337 as amended by Directive 97/11 and themselves subject to the assessment obligation, the Irish legislation, as applicable when the time-limit set in the reasoned opinion expired, meant that any private road construction development carried out in isolation could avoid an environmental impact assessment, even if the development was likely to have significant effects on the environment.

45 It should also be pointed out that a criterion relating to the private or public nature of the road is irrelevant as regards the applicability of point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11.

46 Therefore, the first complaint is well founded.

*The second complaint*

47 It is apparent from the most recent of the Commission's written pleadings that, in its view, and having regard to the withdrawal of the complaints concerning Article 4(1), (5) and (6) of Directive 2003/35, Ireland's transposition of Article 3(1) and (3) to (7) and Article 4(2) to (4) of that directive remains incomplete, as a result of which there is a failure to fulfil obligations under Article 6 of that directive.

48 In addition, the Commission takes the view that, in any event, Ireland did not communicate within the prescribed time-limit the provisions which were deemed to implement the aforementioned articles, contrary to the requirements of Article 6.

49 The second complaint, considered in its various parts, as pleaded in essence by the Commission, thus relates exclusively – as the Commission, moreover, confirmed at the hearing – to the failure to transpose certain provisions of Directive 2003/35, without any criticism of the quality of transposition, and, consequently, no such criticism may properly be raised by the Commission in the context of this case.

50 Moreover, it should be noted that the provisions of the PDA referred to in the present action are those which result from amendments introduced by the amending Act of 2006, mentioned in paragraph 16 of this judgment. Those provisions, as the Advocate General noted in point 53 of her Opinion, entered into force on 17 October 2006, that is to say, before the expiry of the time-limit laid down in the additional reasoned opinion.

The requirement to transpose the provisions of Article 3(1) of Directive 2003/35

– Arguments of the parties

51 As regards Article 3(1) of Directive 2003/35, the Commission claims that the Irish authorities must adopt measures to ensure that domestic legislation does not treat the concepts of 'the public' and 'the public concerned' more narrowly than Directive 2003/35. It points out, in particular, that the rights conferred on non-governmental organisations are not sufficiently guaranteed, as is apparent from the case-law, although that directive confers on such non-governmental organisations certain rights as being among the public concerned.

52 Ireland counters that, in the light of the general obligation to interpret national law in accordance with the provisions of Community law which applies, in particular, to the courts, it is not necessary to introduce legislative definitions of 'the public' and 'the public concerned' in order to give full effect to those definitions. It adds that the newly-created rights are already guaranteed to all of the public and that it is not, therefore, necessary to give a specific definition of 'the public concerned'.

53 Ireland also contends that, pursuant to section 50A(3)(b)(ii) of the PDA, non-governmental organisations promoting the environment are exempted from the requirement to demonstrate that they have a substantial interest.

– Findings of the Court

54 It should be recalled that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express

provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case C-214/98 *Commission* v *Greece*[2000] ECR I-9601, paragraph 49; Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53; and Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 34).

55 It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, inter alia, Case C-197/96 *Commission* v*France* [1997] ECR I-1489, paragraph 15; Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26; and *Commission* v *Luxembourg*, paragraph 34).

56 In the light of the purpose of Article 3(1) of Directive 2003/35, which is to add definitions to those appearing in Article 1(2) of Directive 85/337, and in particular to indicate, for the purposes of the latter directive, what is to be meant by 'the public concerned' and, whereas, at the same time, Directive 2003/35 accords new rights to that public, it cannot be concluded from Ireland's failure to reproduce those definitions in its legislation expressly that Ireland has not fulfilled its obligation to transpose the provisions in question.

57 The scope of the new definition of 'the public concerned' thus introduced by Directive 2003/35 can be assessed, as the Advocate General stated in points 36 and 37 of her Opinion, only with regard to all of the rights which that directive accords to 'the public concerned', since those two aspects are indissociable.

58 In that regard, the Commission does not establish to what extent 'the public concerned', understood as the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures, does not have the rights which it is deemed to enjoy under the amendments introduced by Directive 2003/35.

59 Lastly, it should be pointed out that the Commission's arguments relating to the construal, in the case-law, of the role of non-governmental organisations promoting the environment as belonging to 'the public concerned' deal, primarily, with possible defects in the effective implementation of the rights which those organisations may rely on, in particular in judicial review proceedings, and are, consequently, outside the scope of the complaint before the Court alleging, solely, a failure to transpose.

60 It follows from the foregoing that the second complaint, in so far as it concerns the transposition of Article 3(1) of Directive 2003/35, is unfounded.

The requirement to transpose Articles 3(3) to (6), and 4(2) and (3), of Directive 2003/35

– Arguments of the parties

61 According to the Commission, Article 3(3) to (6), and Article 4(2) and (3), have not been fully transposed.

62 As regards those provisions, Ireland contends that there has been transposition in so far as the planning consent system is concerned, but it accepts that it was still necessary, when the time-limit prescribed in the additional reasoned opinion elapsed, to transpose those provisions by adopting legislative measures in relation to other consent procedures.

63 As regards Article 4(2) and (3) of that directive, Ireland recognises that it still had to adopt and notify certain measures in relation to full transposition of those provisions when the time-limit prescribed in that reasoned opinion elapsed.

– Findings of the Court

64 It must be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9).

65 It is not in dispute that, by the end of the period laid down in the additional reasoned opinion, Ireland had not adopted the laws, regulations and administrative provisions necessary to ensure full transposition of Article 3(3) to (6), and Article 4(2) and (3), of Directive 2003/35. Furthermore, and in accordance with settled case-law, any subsequent changes once the action for failure to fulfil obligations has been lodged cannot be taken into consideration by the Court (see, inter alia, Case C-211/02 *Commission* v *Luxembourg*[2003] ECR I-2429, paragraph 6).

66 In so far as it concerns the failure to transpose Article 3(3) to (6) and Article 4(2) and (3) of Directive 2003/35, the second complaint is therefore well founded.

The requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35

– Arguments of the parties

67 The Commission claims that Ireland did not transpose the requirements arising out of Articles 3(7) and 4(4) of Directive 2003/35, those provisions having inserted, respectively, Article 10a into Directive 85/337 and Article 15a into Directive 96/61. The Commission puts forward five arguments in support of this part of the second complaint.

68 By its first argument, which concerns the concept of sufficient interest in Article 3(7) and Article 4(4) of Directive 2003/35, the Commission asserts that the criterion that a 'substantial interest' must be established in the context of the specific statutory procedure for applying for judicial review of decisions of competent planning authorities laid down in Section 50 of the PDA does not correspond to the 'sufficient interest' criterion in Directive 2003/35.

69 The setting of such a criterion – stricter than that used in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, – amounts, according to the Commission, to non transposition of the requirements laid down in Directive 2003/35.

70 Lastly, the Commission points out that two judgments of the Irish High Court handed down in the *Friends of the Curragh Environment Ltd* case on 14 July 2006 and 8 December 2006 show that the system of judicial review in force in Ireland cannot be regarded as implementing Directive 2003/35, since the High Court stated, in the second of those judgments, in relation to the assessment of 'substantial interest', that that directive had not yet been implemented in Irish law.

71 Ireland contests the relevance of those High Court judgments, inasmuch as they were dealing, primarily, with the issue of the direct effect of Directive 2003/35.

72 It adds that the judgment handed down by the High Court on 26 April 2007 in the*Sweetman* case established, on the contrary, that the abovementioned provisions of that directive are implemented by the judicial review procedure, supplemented by specific procedural rules laid down in certain legislation, in particular section 50 of the PDA, since the criterion of substantial interest was held by the judge to be flexible and not inconsistent with Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35.

73 By its second argument, the Commission claims that Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, have

not been transposed, on the ground that, contrary to the first paragraph in each of those articles, the requirement that an applicant must be able to challenge the substantive legality of decisions, acts or omissions subject to the public participation provisions in each of the directives has not been transposed into Irish law.

74 Ireland contends, in that regard, that those articles do not require provision to be made for an exhaustive review of the merits of a decision, but merely require that it be possible to contest the substantive legality of a decision. Such a form of review is provided for under Irish law.

75 Ireland also asserts that the requirements laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, are fully implemented into Irish law by reason of the existence of the judicial review procedure available before Irish courts. The purpose of judicial review is to provide a form of review of decisions made and actions taken by courts and administrative bodies, to ensure that the functions conferred on such authorities have been carried out correctly and legally.

76 In addition, according to Ireland, a specific statutory judicial review procedure applies to challenges to decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

77 The Commission claims, in its third argument, that no measure has been taken by Ireland to ensure transposition of the requirement of timeliness, laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) Directive 2003/35.

78 In its fourth argument, the Commission raises the same failure to transpose as regards the requirement that any such procedure must not be prohibitively expensive, pointing out that, in relation to costs, there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be prohibitively expensive.

79 According to Ireland, the existing procedures are fair, equitable and not prohibitively expensive. They enable, furthermore, the decisions referred to in Directives 83/337 and 96/61, as amended by Directive 2003/35, to be reviewed in a timely manner.

80 Lastly, by its fifth argument, the Commission criticises Ireland for not having made available to the public practical information on access to administrative and judicial review procedures, as required by the sixth

paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

81 Ireland takes the view that it has fulfilled that obligation, since Order 84 of the Rules of the Superior Courts, referred to in paragraph 17 of this judgment, is a statutory provision and there is, in addition, a website for the Courts Service of Ireland which describes the different courts and the limits of their jurisdiction, and allows for access to High Court judgments.

– Findings of the Court

82 As regards the first argument relating to sufficient interest, it is clear from paragraphs (a) and (b) of the first paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and from paragraphs (a) and (b) of the first paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

83 It is not in dispute that, by enabling applicants who are members of 'the public concerned' and who can claim an interest meeting the conditions laid down in section 50A(3) of the PDA to challenge certain planning measures, Ireland has adopted provisions under which the right of access to justice in that particular area depends directly on those applicants' interest, as the Advocate General points out in point 57 of her Opinion.

84 In that regard, inasmuch as, as has been stated in paragraph 49 of this judgment, the Commission disputes only the failure to transpose certain provisions – having moreover expressly stated that it did not mean to allege incorrect or incomplete transposition – there is no need to ascertain whether the criterion of substantial interest as applied and interpreted by the Irish courts corresponds to the sufficient interest referred to in Directive 2003/35, as that would lead to calling into question the quality of the transposition having regard, in particular, to the competence of the Member States recognised by that directive to determine what constitutes a sufficient interest consistently with the objective which that directive pursues.

85 Furthermore, the second judgment of the High Court in *Friends of the Curragh Environment Ltd*, to which the Commission principally refers, was

handed down under the legislation applicable prior to the amendments made to the PDA in 2006 and it is not, in any event, enough to prove the alleged failure to transpose.

86 The first argument is therefore unfounded.

87 In relation to the second argument, it is common ground that in Irish law, apart from the specific statutory procedure applicable pursuant to sections 50 and 50A of the PDA, there is judicial review governed by Order 84 of the Rules of the Superior Courts. In those review procedures applicants can ask for decisions or acts to be quashed in the context of supervision in relation to decisions and actions taken by lower courts and administrative bodies to ensure that the functions conferred on those authorities are carried out legally.

88 The various procedures thus established for judicial review are applicable to decisions, acts or omissions subject to the public participation provisions in Directives 85/337 and 96/61 as amended by Directive 2003/35, inter alia, in the specific area of planning, and may therefore be considered to constitute transposition of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, inasmuch as they require that the applicant be able to challenge the substantive or procedural legality of such acts, decisions or omissions.

89 Since the Court does not have before it a complaint alleging incorrect transposition of those provisions, it cannot examine the arguments submitted by the Commission relating to the extent of the review actually carried out in the context of judicial review, as shown, in particular, by the case-law of the High Court.

90 The second argument is therefore unfounded.

91 As regards the third argument relating to the failure to transpose Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, in so far as they require that the procedures should be timely, having regard to what was stated in paragraph 49 of this judgment and inasmuch as it follows from sections 50A(10) and (11)(b) of the PDA that the courts having jurisdiction must determine applications as expeditiously as possible consistent with the administration of justice, that argument is therefore unfounded.

92 As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of

those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

95 The fourth argument is thus well founded.

96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.

98 In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

99 The fifth argument must thus be upheld.

100 It follows from the foregoing that the second complaint, in so far as it concerns the requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35 is, in its fourth and fifth arguments, well founded.

Failure to comply with the first paragraph of Article 6 of Directive 2003/35, inasmuch as the obligation to inform the Commission was not fulfilled

– Arguments of the parties

101 The Commission claims that the information provided to it by Ireland in relation to the transposition of the provisions of Directive 2003/35 which introduced Article 10a of Directive 85/337 and Article 15a of Directive 96/61 is not sufficient.

102 It argues, in that regard, that Ireland did not draw to its attention the case-law establishing access for the public concerned to judicial review, or the precise legislative texts that show that the rights and obligations laid down in those provisions have been transposed, in particular as regards the requirement for a fair, equitable, timely and not prohibitively expensive judicial review procedure.

103 It adds that it was not informed of the relevant national case-law regarding, specifically, the use of review procedures in relation to Directive 2003/35, and in particular, that Ireland itself did not send it the judgments handed down by the High Court in the *Friends of the Curragh Environment Ltd* case, which were provided to the Commission by a separate source.

104 Ireland accepts that it has not fully complied with the obligation to inform the Commission laid down in Article 6 of Directive 2003/35. It nevertheless points out that, in so far as Articles 3(7) and 4(4) of that directive were already transposed by existing statutory provisions, it was not obliged to notify those provisions.

– Findings of the Court

105 It should be recalled that, while, in proceedings under Article 226 EC for failure to fulfil obligations, it is incumbent upon the Commission to prove the allegation and to place before the Court the information needed to enable the Court to establish that an obligation has not been fulfilled, in doing which the Commission may not rely on any presumption, it is also for the Member States, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the EC Treaty and the measures taken by the institutions pursuant thereto are applied (see, inter alia, Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraphs 15 and

16, and Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 26).

106 For the purposes set out in that case-law, Article 6 of Directive 2003/35, like other directives, imposes upon the Member States an obligation to provide information.

107 The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 226 EC in order to establish the failure to fulfil the obligation (see Case C-456/03 *Commission* v *Italy*, paragraph 27).

108 Moreover, although the transposition of a directive may be carried out by means of domestic legal rules already in force, the Member States are not, in that event, absolved from the formal obligation to inform the Commission of the existence of those rules so that it can be in a position to assess whether the rules comply with the directive (see, to that effect, Case C-456/03 *Commission* v *Italy*, paragraph 30).

109 In the present case, in so far as the law already in force was deemed to ensure, by itself, the implementation of the provisions of Directive 2003/35 relating to access to justice in environmental matters, it was for Ireland to inform the Commission of the laws or regulations in question, and it cannot properly argue that it had previously notified the Commission of those domestic legal rules in the context of the transposition of Directives 85/337 and 96/61 as applicable before the amendments introduced by Directive 2003/35.

110 Since it claimed that transposition had been confirmed by the case-law of its national courts, in particular, that of the High Court, it was also for Ireland to communicate to the Commission a precise summary of that case-law, thus enabling the Commission to ascertain whether Ireland had indeed implemented Directive 2003/35 solely by virtue of applying national law as it existed before that directive entered into force, and to carry out its task of supervision under the Treaty.

111 Consequently, the second complaint is well founded in so far as it concerns infringement of the obligation to inform the Commission.

112 Therefore, having regard to all of the foregoing considerations, it must be held that

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337 as amended by Directive 97/11, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and

– by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(3) to (7) and 4(2) to (4) of Directive 2003/35, and by failing to adequately notify such provisions to the Commission,

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

113 The remainder of the action is dismissed.

**Costs**

114 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

115 In the present dispute, while the Commission has requested that Ireland be ordered to pay the costs, account must be taken of the fact that a substantial number of the applicant's complaints were unsuccessful. Therefore, each of the parties will be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

**1. Declares that**

**– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3**

**March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category, covered by point 10(e) of Annex II to Directive 85/337, as amended by Directive 97/11, are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, and**

– **by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(3) to (7) and Article 4(2) to (4) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, and by failing to adequately notify such provisions to the Commission of the European Communities,**

**Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35;**

**2. Dismisses the action as to the remainder;**

**3. Orders the Commission of the European Communities and Ireland to bear their own costs.**

[Signatures]

---

* Language of the case: English.

JUDGMENT OF THE COURT (Second Chamber)

10 December 2009 (*)

(Reference for a preliminary hearing – Article 234 EC – Concept of 'national court or tribunal' – Admissibility – Directive 85/337/EEC – Environmental impact assessment – Construction of overhead electrical power lines – Length of more than 15 km – Transboundary constructions – Transboundary power line – Total length exceeding the threshold – Line mainly situated in the territory of a neighbouring Member State – Length of national section below the threshold)

In Case C-205/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Umweltsenat (Austria), made by decision of 2 April 2008, received at the Court on 15 May 2008, in the proceedings

**Umweltanwalt von Kärnten**

v

**Kärntner Landesregierung,**

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Umweltanwalt von Kärnten, by U. Scheuch, Landesrat,

– Alpe Adria Energia SpA, by M. Mendel, Rechtsanwalt,

– the European Commission, by J.-B. Laignelot and B. Kotschy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17, 'Directive 85/337').

2 The reference was made in the context of an action between Umweltanwalt von Kärnten (Environment ombudsman of Carinthia, 'the Umweltanwalt') and the Kärntner Landesregierung (Government of the Province of Carinthia) concerning a decision which the latter adopted on 11 October 2007 ('the contested decision') in regard to Alpe Adria Energia SpA ('Alpe Adria').

### Legal context

*Community legislation*

3 According to the first recital in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

4 As is clear from the fifth recital, to that end, the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

5 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

6 Article 1(1) of Directive 85/337 provides as follows:

‘This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.’

7 Article 2(1) of the Directive is worded as follows:

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4’.

8 Article 4 of the Directive provides that:

‘… projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10’.

9 Article 7(1) of Directive 85/337 provides:

‘Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.’

10 Point 20 of Annex I to the Directive refers to ‘Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km’.

*National legislation*

11 Article 11(7) of the Bundesverfassungsgesetz (Federal Law on the Constitution, ‘BVG’) provides that it is for the Umweltsenat (Environment Tribunal) to take decisions concerning the assessment of the environmental effects of those projects which are likely to have significant effects on the

environment once levels of executive review in each province have been exhausted.

12 According to that article, the Umweltsenat is an independent body composed of the chairman, judges and other legally qualified members, and is instated at the competent Federal Ministry. The establishment, responsibilities and procedure of the Umweltsenat are to be regulated by federal law. Its decisions are not be open to annulment or variation on appeal; an application to the Verwaltungsgerichtshof (Higher Administrative Court) is admissible.

13 Article 20(2) of the BVG reads as follows:

'Where, by means of Federal law or the law of a Province, a collegiate authority comprising at least one member of the judiciary is established to decide matters at last instance and it is provided by law that its decisions may not be annulled or varied by administrative procedure, the other members of the authority are also not bound by any directions in the performance of their duties.'

14 Article 133(4) of the BVG provides for an exception to the rule conferring jurisdiction in general on the Verwaltungsgerichtshof to hear appeals against decisions adopted by the various public administrations, to the effect that independent bodies may hear such appeals in specified domains. The Umweltsenat is one such body.

15 Paragraph 1 of the Bundesgesetz über den Umweltsenat 2000 (Federal Law on the Umweltsenat 2000; 'USG 2000') provides as follows:

'(1) An Umweltsenat shall be set up at the Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management).

(2) The Umweltsenat shall consist of 10 judges and a further 32 legally qualified members.

…'

16 Paragraph 2 of the USG 2000 provides that the members are to be appointed by the Federal President upon proposal of the Federal Government for a term of six years and may be re-appointed. In addition, the Federal Government is bound by certain proposals for appointment.

17 According to Paragraph 4 of the USG 2000:

'Members of the Umweltsenat shall carry out their functions independently and are not bound by any directions.'

18 Paragraph 5 of the USG 2000 provides:

'The Umweltsenat shall rule on appeals in matters set out in the first and second chapters of the Law on environmental impact assessments 2000 (Umweltverträglichkeitsprüfungsgesetz 2000 (BGBl No 697/1993), last amended by BGBl I 149/2006, "UVP-G 2000") …'

19 Paragraph 6 of the USG 2000 states:

'Decisions handed down by the Umweltsenat may not be annulled or varied by administrative action. An application to the Verwaltungsgerichtshof shall be admissible.'

20 According to Paragraph 2(2) of the UVP-G 2000, which transposed Directive 85/337 into Austrian law, a 'project' is defined as:

'the construction of an installation or other intervention in the natural surroundings and landscape including all measures connected in geographical and factual terms …'.

21 Paragraph 3(1) of the UVP-G 2000 provides that:

'The projects listed in Annex I … shall undergo an environmental impact assessment in accordance with the following provisions. The simplified procedure shall be applied to projects that are listed in columns 2 and 3 of Annex I …'

22 Paragraph 3(7) of the UVP-G 2000 provides that:

'On application of the candidate for the project, an authority with which it is cooperating or the environment ombudsman [Umweltanwalt], the authority shall determine whether an environmental impact assessment is to be carried out for a particular project under this federal law and what objective in Annex I or Paragraph 3a(1) to (3) is attained by the project. That finding may also be made of the authority's own motion. The decision shall be adopted by notice within six weeks, both at first and at second instance. The candidate for the project, the cooperating authority, the environment ombudsman and the municipality concerned shall be considered parties. The water planning body shall be heard before the decision is adopted. The essential content of, and grounds for, decisions shall be published by the authority in an adequate fashion or be open to consultation by the public. The municipality concerned may bring an action against the decision before the Verwaltungsgerichtshof. The environment ombudsman and the cooperating authority have no obligation to reimburse expenses.'

23 Annex I to the UVP-G 2000 sets out the projects for which an environmental impact assessment is required under Paragraph 3 thereof. They are divided into three groups (columns). Projects in the first two groups (columns) always require an environmental impact assessment if the thresholds are reached and the criteria laid down are fulfilled. Projects in the third group (column) must be assessed individually once the minimum threshold stated has been reached.

24 Point 16(a) of Annex I to the UVP-G 2000 refers, in column 1, to '[o]verhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km'.

25 Point 16(b) of Annex I to the UVP-G 2000 refers, in column 3, to '[o]verhead electrical power lines in category A [special conservation areas] or B [Alpine regions] protected areas with a voltage of 110 kV or more and a length of more than 20 km'.

## The main proceedings and the question referred to the Court

26 The order for reference indicates that Alpe Adria is an Italian undertaking which is seeking to construct a 220 kV power line with a power rating of 300 MVA to connect the Italian Rete Elettrica Nazionale SpA network and the Austrian VERBUND-Austrian Power Grid AG network.

27 To that end, by letter of 12 July 2007, Alpe Adria applied to the Kärntner Landesregierung for the issue of a determination under Paragraph 3(7) of the UVP-G 2000 for the construction and operation of that project. In Austrian territory, the project comprises an overhead power line approximately 7.4 kilometres long with a switching substation to be constructed in Weidenburg extending up to the State border through the Kronhofgraben via the Kronhofer Törl. The length of the project on Italian territory is approximately 41 kilometres.

28 The Kärntner Landesregierung determined, in the contested decision, that no environmental impact assessment was required for the project at issue because the length of the Austrian part of the project did not reach the minimum 15 kilometre threshold stipulated in the UVP-G 2000.

29 It added that, if a project is likely to have significant effects on the environment in another Member State, Article 7 of Directive 85/337 requires the Member States in whose territory the project is intended to be carried out to include that other Member State in the environmental impact assessment procedure. However, that article applied only to projects situated entirely in the territory of one Member State and did not apply to transboundary projects.

30 Consequently, in the absence of any specific provision concerning transboundary projects in Directive 85/337, each Member State was required to assess, on the basis solely of its national law, whether a project was subject to Annex I of the Directive.

31 The Kärntner Landesregierung went on to state that the UVP-G 2000 did not contain any provision according to which the entire length of transboundary power line routes and other line-based projects was to be taken into consideration.

32 By application lodged at the Umweltsenat on 18 December 2007, the Environment ombudsman brought an action seeking the annulment of the contested decision.

33 It is against that background that the Umweltsenat decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Council Directive 85/337 ... to be interpreted as meaning that a Member State must provide for an obligation to carry out an assessment in the case of types of projects listed in Annex I to the directive, in particular in point 20 (construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km), where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment (here, a length of 15 km) is not reached or exceeded by the part of the scheme situated on its national territory but is reached or exceeded by adding the parts of the scheme proposed to be situated in a neighbouring State?'

## Admissibility of the question referred

*The status of the Umweltsenat as a court or tribunal*

34 As a preliminary point, it must be established whether the Umweltsenat is a court or tribunal for the purposes of Article 234 EC and, therefore, whether its question is admissible.

35 According to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent (Case 61/65 *Vaasen-Göbbels* [1966] ECR 261 at 273, and Case

C-195/06*Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 19 and the case-law cited).

36 In that regard, it must be pointed out, first, that it is indisputably clear from the provisions of Articles 11(7), 20(2) and 133(4) of the BVG and of Paragraphs 1, 2, 4 and 5 of the USG 2000 that the Umweltsenat meets the criteria that it be established by law, be permanent and have compulsory jurisdiction, apply rules of law and be independent.

37 It must also be pointed out, as the Advocate General did in points 58 and 59 of his Opinion, that the procedure before the Umweltsenat ensures that the right of appeal rests with anyone who participated in the administrative proceedings and with the institutions referred to in the UVP-G 2000. The Umweltsenat may hold a hearing of its own motion or at the request of one of the parties and any party appearing may be represented by a lawyer. The Umweltsenat's decisions have the force of *res judicata*, they must state reasons and are delivered in open court.

38 It should also be noted that the provisions of the USG 2000 and the UVP-G 2000, read in combination with the provisions of Article 133(4) of the BVG, guarantee the inter parties nature of the proceedings before the Umweltsenat, which rules on the basis of the general provisions of the Law on administrative procedure (Verwaltungsverfahrensgesetz).

39 It is apparent from the foregoing that the Umweltsenat has to be considered to be a court or tribunal for the purposes of Article 234 EC and so its question is admissible.

*The question referred*

40 Alpe Adria argues that the questions of Community law which have been raised are purely hypothetical in the present case. They are not objectively necessary in order to settle the dispute in the main proceedings and bear no relation to the dispute before the national court.

41 In this respect, it must be recalled that, according to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-545/07 *Apis-Hristovich* [2009] ECR I-0000, paragraph 28 and the case-law cited).

42 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (*Apis-Hristovich*, paragraph 29 and the case-law cited).

43 In the present case, the Court has been asked to provide the national court with criteria for interpreting Directive 85/337 so as to permit it to assess whether, under Community law, the project at issue is subject to the procedural obligations laid down in the Directive, notwithstanding the fact that national law does not lay down such procedural obligations for that project.

44 Under those circumstances, the reference for a preliminary ruling must be regarded as admissible.

**Substance**

45 By its question, the national court is asking, essentially, whether Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even though the project is transboundary in nature and less than 15 km of it is located in the territory of that Member State.

46 First of all, it must be pointed out that a project which concerns the construction of a 220 kV electrical power line with a nominal power rating of 300 MVA and a length of 48.4 km is one of the projects covered by point 20 of Annex I to the Directive which are to be the subject of an obligatory environmental impact assessment pursuant to Articles 2(1) and 4(1) of the Directive.

47 Next, in order to answer the question put by the national court, it must be ascertained whether the Directive is to be interpreted as meaning that that obligation also applies to a transboundary project such as the one at issue in the main proceedings.

48 It must be borne in mind that, according to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given throughout the Community an autonomous and uniform interpretation, which must take into account the context of the provision and the purpose of the legislation in question (Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-290/03 *Barker* [2006] ECR I-3949, paragraph 40).

49 In that regard, Article 2(1) of Directive 85/337 imposes an obligation on the Member States to require that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are the subject of an assessment.

50 The Court has already held, in regard to the obligation to assess effects on the environment, that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 31 and 39).

51 It must also be pointed out that Directive 85/337 adopts an overall assessment of the effects of projects on the environment (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 39 and the case-law cited) irrespective of whether the project might be transboundary in nature.

52 In addition, the Member States must implement Directive 85/337 in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be the subject of an assessment with regard to their effects (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 33).

53 Moreover, the Court has held that the purpose of Directive 85/337 cannot be circumvented by the splitting of projects and that the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by the obligation to carry out an assessment, when, taken together, they are likely to have 'significant effects on the environment' within the meaning of Article 2(1) of Directive 85/337 (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 44).

54 It follows that projects listed in Annex I to Directive 85/337 which extend to the territory of a number of Member States cannot be exempted from the application of the Directive solely on the ground that it does not contain any express provision in regard to them.

55 Such an exemption would seriously interfere with the objective of Directive 85/337. Its effectiveness would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State (see, by analogy, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 53).

56 As the Advocate General pointed out in point 81 of his Opinion, that finding is strengthened by the terms of Article 7 of Directive 85/337, which provide for inter-State cooperation when a project is likely to have significant effects on the environment in another Member State.

57 It must be stated that the fact that the section located in Austria has a length of less than 15 km cannot, in itself, cause the project to be exempt from the assessment procedure laid down in Directive 85/337. The Member State concerned must carry out an environmental impact assessment of the project in its own territory which takes account of the specific effects of that project.

58 In the light of the foregoing, Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

**Costs**

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Articles 2(1) and 4(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.**

[Signatures]

* Language of the case: German.

JUDGMENT OF THE COURT (Second Chamber)

15 October 2009 (*)

(Directive 85/337/EEC – Public participation in environmental decision-making procedures – Right of access to a review procedure to challenge decisions authorising projects likely to have significant effects on the environment)

In Case C-263/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Högsta domstolen (Sweden), made by decision of 29 May 2008, received at the Court on 19 June 2008, in the proceedings

**Djurgården-Lilla Värtans Miljöskyddsförening**

v

**Stockholms kommun genom dess marknämnd,**

THE COURT (Second Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans, K. Schiemann and L. Bay Larsen, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2009,

after considering the observations submitted on behalf of:

– Djurgården-Lilla Värtans Miljöskyddsförening, by P. Schönning and G. Högberg Björck, jur kand,

– the Swedish Government, by A. Falk, K. Petkovska, C. Meyer-Seitz and S. Johannesson, acting as Agents,

– the Commission of the European Communities, by J.-B. Laignelot and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2009,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of provisions of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 1985 L 156, p. 17) ('Directive 85/337').

2 The reference was made in the course of proceedings between the Djurgården-Lilla Värtans Miljöskyddsförening (the Djurgården-Lilla Värtans association for environmental protection) ('the Miljöskyddsförening') and Stockholms kommun genom dess marknämnd (Municipality of Stockholm).

### Legal background

*Community law*

Directive 2003/35

3 Article 1 of Directive 2003/35 is worded as follows:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1)], in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.'

Directive 85/337

4 Article 1(2) of Directive 85/337 provides:

'For the purposes of this Directive:

…

"the public" means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"the public concerned" means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5 Under Article 2 of Directive 85/337:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it.

…'

6 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

7 Point 11 in Annex I to Directive 85/337 mentions '[g]roundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres'.

8 Point 10 of Annex II to the directive, entitled 'Infrastructure projects', mentions in subparagraph (l) '[g]roundwater abstraction and artificial groundwater recharge schemes not included in Annex I'.

9 Article 6 of Directive 85/337 is worded as follows:

'…

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which

comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [OJ 2003 L 41, p. 26], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned

to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

10 Article 10a of Directive 85/337 provides:

'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.'

*National law*

11 The drawing off of groundwater and supply of water to increase the amount of groundwater, and the construction of installations for that purpose, constitute water works requiring development consent under Paragraphs 2

and 9 of Chapter 11 of the Environment Act. At first instance, requests for development consent in this specific area are examined by Environmental Chambers in accordance with Paragraph 9(b) of that Act. The decisions of the Environmental Chambers may be appealed before the Environmental Appeal Chambers whose judgments may in turn be subject to appeal before the Högsta domstolen (Supreme Court), pursuant to Paragraphs 1 and 9 of Chapter 23 that act.

12 The provisions relating to environmental impact assessments appear in Chapter 6 of the Environment Act. They provide in particular that a party wishing to carry out works subject to development consent is to consult the länsstyrelsen (regional authority), the supervisory body, and individuals who may be assumed to be particularly affected. The regional authority is then required to take a position on whether the planned works are to be assumed to entail significant effects on the environment. If the regional authority decides that this is the case, works are to be assumed to entail such an effect, consultations are also to be held with other national authorities, municipalities, the public and organisations which may be assumed to be affected.

13 The right of appeal against judgments and decisions is governed by Paragraphs 12 and 13 of Chapter 16 of the Environment Act. The right of appeal for parties to an action and for certain organisations and authorities is covered in Paragraph 12 et seq. of Chapter 16. Paragraph 13 provides that a non-profit making association, on certain conditions set out in the provision, may appeal against judgments and decisions on development consent, approval and exemption under the Environment Act.

14 Paragraph 13 requires the association to fulfil three conditions, namely that the statutes of the association must state that its purpose is the protection of nature and the environment, the association must have been active in Sweden for at least three years and it must have at least 2 000 members.

## The dispute in the main proceedings and the questions referred for a preliminary ruling

15 The Municipality of Stockholm concluded a contract with an electricity company for the construction of a tunnel approximately one kilometre in length through the hills between the areas of Hjorthagen and Fisksjöäng in North Djurgården in order to house electric cables replacing overground high tension cables.

16 The implementation of that project required, first, the abstraction of groundwater leaking into the power cable tunnel and access tunnel and,

second, the construction on certain sites in the area concerned of facilities designed to drain off water and recharge it into the ground or rock in order to counteract any reduction in the amount of groundwater.

17 By decision of 27 May 2004, the länsstyrelsen i Stockholms län (Stockholm Regional Authority), giving its decision after an examination under Chapter 6 of the Environment Act, concluded, on the basis of the environmental impact assessment carried out for that project, that the works concerned were likely to have significant effects on the environment particularly with respect to groundwater.

18 By judgment of 13 December 2006, the miljödomstolen vid Stockholms tingsrätt (Environmental Chamber of the District Court of Stockholm) granted the Municipality of Stockholm development consent to carry out the works at issue, pursuant to Chapter 11 of the Environment Act.

19 The Miljöskyddsförening appealed against that decision before the Miljööverdomstolen of the Svea Hovrätt (Environmental Appeal Chamber of the Svea Court of Appeal), but that appeal was held to be inadmissible on the ground that the Miljöskyddsförening had not fulfilled the condition laid down in Paragraph 13 of Chapter 16 of the Environmental Act that it must have at least 2 000 members to be entitled to appeal against judgments and decisions covered by that act.

20 The Miljöskyddsförening brought an appeal against that decision before the Högsta domstolen.

21 Before the Högsta domstolen, the question arose as to whether the project at issue fell within the scope of Directive 85/337 as a project included in Annex II, point 10(l) thereto, as that point might, in the Swedish version of the directive, be limited to the drawing off of groundwater for a profitable purpose. Furthermore, the question also arose as to the exact scope of the right of appeal provided for by the Aarhus Convention, and whether the conditions laid down by Swedish law from that point of view, were too restrictive.

22 Accordingly, the Högsta domstolen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is point 10 of Annex II to Directive 85/337 to be interpreted as meaning that it encompasses water-related works which involve the drawing-off from a tunnel for power cables of groundwater leaking into it and infiltration (supply) of water into the ground or hill to compensate for any reduction in the groundwater, and the construction and maintenance of installations for the drawing-off and infiltration?

(2) If the answer to Question 1 is affirmative: Does the provision in Article 10a of Directive 85/337 – that under certain circumstances the public concerned is to have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of a decision – imply that there is also a requirement that the public concerned is to be entitled to challenge a decision of a court in planning consent proceedings in a case where the public concerned has had the opportunity of participating in the court's examination of the question of planning consent and of submitting its views to that court?

(3) If the answers to Questions 1 and 2 are affirmative: Are Articles 1(2), 6(4) and 10a of Directive 85/337 to be interpreted as meaning that different national requirements can be laid down with regard to the public concerned referred to in Articles 6(4) and 10a, with the result that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 6(4) in respect of projects which may have significant effects on the environment in the area where the association is active but do not have a right of appeal such as is referred to in Article 10a?'

## The questions referred for a preliminary ruling

*The first question*

23 By its first question, the referring court asks essentially whether a project of the type at issue in the main proceedings must be regarded as being covered by 'groundwater abstraction and artificial groundwater recharge schemes not included in Annex I' to Directive 85/337 mentioned in point 10(l) of Annex II to that directive.

24 According to the referring court, the Swedish version of point 10(l) of Annex II may cover just projects for abstracting groundwater with a view to the subsequent use of that water.

25 It is clear from settled case-law that the need for an application, and hence a uniform interpretation, of the provisions of Community law requires that, in cases of doubt, the text of a provision must not be considered in isolation in one of its versions, but, on the contrary, should be interpreted and applied in the light of the versions existing in the other official languages (Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20, and Case C-311/06 *Consiglio Nazionale degli Ingegneri*[2009] ECR I-0000, paragraph 53).

26 Furthermore, the need for such an interpretation requires that in the case of divergence between the various language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28).

27 As far as concerns point 10(l) of Annex II to Directive 85/337, it is clear from an examination of the various language versions and, in particular, the Dutch, English, Finnish, French, German, Italian, Polish, Portuguese and Spanish versions, that that provision covers groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of the purpose for which those works must be carried out and, in particular, of the subsequent use of the water thereby abstracted or recharged into the ground.

28 In addition, point 11 in Annex I to that directive does not mention any further criteria as regards groundwater abstraction or groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

29 Finally, it is clear from settled case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 32 and the case-law cited).

30 Consequently, the provisions of point 10(l) of Annex II to Directive 85/337 must be interpreted as meaning that they cover all groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of their purpose, which means that they also cover schemes which do not involve the subsequent use of that groundwater.

31 Having regard to the foregoing, the answer to the first question is that a project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharge, are covered by point 10(l) in Annex II to Directive 85/337, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.

*The second question*

32 By its second question, the referring court asks essentially whether Article 10a of Directive 85/337 implies that members of the public concerned are to have access to a review procedure to challenge a decision by which a body attached to a court of law of a Member State has given a ruling on a request

for development consent even where they had the opportunity to participate in the court's examination of the question of development consent and to express their views.

33 Article 10a of Directive 85/337, taking account of the amendments introduced by Directive 2003/35 which is intended to implement the Aarhus Convention, provides for members of the public concerned who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope.

34 Thus, according to the wording of that provision, persons who are members of the public concerned and either have sufficient interest, or if national law so requires, maintain that one of the projects covered by Directive 85/337 impairs their rights, are to have access to a review procedure.

35 It is also apparent therefrom that any non-governmental organisations which promote environmental protection and meet the conditions which may be required by national law satisfy the criteria, with respect to the public concerned who may bring an appeal, laid down in Article 1(2) of Directive 85/337 read in conjunction with Article 10a.

36 Furthermore, Article 6(4) of Directive 85/337 guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment.

37 The fact that development consent for housing electric cables and groundwater abstraction such as that at issue in the main proceedings, which is a decision within the meaning of Article 10a of Directive 85/337, is given by a court exercising administrative powers does not prevent an association fulfilling the conditions set out in paragraph 35 of this judgment, and in accordance with the detailed rules laid down by national law, from exercising its right of access to a review procedure in order to challenge that decision.

38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

39 Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

*The third question*

40 By its third question, the referring court asks essentially whether, in the context of the implementation of Articles 6(4) and 10a of Directive 85/337, Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 2(2) of that directive but no right of access to a review procedure to challenge the decision adopted at the end of that procedure.

41 It is clear from the order for reference, the file submitted to the Court, and the arguments put forward at the hearing, that the reason for that question is the existence in the relevant national legislation of the rule that only an association with at least 2 000 members may bring an appeal against a decision adopted on an environmental matter.

42 It is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with Article 10a, to be entitled to challenge the decision which authorises it.

43 The directive leaves it to national law to determine the conditions for the admissibility of the action. Those conditions may be having 'sufficient interest' or 'impairment of a right', and national laws generally use one or other of those two concepts.

44 As regards non-governmental organisations which promote environmental protection, Article 1(2) of Directive 85/337, read in conjunction with Article 10a thereof, requires that those organisations 'meeting any requirements under national law' are to be regarded either as having 'sufficient interest' or as having a right which is capable of being impaired by projects falling within the scope of that directive.

45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the

conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

48 In that connection, it must be stated that, although Directive 85/337 provides that members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it, that directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Article 6(4) thereof.

49 Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.

50 Furthermore, Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with. As the Advocate General notes, in point 78 of her Opinion, the rule of the Swedish legislation at issue is such as to deprive local associations of any judicial remedy.

51 The Swedish Government, which acknowledges that at present only two associations have at least 2 000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.

52 Accordingly, the answer to the third question is that Article 10a of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

**Costs**

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharging, are covered by point 10(l) in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.**

2. **Members of the 'public concerned' within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35,**

**must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.**

3. **Article 10a of Directive 85/337, as amended by Directive 2003/35, precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2 000 members.**

[Signatures]

---

* Language of the case: Swedish.

JUDGMENT OF THE COURT (Fourth Chamber)

12 May 2011 (*)

(Directive 85/337/EEC – Environmental impact assessment – Aarhus Convention – Directive 2003/35/EC – Access to justice – Non-governmental organisations for the protection of the environment)

In Case C-115/09,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany), made by decision of 5 March 2009, received at the Court on 27 March 2009, in the proceedings

**Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV**

v

**Bezirksregierung Arnsberg,**

intervening party:

**Trianel Kohlekraftwerk Lünen GmbH & Co. KG,**

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, A. Arabadjiev, L. Bay Larsen, and C. Toader, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2010,

after considering the observations submitted on behalf of:

– the Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV, by D. Teßmer, and B.W. Wegener, Rechtsanwälte,

– the Bezirksregierung Arnsberg, by D. Bremecker, acting as Agent,

– Trianel Kohlekraftwerk Lünen GmbH & Co. KG, by C. Riese, and U. Karpenstein, Rechtsanwälte,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Russo, avvocato dello Stato,

– the European Commission, by J.-B. Laignelot and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

## Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The reference has been made in proceedings between the Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (the Nordrhein-Westfalen branch of Friends of the Earth, Germany; 'Friends of the Earth') and the Bezirksregierung Arnsberg, concerning the authorisation granted by the latter to Trianel Kohlekraftwerk GmbH & Co. KG ('Trianel') for the construction and operation of a coal-fired power station in Lünen.

### Legal context

*International law*

3 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as 'the Aarhus Convention', was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the

Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1).

4 Article 9 of the Aarhus Convention provides:

‘…

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

…'[…] »

*European Union ('EU') law*

Directive 2003/35

5 Recital 5 in the preamble to Directive 2003/35 states that Community law should be properly aligned with the Aarhus Convention with a view to the ratification of that Convention by the Community.

6 Recital 9 to Directive 2003/35 states:

'Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.'

7 Recital 11 to Directive 2003/35 states that Directive 85/337 should be amended to ensure that it is fully compatible with the provisions of the Aarhus Convention and, in particular, with Article 6 and Article 9(2) and (4) thereof.

8 Article 1 of Directive 2003/35 is worded as follows:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Aarhus Convention, in particular by:

…

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.'

Directive 85/337

9 Article 1(1) of Directive 85/337 provides:

'This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.'

10 Article 1(2) of Directive 85/337 sets out the definitions added by Directive 2993/85 of the concepts of 'the public' and 'the public concerned':

‘For the purposes of this Directive:

…

‘the public’ means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

‘the public concerned’ means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

…’

11 Under Article 10a of Directive 85/337, also inserted by Directive 2003/35:

‘Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively,

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

…

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

…’

Directive 92/43/EC

12 Article 6(3) of Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206,

p. 7), as amended by Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive') provides as follows:

'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

*National law*

13 Paragraph 42 of the Administrative Court Rules (Verwaltungsgerichtsordnung, BGBl. 1991 I, p. 686; 'the VwGO') lays down the following conditions for the admissibility of actions:

'1. An action can seek to have an administrative measure set aside (action for annulment) or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoinder).

2. Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act.'

14 In addition, the first sentence of Paragraph 113(1) of the VwGO provides that:

1. 'In so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate'.

15 The first sentence of Paragraph 2(1) of the Law on environmental impact assessments (Gesetz über die Umweltverträglichkeitsprüfung, BGBl. 2005 I, p. 1757; 'the UVPG') provides that the environmental impact assessment is to form an integral part of administrative procedures aimed at reaching a decision as to whether a project can be authorised.

16 Paragraph 2(3)(1) of the UVPG provides that permits, planning approval decisions and other official decisions as to whether a project can be authorised, taken in the course of an administrative procedure, with the

exception of declarations, constitute decisions for the purposes of the first sentence of Paragraph 2(1).

17 Under Paragraph 1(1)(1)(a) of the Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC (Umwelt-Rechtsbehelfsgesetz, BGBl. 2006 I, p. 2816; 'the UmwRG'), that law is to apply to actions which challenge decisions for the purposes of Paragraph 2(3) of the UVPG concerning projects in relation to which there may be, under the UVPG, an obligation to implement an environmental impact assessment.

18 Paragraph 2(1)(1) of the UmwRG provides that a domestic or foreign association recognised under Paragraph 3 of the UmwRG may, without being required to maintain an impairment of its own rights, bring an action in accordance with the VwGO to challenge such a decision or a failure to adopt such a decision, provided that the association asserts that the decision contravenes legislative provisions 'which seek to protect the environment, which confer individual rights and which may be relevant to the decision'.

19 Moreover, point (1) of the first sentence of Paragraph 2(5) of the UmwRG provides that such actions are to be deemed to be well founded if the decision infringes legislative provisions 'which seek to protect the environment, which confer individual rights and which are relevant to the decision' and if the infringement 'affects environmental protection concerns included in the objectives which the association, under its statutes, is committed to promote'.

20 Point (2) of the first sentence of Paragraph 5(1) of the Federal Law on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment – the Anti-Pollution Law (Bundes-Immissionsschutzgesetz, BGBl. 2002 I, p. 3830; 'the BImSchG') provides, inter alia, that for the purposes of ensuring high levels of 'environmental protection overall', installations subject to official approval are to be constructed and operated in a manner which ensures the prevention of effects harmful to the environment and other dangers, major disadvantages and major disturbances.

21 The first sentence of Paragraph 8(1) of the BImSchG provides that, on application, a permit may be granted for the construction of an installation or a part of an installation, or the construction and operation of a part of an installation, if: (i) there is a legitimate interest in the grant of a limited permit, (ii) the conditions for the grant of a permit in respect of the component for which a limited permit is sought are satisfied and (iii) a preliminary assessment indicates that no obstacles are present which are from the outset insuperable, thereby precluding the construction and operation of the installation as a whole.

22 Paragraph 9(1) of the BImSchG provides that, on application, a preliminary decision may be issued regarding specific permit conditions and regarding the installation site, provided that the effects of the planned installation can be adequately assessed and that there is a legitimate interest in the issuing of a preliminary decision.

23 Paragraph 61 of the Law on nature protection and countryside conservation (Bundesnaturschutzgesetz, BGBl. 2002 I, p. 1193) provides:

‘(1) Independently of any impairment of its own rights, a ... recognised association may bring actions in accordance with the [VwGO] challenging

1. Exemptions from prohibitions and requirements intended to protect nature conservation areas, national parks and other protected areas established under Paragraph 33(2) and

2. Planning approval decisions concerning projects which entail an encroachment on nature and the countryside, together with planning permits, where public participation is provided for

…

(2) Actions brought in accordance with subparagraph 1 are not admissible unless the association

1. claims that the adoption of one of the administrative measures mentioned in the first sentence of subparagraph 1 contravenes provisions of the present law, provisions which have been adopted or which continue to apply on the basis or within the framework of the present law, or other provisions which must be taken into account when adopting an administrative measure and whose objectives include concern for nature protection and countryside conservation;

2. is affected as regards a matter which, under its statutes, is within its ambit and in respect of which it is recognised …’

## Background and questions referred

24 Trianel – the intervener in the main proceedings – intends to construct and operate a coal-fired power station in Lünen. The power station, which will deliver heat output to a maximum of 1 705 megawatts and 750 megawatts of electricity output, will enter service in 2012. Within eight kilometers of the project site, there are five areas designated as special areas of conservation within the meaning of the Habitats Directive.

25 On 6 May 2008, in the context of the environmental impact assessment of that project, the Bezirksregierung Arnsberg (Arnsberg District Administration) – the defendant in the main proceedings – issued Trianel with a preliminary decision and a partial permit for the project. The preliminary decision stated that there were no legal objections to the project.

26 On 16 June 2008, Friends of the Earth initiated proceedings for the annulment of those measures before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Nordrhein-Westfalen Land; 'the referring court'). Friends of the Earth relied, in particular, on an infringement of the provisions transposing into German law the Habitats Directive and, in particular, Article 6 thereof.

27 According to the referring court, those measures infringe Article 6(3) of the Habitats Directive inasmuch as the environmental impact assessment of the project at issue did not show that it was unlikely to have a significant effect on the special areas of conservation located nearby.

28 The referring court finds that, on the basis of domestic law, an environmental protection organisation is not entitled to rely on infringement of the law for the protection of water and nature or on the precautionary principle laid down in point (2) of the first sentence of Paragraph 5(1) of the BImSchG, as those provisions do not confer rights on individuals for the purposes of point (1) of Paragraph 2(1) and point (1) of Paragraph 2(5) of the UmwRG.

29 It states that, accordingly, the right of action accorded to non-governmental organisations is comparable with that provided for under the general rules of administrative procedural law governing actions for annulment and, in particular, under Paragraph 42(2) and the first sentence of Paragraph 113(1) of the VwGO, which provide that an action challenging an administrative measure will be admissible only if the administrative measure affects the claimant's rights, that is to say, his individual public law rights.

30 The referring court adds that the decisive criterion for establishing whether a provision of national law protects individual rights is the extent to which that provision adequately specifies and delimits the interest or right protected, envisages the way in which the right might be regarded as impaired and determines the class of persons protected.

31 The referring court finds in that regard that, in the field of anti-pollution law, point (2) of the first sentence of Paragraph 5(1) of the BImSchG – in the same way, moreover, as the law for the protection of water and nature – primarily concerns the general public and not the protection of individual rights.

32 In addition, the referring court notes that the project at issue does not come within the scope of Paragraph 61 of the Law on nature protection and countryside conservation, which permits, in certain cases, an exception to be made to that condition of admissibility for actions brought by recognised associations in the environmental field.

33 Since it considers that such a restriction on access to justice could nevertheless undermine the useful effect of Directive 85/337, the referring court wonders whether the action brought by Friends of the Earth ought not to be allowed on the basis of Article 10a of that directive.

34 In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein Westfalen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 10a of Directive 85/337 … require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?

(2) Unless Question 1 is answered unreservedly in the affirmative:

Does Article 10a of Directive 85/337 … require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to base their argument on the infringement of environmental provisions relating to the approval of a project which are derived directly from Community law or which transpose Community environmental legislation into domestic law, including provisions intended to serve the interests of the general public alone, rather than those which, at least in part, protect the legal interests of individuals?

(a) If Question 2 calls, in principle, for an affirmative response:

Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

(b) If Question 2(a) is answered in the affirmative:

What are the relevant substantive conditions (for example, direct effect, protection objective or aim of the legislation)?

(3) If either Question 1 or Question 2 is answered in the affirmative:

Does the directive directly entitle non-governmental organisations to a right of access to the courts which exceeds that provided for under the rules laid down in national law?'

## The questions referred

*Questions 1 and 2*

35 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of Directive 85/337 ('environmental protection organisations'), to rely before the courts, in an action contesting a decision authorising projects likely to have 'significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule which protects only the interests of the general public and not the interests of individuals. The referring court also asks the Court whether Article 10a of Directive 85/337 precludes such legislation in general or only in so far as it does not permit an organisation of that nature to rely before the courts on particular provisions of environment law, whether of Community or purely national origin.

36 It emerges from the order for reference that the question is justified by the fact that the applicable national legislation makes the admissibility of an action such as that brought by the applicant in the main proceedings conditional upon the applicant showing that the administrative decision contested impairs an individual right which, under national law, can be categorised as an individual public-law right.

37 First of all, it should be noted that the first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure 'to challenge [their] substantive or procedural legality', without in any way limiting the pleas that could be put forward in support of such an action.

38 With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation.

39 The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes a sufficient interest and impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned 'wide access to justice'.

40 With regard to actions brought by environmental protection organisations, the second and third sentences of the third paragraph of Article 10a of Directive 85/337 add that, to that end, such organisations must be regarded as having either a sufficient interest or rights which may be impaired, depending on which of those conditions for admissibility is adopted in the national legislation.

41 Those various provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which – as is stated in recital 5 to Directive 2003/35 – EU law should be 'properly aligned'.

42 It follows that, whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article.

43 Lastly, it should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

44 Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

45 With regard to legislation such as that at issue in the main proceedings, although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337, such a limitation cannot be applied as

such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337.

46 If, as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.

47 It follows first that the concept of 'impairment of a right' cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation.

48 It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

49 In that regard, in order to give the referring court the most useful answer possible, it should be pointed out that a plea raised against a contested decision which alleges infringement of the rules of national law flowing from Article 6 of the Habitats Directive must be capable of being relied on by an environmental protection organisation.

50 Consequently, the answer to Questions 1 and 2, read together, is that Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

*Question 3*

51 By its third question, the referring court asks the Court, essentially, whether an environmental protection association can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

52 That question arises in the event that it would not be possible for the referring court to interpret national procedural law in a manner consistent with the requirements of EU law.

53 In that regard, it should first of all be borne in mind that the Member States' obligation under a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, to that effect, Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 47 and the case-law cited).

54 The Court has held that whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State, where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraph 58).

55 It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought.

56 The same is not true, however, of the provisions laid down in the last two sentences of the third paragraph of Article 10a of Directive 85/337.

57 By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired, those provisions lay down rules which are precise and not subject to other conditions.

58 In addition, as was stated above, the rights which environmental protection organisations may rely on in judicial proceedings pursuant to Article 10a of Directive 85/337 include the rules of EU environment law and, in particular, the rules of national law flowing from Article 6 of the Habitats Directive.

59 The answer to Question 3 is therefore that non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

**Costs**

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.**

2. **Such a non-governmental organisation can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article**

**1(1) of Directive 85/337, as amended, on the infringement of the rules of national law flowing from Article 6 of Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.**

[Signatures]

---

*Language of the case: German.

JUDGMENT OF THE COURT (Fourth Chamber)

14 March 2013 (*)

(Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects on the environment – Consent for such a project without an appropriate assessment – Objectives of that assessment – Conditions to which the existence of a right to compensation are subject – Whether protection of individuals against pecuniary damage is included)

In Case C-420/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 21 July 2011, received at the Court on 10 August 2011, in the proceedings

**Jutta Leth**

v

**Republik Österreich,**

***Land* Niederösterreich,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, (Rapporteur), President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2012,

after considering the observations submitted on behalf of:

– Ms Leth, by W. Proksch, Rechtsanwalt,

– Republik Österreich, by C. Pesendorfer and P. Cede, acting as Agents,

– *Land* Niederösterreich, by C. Lind, Rechtsanwalt,

– the Czech Government, by D. Hadroušek and M. Smolek, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by E. Fitzsimons, SC,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the Latvian Government, by I. Kalniņš and A. Nikolajeva, acting as Agents,

– the United Kingdom Government, by J. Beeko and L. Seeboruth, acting as Agents, assisted by E. Dixon, Barrister,

– the European Commission, by P. Oliver and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2012,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The request has been made in the course of proceedings between Ms Leth, on the one hand, and Republik Österreich (Republic of Austria) and *Land* Niederösterreich (State of Lower Austria), on the other, regarding her application for (i) compensation for the pecuniary damage which she claims to have sustained as a result of the decrease in the value of her home following the extension of Vienna-Schwechat airport (Austria) and (ii) a declaration that the defendants in the main proceedings will be liable for any future damage.

### Legal context

*European Union law*

Directive 85/337

3 The first, third, sixth and eleventh recitals in the preamble to Directive 85/337 are worded as follows:

‘… the … action programmes of the European Communities on the environment … stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; … they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical-planning and decision-making processes; … to that end, they provide for the implementation of procedures to evaluate such effects;

…

… in addition, it is necessary to achieve one of the Community’s objectives in the sphere of the protection of the environment and the quality of life;

…

… general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

… development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; … this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

…

… the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life’.

4 Article 1 of Directive 85/337 states:

‘1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…'

5 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.'

6 Article 3 of Directive 85/337 states:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

7 Under Article 4, paragraphs 1 to 3, of Directive 85/337:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State,

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.'

8 Article 5(1) and (3) of the Directive provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV …

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

…

– the data required to identify and assess the main effects which the project is likely to have on the environment,

…'

9 Among the projects referred to in Article 4(1) of Directive 85/337 are, according to Annex I, paragraphs 7(a) and 22, the '[c]onstruction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more' and '[a]ny change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.'

10 The first indent of paragraph 13 of Annex II to Directive 85/337 includes, among the projects referred to in Article 4(2) of that directive, '[a]ny change or extension of projects listed in Annex I …, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)'.

11 Annex IV to the directive, entitled 'Information referred to in Article 5(1)' states, in paragraphs 3 to 5:

'3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular,

population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description … of the likely significant effects of the proposed project on the environment resulting from:

   – the existence of the project,

   – the use of natural resources,

   – the emission of pollutants, the creation of nuisances and the elimination of waste,

   and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment.'

*Austrian law*

12 Directive 85/337 was transposed into Austrian law by the Law of 1993 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 1993; 'UVP-G 1993'), which was in force from 1 July 1994 until the entry into force, on 11 August 2000, of the Law of 2000 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 2000), which was designed to transpose Directive 97/11.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

13 Since 1997, Ms Leth, the applicant in the main proceedings, has been the owner of a property situated within the security zone of Vienna-Schwechat airport. She lives in the house built on that property.

14 Since the accession of the Republic of Austria to the European Union, on 1 January 1995, the authorities of the defendants in the main proceedings have, without carrying out environmental impact assessments, consented to and completed several projects relating to the development and extension of Vienna-Schwechat airport. By decision of 21 August 2001, the Minister-President of *Land* Niederösterreich expressly stated that no environmental impact assessment procedure was necessary in relation to the continued development and certain extensions of that airport.

15 In 2009, Ms Leth brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) against the two defendants in the main proceedings, in which she sought payment by them of EUR 120 000 in respect of the decrease in the value of her property, in particular as a result of aircraft noise, and a declaration that the defendants will be liable for any future damage, including damage to her health, arising from the late and incomplete transposition of Directive 85/337, Directive 97/11, and Directive 2003/35, and from the failure to carry out an environmental impact assessment before giving the various consents relating to the development of Vienna-Schwechat airport. The defendants in the main proceedings have contended that their authorities acted lawfully and without negligence, and that the claim brought is time-barred.

16 The Landesgericht für Zivilrechtssachen Wien dismissed the action in its entirety on the ground that the rights relied upon were time-barred. By way of a part-judgment on the appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) confirmed the dismissal of the claim for payment of EUR 120 000, but set aside the dismissal of the claim in relation to the application for a declaration that the defendants in the main proceedings would be liable for future damage, referring the case back to the first-instance court in order for it to rule afresh on that latter application. In that respect, the Oberlandesgericht Wien found that the claim for payment of EUR 120 000 related only to purely pecuniary damage, which did not come within the objective of protection pursued by the provisions of European Union law, in particular those of the relevant directives, and by national law. As regards the application for a declaration of liability in respect of future damage, that court found that that application was not time-barred. Subsequently, an appeal on a point of law ('Revision') against the dismissal of the claim for that payment and an appeal against the referral back of the application for a declaration of liability were brought before the referring court.

17 The referring court takes the view that the decision on those claims, which are in any event not time-barred in their entirety, depends on whether the duty of the competent authorities of the Member State concerned to carry out an environmental impact assessment, laid down in both European Union law and national law, is liable to protect the individuals concerned against purely pecuniary damage caused by a project in respect of which such an assessment has not been carried out.

18 It is in that context that the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Is Article 3 of Directive 85/337 …, as amended by Directive 97/11 … and by Directive 2003/35 …, to be interpreted as meaning that:

1. the term ‘material assets’ covers only their substance or also their value;

2. the environmental impact assessment serves also to protect an individual against pecuniary damage as a result of a decrease in the value of his property?’

## Procedure before the Court

19 By letter of 21 December 2012, the applicant in the main proceedings requested the reopening of the oral procedure, claiming, first, that, in examining – in her Opinion delivered on 8 November 2012 – the issue of whether the environmental impact assessment under Article 3 of Directive 85/337 includes the assessment of the effects of the project under examination on the value of material assets, the Advocate General introduced a new question which had not been posed by the referring court and which had not been the subject of an exchange of views between the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, and, as a consequence, the first question as posed by the referring court was not answered. Secondly, she claims that those interested persons did not have the opportunity to exchange views on the consequences to be drawn from the fact that the public concerned was not informed of the projects at issue and could not, therefore, participate in the decision-making process.

20 In that respect, it must be pointed out that, under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case has to be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

21 In the present case, the Court considers that the request for a preliminary ruling does not need to be examined on the basis of an argument that has not yet been debated before it and that it has all the information necessary to deal with the request for a preliminary ruling.

22 The request by the applicant in the main proceedings that a new hearing be held and her alternative application for leave to submit additional written observations must therefore be dismissed.

## The questions referred to the Court

23 By its questions, the referring court asks, in essence, whether Article 3 of Directive 85/337 must be interpreted as meaning, first, that the environmental

impact assessment, as provided for in that article, includes the assessment of the effects of the project under examination on the value of material assets and, secondly, that the fact that an environmental impact assessment has not been carried out, in breach of Directive 85/337, confers on an individual a right to compensation for pecuniary damage caused by a decrease in the value of his property resulting from the environmental effects of the project under examination.

24 As regards the term 'material assets' within the meaning of Article 3 of Directive 85/337, it must be recalled that, according to settled case-law, it follows from the need for a uniform application of European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-497/10 PPU *Mercredi* [2010] ECR I-14309, paragraph 45).

25 Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.

26 It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.

27 However, as has correctly been pointed out by *Land* Niederösterreich and by several of the governments which have submitted observations to the Court, an extension of the environmental assessment to the pecuniary value of material assets cannot be inferred from the wording of Article 3 of Directive 85/337 and would also not be in accordance with the purpose of that directive.

28 It follows from Article 1(1) of, and from the first, third, fifth and sixth recitals in the preamble to, Directive 85/337 that the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life. The information which must be supplied by the developer in accordance with Article 5(1) of, and Annex IV to, Directive 85/337, as well as the criteria which enable Member States to determine whether small-scale projects,

meeting the characteristics laid down in Annex III to that directive, require a environmental assessment, also relate to that purpose.

29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.

31 That finding, however, does not necessarily imply that Article 3 of Directive 85/337 must be interpreted as meaning that the fact that an environmental impact assessment has not been carried out, contrary to the requirements of that directive, in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material assets, does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets.

32 It must be recalled, from the outset, that the Court has already ruled that an individual may, where appropriate, rely on the duty to carry out an environmental impact assessment under Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4 thereof (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 61). That directive thus confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.

33 Accordingly, it is necessary to examine whether Article 3 of Directive 85/337, read in conjunction with Article 2 thereof, is intended, in the event of an omission to carry out an environmental impact assessment, to confer on individuals a right to compensation for pecuniary damage such as that invoked by Ms Leth.

34 In that respect, it follows from the third and eleventh recitals in the preamble to Directive 85/337 that the purpose of that directive is to achieve one of the European Union's objectives in the sphere of the protection of the environment and the quality of life and that the effects of a project on the environment must be assessed in order to take account of the concerns to contribute by means of a better environment to the quality of life.

35 In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case-by-case basis.

36 It must therefore be concluded that the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.

37 As regards a right to compensation for such pecuniary damage, it follows from the Court's settled case-law that, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law. In that regard, the Court has already held that, in order to remedy the failure to carry out an environmental impact assessment of a project within the meaning of Article 2(1) of Directive 85/337, it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental impacts, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered (see *Wells*, paragraphs 66 to 69).

38 The detailed procedural rules that are applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67).

39 Thus, it is on the basis of the rules of national law on liability that the Member State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of that loss or damage laid down by national law ensure compliance with the principles of equivalence and effectiveness recalled in the previous paragraph (see Joined

Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 67).

40 It must, however, be pointed out that European Union law confers on individuals, under certain conditions, a right to compensation for damage caused by breaches of European Union law. According to the Court's settled case-law, the principle of State liability for loss or damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (see Case C-429/09 *Fuß* [2010] ECR I-12167, paragraph 45 and the case-law cited).

41 In that respect, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the individuals (see, *Fuß*, paragraph 47, and Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] ECR I-12655, paragraph 87 and the case-law cited).

42 Those three conditions are necessary and sufficient to found a right in individuals to obtain redress on the basis of European Union law directly, although this does not mean that the Member State concerned cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, paragraph 66).

43 It is, in principle, for the national courts to apply the criteria, directly on the basis of European Union law, for establishing the liability of Member States for damage caused to individuals by breaches of European Union law, in accordance with the guidelines laid down by the Court for the application of those criteria (see Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 210 and the case-law cited).

44 In that regard, it has already been established, in paragraphs 32 and 36 of the present judgment, that Directive 85/337 confers on the individuals concerned a right to have the effects on the environment of the project under examination assessed by the competent services, and that pecuniary damage, in so far as it is a direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

45 However, as indicated in paragraph 41 of the present judgment, the existence of a direct causal link between the breach in question and the damage sustained by the individuals is, in addition to the determination that

the breach of European Union law is sufficiently serious, an indispensable condition governing the right to compensation. The existence of that direct causal link is also a matter for the national courts to ascertain, in accordance with the guidelines laid down by the Court.

46 To that end, the nature of the rule breached must be taken into account. In the present case, that rule prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.

47 Consequently, it appears that, in accordance with European Union law, the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

48 The answer to the questions referred is therefore that Article 3 of Directive 85/337 must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337. The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

## Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.**

**The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.**

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2013 (*)

(Assessment of the effects of certain projects on the environment – Directive 85/337/EEC– Articles 2(1) and 4(2) – Projects listed in Annex II – Extension works to the infrastructure of an airport – Examination on the basis of thresholds or criteria – Article 4(3) – Selection criteria – Annex III, point 2(g) – Densely populated areas)

In Case C-244/12,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Verwaltungsgerichtshof (Austria), made by decision of 19 April 2012, received at the Court on 21 May 2012, in the proceedings

**Salzburger Flughafen GmbH**

v

**Umweltsenat,**

intervening parties:

**Landesumweltanwaltschaft Salzburg,**

**Bundesministerin für Verkehr, Innovation und Technologie,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Salzburger Flughafen GmbH, by G. Lebitsch, Rechtsanwalt,

– Landesumweltanwaltschaft Salzburg, by W. Wiener, Landesumweltanwalt,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by P. Oliver and D. Düsterhaus, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of the relevant provisions of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337').

2 The request has been made in proceedings between Salzburger Flughafen GmbH ('Salzburger Flughafen') and the Umweltsenat (Administrative Chamber for Environmental Matters) concerning the obligation to subject certain projects which expand the infrastructure of the airport of Salzburg (Austria) to an environmental impact assessment.

### Legal context

*European Union law*

3 Article 1 of Directive 85/337 provides:

'1. This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

2. For the purposes of this Directive:

"project" means:

– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…'

4 Article 2(1) of that directive provides:

‘Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.’

5 Under Article 3 of that directive:

‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– material assets and the cultural heritage,

– the interaction between the factors mentioned in the first, second and third indents.’

6 Article 4 of that directive is drafted as follows:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

…’

7 Annex I to Directive 85/337 lists the projects referred to in Article 4(1) of the directive, which must undergo a compulsory environmental assessment. Point 7(a) of Annex I to the directive refers to the '[c]onstruction … of airports … with a basic runway length of 2 100 m or more'.

8 Annex II to that directive lists the projects referred to in Article 4(2) thereof, in respect of which the Member States retain their discretion, in accordance with the conditions laid down in that article, as regards carrying out an environmental assessment. Point 10(d) of that annex concerns the '[c]onstruction of airfields (projects not included in Annex I)' and the first indent of point 13 of that annex refers to '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

9 Annex III to Directive 85/337, which refers to the selection criteria set out in Article 4(3) thereof, provides in point 2, entitled 'Location of projects':

'The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

…

– the absorption capacity of the natural environment, paying particular attention to the following areas:

…

(g) densely populated areas;

…'

*Austrian law*

10 Directive 85/337 was transposed into Austrian law by the Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungsgesetz 2000), in the version applicable to the facts in the main proceedings (BGBl. I, 50/2002; 'the UVPG 2000').

11 Articles 1, 3 and 3a of the UVPG 2000 contain provisions concerning the object and content of environmental impact assessments, the principle in accordance with which the projects listed in Annex I to that Law must be subject to such an assessment, the procedure and the conditions to be followed in that regard and the persons or entities authorised to request an assessment.

12 Thus, the projects which require an assessment are listed in Annex I to the UVPG 2000, in accordance with the principle stated in the provisions referred to above. Where there are changes to those projects, there must be an examination on a case-by-case basis above a certain threshold, with a view to carrying out an assessment. Column 1 of that annex, in point 14(d), refers, in that regard, to the following projects:

'Modification of airports, if this is expected to increase the number of aircraft movements (motor aircrafts, power gliders in powered flight or helicopters) by 20,000 or more per year…'

13 Operation of a civilian airport and all modifications to the extent of the operation limited by the licence require a 'civil airport licence' in accordance with Paragraph 68(1) of the Aviation Law (Luftfahrtgesetz) and an 'operating licence' under Paragraph 73(1) of that Law. In addition, the construction, use and substantial modification of civilian ground installations require a licence in accordance with Paragraph 78(1) of that Law.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

14 Salzburger Flughafen operates Salzburg Airport, which has a runway of over 2 100 metres in length. On 30 July 2002, it applied for a permit to construct an additional terminal, which it justified on the ground that, in the light of the requirement to ensure full checks on hold luggage, the existing passenger handling facilities were no longer capable of handling peak volumes of passengers. By decision of 2 April 2003, the Landeshauptfrau von Salzburg (Head of Government of the Province of Salzburg), the competent administrative authority, issued the construction permit. The additional terminal was built in 2003/2004. It has been operational ever since.

15 In 2004, Salzburger Flughafen made further applications for expansion of the airport. They concerned, firstly, an area of approximately 90 000 m2 in the south-western part of the present airport site for the construction of ancillary buildings, in particular warehouses, and the extension of vehicle parking areas and aircraft standing areas. Secondly, it applied to incorporate in that expansion further areas of almost 120 000 m2 to the north west of the airport primarily for general aviation, the construction of hangars and vehicle parking and aircraft standing areas. It also sought authorisation to alter taxiways. The application did not involve any changes to the runway itself.

16 The fact that the airport is sited in an urban area, with, in addition, a high level of air pollution, and the expected effects on the environment led the Landesumweltanwaltschaft Salzburg (Provincial Legal Office for the Environment), on 13 March 2006, to request the Amt der Salzburger

Landesregierung (Office of the Salzburg Federal Government; 'the Amt') to lay down a requirement for an environmental assessment covering both the additional terminal and the expansion works to the airport infrastructure. Since the Amt rejected that request, the Landesumweltanwaltschaft Salzburg appealed against that decision to the Umweltsenat (Environmental Tribunal).

17 In its decision, the Umweltsenat found that both the extension of the airport infrastructure already in existence, following the construction and putting into operation of the additional terminal, and the expansion proposed in the permit applications require an environmental impact assessment, in accordance with the relevant provisions of the UVPG 2000, read in conjunction with Directive 85/337.

18 To justify its decision, that authority noted that if, in the context of the dispute in the main proceedings, the national legislation does not require any environmental impact assessment, since the threshold established, namely an increase in the number of aircraft movements of at least 20 000 per year, is not exceeded, that legislation only imperfectly transposes Directive 85/337. The UVPG 2000 establishes too high a threshold, so that changes to the infrastructure of small or medium-sized airports ought never, in practice, to give rise to an environmental impact assessment. In addition, the Umweltsenat noted that the national legislation at issue does not list sites requiring specific protection, whereas Directive 85/337 requires, under Annex III(2)(g) thereto, that special attention be paid to densely populated areas. The airport under consideration is near to the city of Salzburg.

19 The Umweltsenat therefore took the view that it was necessary to apply Directive 85/337 directly, because of the fact that the changes to the airport infrastructure can be regarded, in particular by reason of their nature, size and characteristics, as a modification of the airport itself, likely to increase its activity and aircraft traffic.

20 An appeal has been brought against that decision by Salzburger Flughafen before the Verwaltungsgerichtshof (Supreme Administrative Court).

21 The referring court notes that, in accordance with the case-law of the Court following from Cases C-2/07 *Abraham and Others* [2008] ECR I-1197 and C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, the relevant provisions of Annex II to Directive 85/337, read in conjunction with those of Annex I thereto, also encompass works to change the infrastructure of an existing airport. Furthermore, in order to avoid misuse of the European Union rules by splitting projects which, taken together, are likely to have significant effects on the environment, it is necessary to take into account the cumulative effect of such projects which have an objective and chronological link between them. The Verwaltungsgerichtshof is therefore of

the opinion that the assessment of the environmental impact of the later project, namely the expansion of the airport area, must also take into account the impact of the earlier project, the construction of the additional terminal.

22 As regards the fact that the project at issue in the main proceedings, taken as a whole, appears to require an environmental impact assessment pursuant to the provisions of Directive 85/337 while the national legislation does not require such an assessment, the Verwaltungsgerichtshof observes that, in accordance with the case-law of the Court, the measure of discretion conferred on Member States by Article 4(2) of Directive 85/337 is limited by the obligation set out in Article 2(1) of the directive to make projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, subject to an impact assessment. Thus, a Member State which establishes criteria or thresholds without taking into consideration the location of projects or which establishes them at a level which, in practice, means that all of a particular type of projects will be removed in advance from the obligation of carrying out an impact assessment exceeds the discretion which it has (*Abraham and Others*, paragraph 37; Case C-72/95 *Kraaijeveld and Others*[1996] ECR I-5403, paragraph 53 and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

23 As regards the monitoring of compliance with that discretion and the consequences if it is exceeded, the referring court points out that, in accordance with the case-law of the Court, where that discretion is exceeded by the legislative or administrative authorities of a Member State, individuals may rely on Articles 2(1) and 4(2) of Directive 85/337 before the courts of a Member State against the national authorities and thus obtain an order that the national rules or measures which are incompatible with those provisions be set aside. In such a case, it follows from the judgments in *Kraaijeveld and Others* (paragraphs 59 to 61) and *WWF and Others* (paragraph 5 of the operative part) that it is for the authorities of a Member State to adopt, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

24 With regard to the direct effect of the relevant provisions of Directive 85/337, the referring court is of the opinion that, from the point of view of their content, those provisions are unconditional. As regards whether they are also sufficiently precise to be capable of direct application, it notes that the selection criteria laid down in Annex III to Directive 85/337 in any event state the limits of the discretion of the Member States under Article 4(2) of that directive. The rules at issue in the main proceedings do not take account of the criterion of location of the projects provided for in point 2(g) of Annex III to Directive 85/337. In addition, the threshold established in those rules

means that it is, in practice, highly unlikely that there would be an environmental assessment for medium-sized or small airports. Thus, according to the referring court, not only does the legislation at issue in the main proceedings fail fully to transpose Directive 85/337, but, in addition, it manifestly fails to take account of the clear and sufficiently precise criteria laid down in Annex III to that directive.

25 Having regard to those considerations and to the fact that it rules at final instance, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does … Directive 85/337/EEC … preclude a national rule by which it is established that an environmental impact assessment for infrastructure works (not concerning the runway) at an airport, that is the construction of a terminal and the extension of the airport site to construct further facilities (in particular hangars, equipment buildings and parking areas), shall only be carried out if the annual number of aircraft movements is anticipated to increase by no less than 20 000?

In the event that Question 1 is answered in the affirmative:

2. In the absence of relevant national provisions, does Directive 85/337 require and allow for the direct application of its provisions to assess (taking due account of the objectives thereby pursued and the criteria set out in Annex III thereto) the environmental impact of a project – specified in Question 1 – which is covered by Annex II?’

## Consideration of the questions referred

*The first question*

26 By its first question, the referring court asks, in essence, whether the provisions of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

27 In order to respond to that question, it is necessary to note that, as follows from the combined provisions of Article 4(2) of Directive 85/337 and the first indent of point 13 of Annex II thereto, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, the Member States must determine on the basis of a case-by-

case examination or of thresholds or criteria which they establish, whether such a project must be made subject to an environmental impact assessment.

28 In that regard, it must be borne in mind that, in accordance with the settled case-law of the Court, works to change the infrastructure of an existing airport, without extension of the runway, are likely to be covered by point 13 of Annex II to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (see, to that effect, *Brussels Hoofdstedelijk Gewest*, paragraph 35 and the case-law cited).

29 As regards the establishment of thresholds or criteria to determine whether such a project must be made subject to an environmental impact assessment, it must be borne in mind that, indeed, Article 4(2)(b) of Directive 85/337 confers a measure of discretion on the Member States in that regard. However, that discretion is limited by the obligation set out in Article 2(1) of the directive to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an impact assessment (see, to that effect, *WWF and Others*, paragraph 36 and the case-law cited).

30 Thus, the criteria and/or thresholds mentioned in Article 4(2)(b) of Directive 85/337 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II to that directive which may be envisaged on the territory of a Member State (see, to that effect,*WWF and Others*, paragraph 37 and the case-law cited).

31 The Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of Directive 85/337 unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *WWF and Others*, paragraph 38 and the case-law cited).

32 Finally, it is apparent from Article 4(3) of Directive 85/337 that for the establishment of thresholds or criteria under Article 4(2)(b), regard must be had to the relevant selection criteria established in Annex III to the directive. Those criteria include the absorption capacity of the natural environment and, in that regard, particular attention must be paid to densely populated areas.

33 It must be noted that a threshold such as that at issue in the main proceedings is incompatible with the general obligation laid down in Article

2(1) of that directive for the purposes of correct identification of projects likely to have significant effects on the environment.

34 As the referring court points out, the establishment of such a high threshold means that changes to the infrastructure of small or medium-sized airports can never, in practice, give rise to an environmental impact assessment, despite the fact, as the observation from the European Commission pertinently states, it cannot be excluded that such works may have significant effects on the environment.

35 Furthermore, by establishing such a threshold in order to decide on the need for an environmental assessment of projects such as those at issue in the main proceedings, the national legislation concerned, despite the obligation placed on Member States by Article 4(3) of Directive 85/337, takes into consideration only the quantitative aspect of the consequences of a project, without taking account of the other selection criteria in Annex III to that directive, particularly that laid down in point 2(g) of that annex, namely the population density of the area affected by the project. It is not in dispute that the airport whose infrastructure is affected by the changes at issue in the main proceedings is located near to the city of Salzburg.

36 Moreover, the referring court observes that, in the circumstances of the main proceedings, with a view to deciding whether an environmental assessment must be carried out, it is necessary to take account of the effects on the environment of both the earlier project concerning the construction of the additional terminal and the later project concerning the expansion of the airport area.

37 In that regard, in accordance with the case-law of the Court, it can be necessary to take account of the cumulative effect of projects in order to avoid a circumvention of the objective of the European Union legislation by the splitting of projects which, taken together, are likely to have significant effects on the environment (see, to that effect, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36 and the case-law cited). It is for the referring court to examine, in the light of that case-law, whether and to what extent the effects on the environment of the projects referred to in paragraph 15 of this judgment and the projects already carried out during 2003 and 2004 must be assessed as a whole.

38 Consequently, the answer to the first question is that Articles 2(1) and 4(2)(b) and (3) of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

**The second question**

39 By its second question, the referring court asks, in essence, whether, when a Member State makes an incorrect transposition of Directive 85/337, that directive requires an environmental impact assessment of projects such as those at issue in the main proceedings, which fall within the scope of Annex II thereto.

40 The question referred must be understood as asking whether, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

41 In accordance with the case-law of the Court, if the discretion conferred on Member States by Article 4(2) of Directive 85/337, read in conjunction with Article 2(1) thereof has been exceeded, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to that effect,*Kraaijeveld and Others*, paragraph 61, and *WWF and Others*, paragraphs 70 and 71).

42 The same conclusion applies to a situation such as that of the main proceedings, equivalent from the point of view of its effects to that described in the preceding paragraph of this judgment, in which the threshold established by the national legislation results in an incorrect transposition of Article 4(2)(b), read in conjunction with Articles 2(1) and 4(3) of Directive 85/337.

43 Consequently, in a situation such as that of the main proceedings, as the Commission rightly points out, when a Member State, on the basis of Article 4(2)(b) of Directive 85/337, has established a threshold which is likely to exempt in advance entire classes of projects from an environmental assessment, the national authorities are obliged to ensure, in accordance with Article 2(1) and Article 4(2)(a) and (3) of that directive, that it is determined, in each individual case, whether such an assessment must be undertaken and if so, to undertake that assessment.

44 However, the Austrian Government and Salzburger Flughafen dispute that conclusion, referring to Case C-201/02 *Wells* [2004] ECR I-723, in accordance with which the principle of legal certainty preludes an individual from relying on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.

45 That objection cannot be accepted.

46 In the case which gave rise to the *Wells* judgment, the Court held, firstly, that it had to be recognised that it is possible for an individual to rely on the provisions of Directive 85/337 and, secondly, that the owners of the land at issue had to bear the consequences of the belated performance of the obligations of the Member State concerned which follow from that directive.

47 Thus, in the main proceedings, in the event that a decision finds that an environmental study is necessary, Salzburger Flughafen, as the user of the land in question, must also bear the consequences of such a decision.

48 Accordingly, the answer to the second question is that, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

## Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Articles 2(1) and 4(2)(b) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an**

**environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year;**

2. **When a Member State, pursuant to Article 4(2)(b) of Directive 85/337, as amended by Directive 97/11, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.**

[Signatures]

---

* Language of the case: German.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

**ARRÊT DU 20 AVRIL 2010**

# 2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

**JUDGMENT OF 20 APRIL 2010**

Mode officiel de citation :
*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010*, p. 14

---

Official citation :
*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14

ISSN 0074-4441
ISBN 978-92-1-071089-3

**Sales number**
**N° de vente : 977**

20 AVRIL 2010

ARRÊT

# USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY
(ARGENTINE c. URUGUAY)

---

# PULP MILLS ON THE RIVER URUGUAY
(ARGENTINA *v.* URUGUAY)

20 APRIL 2010

JUDGMENT

TABLE DES MATIÈRES

*Paragraphes*

QUALITÉS 1-24

I. CADRE JURIDIQUE ET FAITS DE L'ESPÈCE 25-47

A. Cadre juridique 26-27
B. Le projet CMB (ENCE) 28-36
C. L'usine Orion (Botnia) 37-47

II. ÉTENDUE DE LA COMPÉTENCE DE LA COUR 48-66

III. LA VIOLATION ALLÉGUÉE DES OBLIGATIONS DE NATURE PROCÉDURALE 67-158

A. Les liens entre les obligations de nature procédurale et les obligations de fond 71-79
B. Les obligations de nature procédurale et leur articulation 80-122

1. La nature et le rôle de la CARU 84-93
2. L'obligation de l'Uruguay d'informer la CARU 94-111
3. L'obligation de l'Uruguay de notifier les projets à l'autre partie 112-122

C. Les Parties sont-elles convenues de déroger aux obligations de nature procédurale prévues dans le statut de 1975? 123-150

1. L'«arrangement» du 2 mars 2004 entre l'Argentine et l'Uruguay 125-131
2. L'accord créant le Groupe technique de haut niveau (GTAN) 132-150

D. Les obligations de l'Uruguay après l'expiration de la période de négociation 151-158

IV. LES OBLIGATIONS DE FOND 159-266

A. La charge de la preuve et la preuve par expertise 160-168
B. Les violations alléguées des obligations de fond 169-266

1. L'obligation de contribuer à l'utilisation rationnelle et optimale du fleuve (article premier) 170-177
2. L'obligation de veiller à ce que la gestion du sol et des forêts ne cause pas un préjudice au régime du fleuve ou à la qualité de ses eaux (article 35) 178-180
3. L'obligation de coordonner les mesures propres à éviter une modification de l'équilibre écologique (article 36) 181-189
4. L'obligation d'empêcher la pollution et de préserver le milieu aquatique (article 41) 190-266

*a)* Evaluation de l'impact sur l'environnement 203-219

i) Le choix du site de Fray Bentos pour l'usine Orion (Botnia) 207-214
ii) Consultation des populations concernées 215-219

TABLE OF CONTENTS


*Paragraphs*

CHRONOLOGY OF THE PROCEDURE 1-24

I. LEGAL FRAMEWORK AND FACTS OF THE CASE 25-47

A. Legal framework 26-27
B. CMB (ENCE) Project 28-36
C. Orion (Botnia) mill 37-47

II. SCOPE OF THE COURT'S JURISDICTION 48-66

III. THE ALLEGED BREACH OF PROCEDURAL OBLIGATIONS 67-158

A. The links between the procedural obligations and the substantive obligations 71-79
B. The procedural obligations and their interrelation 80-122

1. The nature and role of CARU 84-93
2. Uruguay's obligation to inform CARU 94-111
3. Uruguay's obligation to notify the plans to the other party 112-122

C. Whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute 123-150

1. The "understanding" of 2 March 2004 between Argentina and Uruguay 125-131
2. The agreement setting up the High-Level Technical Group (the GTAN) 132-150

D. Uruguay's obligations following the end of the negotiation period 151-158

IV. SUBSTANTIVE OBLIGATIONS 159-266

A. Burden of proof and expert evidence 160-168
B. Alleged violations of substantive obligations 169-266

1. The obligation to contribute to the optimum and rational utilization of the river (Article 1) 170-177
2. The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35) 178-180
3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36) 181-189
4. The obligation to prevent pollution and preserve the aquatic environment (Article 41) 190-266

*(a)* Environmental Impact Assessment 203-219

(i) The siting of the Orion (Botnia) mill at Fray Bentos 207-214
(ii) Consultation of the affected populations 215-219

*b)* La question des techniques de production utilisées à l'usine Orion (Botnia) 220-228
*c)* L'impact des rejets sur la qualité des eaux du fleuve 229-259

i) L'oxygène dissous 238-239
ii) Le phosphore 240-250
iii) Les substances phénoliques 251-254
iv) La présence de nonylphénols dans le milieu aquatique 255-257
v) Les dioxines et furanes 258-259

*d)* Effets sur la diversité biologique 260-262
*e)* Pollution atmosphérique 263-264
*f)* Conclusions relatives à l'article 41 265
*g)* Obligations continues : suivi et contrôle 266

V. LES DEMANDES PRÉSENTÉES PAR LES PARTIES DANS LEURS CONCLUSIONS FINALES 267-281

DISPOSITIF 282

*(b)* Question of the production technology used in the Orion (Botnia) mill 220-228
*(c)* Impact of the discharges on the quality of the waters of the river 229-259
(i) Dissolved oxygen 238-239
(ii) Phosphorus 240-250
(iii) Phenolic substances 251-254
(iv) Presence of nonylphenols in the river environment 255-257
(v) Dioxins and furans 258-259
*(d)* Effects on biodiversity 260-262
*(e)* Air pollution 263-264
*(f)* Conclusions on Article 41 265
*(g)* Continuing obligations: monitoring 266

V. THE CLAIMS MADE BY THE PARTIES IN THEIR FINAL SUBMISSIONS 267-281

OPERATIVE CLAUSE 282

## ABRÉVIATIONS ET ACRONYMES

| | |
|---|---|
| AAP | «Autorización Ambiental Previa» (autorisation environnementale préalable) |
| ADCP | «Acoustic Doppler Current Profiler» (profileur de courant à effet Doppler) |
| AOX | «Adsorbable Organic Halogens» (composés organo-halogénés adsorbables) |
| BAT | «Best Available Techniques (or Technology)» (meilleures techniques disponibles) |
| Botnia | «Botnia S.A.» et «Botnia Fray Bentos S.A.» (deux sociétés de droit uruguayen créées par la société finlandaise Oy Metsä-Botnia AB) |
| CARU | «Comisión Administradora del Río Uruguay» (commission administrative du fleuve Uruguay) |
| CIS | «Cumulative Impact Study» (étude d'impact cumulé réalisée en septembre 2006 à la demande de la Société financière internationale) |
| CMB | «Celulosas de M'Bopicuá S.A.» (société de droit uruguayen créée par la société espagnole ENCE) |
| CMB (ENCE) | Usine de pâte à papier projetée à Fray Bentos par la société espagnole ENCE ayant créé à cette fin la société uruguayenne CMB |
| DINAMA | «Dirección Nacional de Medio Ambiente» (direction nationale de l'environnement du Gouvernement uruguayen) |
| ECF | «Elemental Chlorine-Free» (exempt de chlore élémentaire) |
| EIE | Evaluation de l'impact sur l'environnement |
| ENCE | «Empresa Nacional de Celulosas de España» (société espagnole ayant créé la société CMB de droit uruguayen) |
| GTAN | «Grupo Técnico de Alto Nivel» (Groupe technique de haut niveau créé en 2005 par l'Argentine et l'Uruguay pour résoudre leur litige concernant les usines CMB (ENCE) et Orion (Botnia)) |
| IPPC-BAT | «Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry» (document de référence en matière de prévention et de réduction intégrées de la pollution sur les meilleures techniques disponibles dans l'industrie de la pâte et du papier) |
| MVOTMA | «Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente» (ministère uruguayen du logement, de l'aménagement du territoire et de l'environnement) |
| Orion (Botnia) | Usine de pâte à papier construite à Fray Bentos par la société finlandaise Oy Metsä-Botnia AB, ayant créé à cette fin les sociétés uruguayennes Botnia S.A. et Botnia Fray Bentos S.A. |
| OSE | «Obras Sanitarias del Estado» (organisme public uruguayen chargé de l'assainissement et de la distribution de l'eau) |

## ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| AAP | "Autorización Ambiental Previa" (initial environmental authorization) |
| ADCP | Acoustic Doppler Current Profiler |
| AOX | Adsorbable Organic Halogens |
| BAT | Best Available Techniques (or Technology) |
| Botnia | "Botnia S.A." and "Botnia Fray Bentos S.A." (two companies formed under Uruguayan law by the Finnish company Oy Metsä-Botnia AB) |
| CARU | "Comisión Administradora del Río Uruguay" (Administrative Commission of the River Uruguay) |
| CIS | Cumulative Impact Study (prepared in September 2006 at the request of the International Finance Corporation) |
| CMB | Celulosas de M'Bopicuá S.A." (a company formed under Uruguayan law by the Spanish company ENCE) |
| CMB (ENCE) | Pulp mill planned at Fray Bentos by the Spanish company ENCE, which formed the Uruguayan company CMB for that purpose |
| DINAMA | "Dirección Nacional de Medio Ambiente" (National Directorate for the Environment of the Uruguayan Government) |
| ECF | Elemental Chlorine-Free |
| EIA | Environmental Impact Assessment |
| ENCE | "Empresa Nacional de Celulosas de España" (Spanish company which formed the company CMB under Uruguayan law) |
| ESAP | Environmental and Social Action Plan |
| GTAN | "Grupo Técnico de Alto Nivel" (High-Level Technical Group established in 2005 by Argentina and Uruguay to resolve their dispute over the CMB (ENCE) and Orion (Botnia) mills) |
| IFC | International Finance Corporation |
| IPPC-BAT | Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry |
| MVOTMA | "Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente" (Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs) |
| Orion (Botnia) | Pulp mill built at Fray Bentos by the Finnish company Oy Metsä-Botnia AB, which formed the Uruguayan companies Botnia S.A. and Botnia Fray Bentos S.A. for that purpose |
| OSE | "Obras Sanitarias del Estado" (Uruguay's State Agency for Sanitary Works) |
| POPs | Persistent Organic Pollutants |
| PROCEL | "Plan de Monitoreo de la Calidad Ambiental en el Río Uruguay en áreas de Plantas Celulósicas" (Plan for monitoring water quality in the area of the pulp mills set up under CARU) |

| | |
|---|---|
| PAES | Plan d'action environnemental et social |
| POP | Polluants organiques persistants |
| PROCEL | « Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en áreas de Plantas Celulósicas » (plan de contrôle et de suivi (monitoring) de la qualité des eaux du fleuve Uruguay dans la zone des usines de pâte à papier, mis en place dans le cadre de la CARU) |
| PROCON | « Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay » (programme de contrôle de la qualité et de la pollution des eaux du fleuve Uruguay, mis en place dans le cadre de la CARU) |
| SFI | Société financière internationale |

PROCON "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay" (Water quality and pollution control programme set up under CARU)

COUR INTERNATIONALE DE JUSTICE

ANNÉE 2010

2010
20 avril
Rôle général
n° 135

**20 avril 2010**

# AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

*Cadre juridique et faits de l'espèce.*

*Traité de Montevideo de 1961 — Statut du fleuve Uruguay de 1975 — Etablissement de la commission administrative du fleuve Uruguay (CARU) — Projet d'usine de pâte à papier CMB (ENCE) — Projet d'usine de pâte à papier Orion (Botnia) — Terminal portuaire de Nueva Palmira — Objet du différend.*

*

*Etendue de la compétence de la Cour.*

*Clause compromissoire (article 60 du statut de 1975) — Dispositions du statut de 1975 et compétence* ratione materiae *— Incompétence de la Cour pour connaître d'allégations relatives à la pollution sonore et visuelle ou aux mauvaises odeurs (article 36 du statut de 1975) — Pollution atmosphérique et atteinte à la qualité des eaux du fleuve examinées dans le cadre des obligations de fond.*

*Article premier du statut de 1975 — Définition du but du statut de 1975 — Mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve — Portée de la référence aux « droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties » — Texte original espagnol — Statut adopté par les parties dans le respect de leurs engagements internationaux respectifs.*

*Alinéa* a) *de l'article 41 du statut de 1975 — Texte original espagnol — Absence de « clause de renvoi » ayant pour effet d'incorporer dans le champ d'application du statut les obligations des parties découlant des accords internationaux et autres normes qui y sont visées — Obligation des parties d'exercer leurs pouvoirs de réglementation en conformité avec les accords internationaux applicables aux fins de la protection et de la préservation du milieu aquatique du fleuve Uruguay — Règles d'interprétation du statut de 1975 — Article 31 de la convention*

INTERNATIONAL COURT OF JUSTICE

YEAR 2010

2010
20 April
General List
No. 135

**20 April 2010**

# CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

*Legal framework and facts of the case.*
*1961 Treaty of Montevideo — 1975 Statute of the River Uruguay — Establishment of the Administrative Commission of the River Uruguay (CARU) — CMB (ENCE) pulp mill project — Orion (Botnia) pulp mill project — Port terminal at Nueva Palmira — Subject of the dispute.*

*

*Scope of the Court's jurisdiction.*
*Compromissory clause (Article 60 of the 1975 Statute) — Provisions of the 1975 Statute and jurisdiction* ratione materiae *— Lack of jurisdiction for the Court to consider allegations concerning noise and visual pollution or bad odours (Article 36 of the 1975 Statute) — Air pollution and impact on the quality of the waters of the river addressed under substantive obligations.*

*Article 1 of the 1975 Statute — Definition of the purpose of the 1975 Statute — Joint machinery necessary for the optimum and rational utilization of the river — Significance of the reference to the "rights and obligations arising from treaties and other international agreements in force for each of the parties" — Original Spanish text — Statute adopted by the parties in observance of their respective international commitments.*
*Article 41* (a) *of the 1975 Statute — Original Spanish text — Absence of a "referral clause" having the effect of incorporating within the ambit of the Statute the obligations of the parties under international agreements and other norms envisaged in the Statute — Obligation for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay — Rules for interpreting the 1975 Statute — Article 31 of the Vienna*

*de Vienne sur le droit des traités — Distinction entre la prise en considération d'autres règles internationales lors de l'interprétation du statut de 1975 et l'étendue de la compétence de la Cour en vertu de son article 60.*

*

*Violation alléguée des obligations de nature procédurale.*

*Question des liens entre les obligations de nature procédurale et les obligations de fond — Objet et but du statut de 1975 — Utilisation rationnelle et optimale du fleuve Uruguay — Développement durable — Coopération entre les parties pour la gestion commune des risques de dommages à l'environnement — Existence d'un lien fonctionnel, relatif à la prévention, entre les obligations de nature procédurale et les obligations de fond — Responsabilité en cas de violation des unes ou des autres.*

*Articulation des différentes obligations de nature procédurale prévues par les articles 7 à 12 du statut de 1975 — Texte original espagnol de l'article 7 — Obligation d'informer, de notifier et de négocier comme moyen approprié de parvenir à l'objectif d'utilisation rationnelle et optimale du fleuve en tant que ressource partagée — Personnalité juridique de la CARU — Rôle central de la CARU dans la gestion commune du fleuve et l'obligation de coopérer entre les parties.*

*Obligation d'informer la CARU (premier alinéa de l'article 7 du statut de 1975) — Ouvrages soumis à cette obligation — Lien entre l'obligation d'informer la CARU, la coopération entre les parties et l'obligation de prévention — Détermination sommaire par la CARU d'un risque de préjudice sensible à l'autre partie — Contenu de l'information devant être transmise à la CARU — Obligation d'informer la CARU avant la délivrance de l'autorisation environnementale préalable — L'information de la CARU par des opérateurs privés ne peut tenir lieu de l'obligation d'informer prévue par le statut de 1975 — Violation par l'Uruguay de l'obligation d'informer la CARU.*

*Obligation de notifier les projets à l'autre partie (deuxième et troisième alinéas de l'article 7 du statut de 1975) — Nécessité de disposer d'une évaluation de l'impact sur l'environnement (EIE) complète — Notification de l'EIE à l'autre partie par l'intermédiaire de la CARU avant toute décision relative à la viabilité environnementale du projet — Violation par l'Uruguay de l'obligation de notifier les projets à l'Argentine.*

*Question de l'éventuelle dérogation aux obligations de nature procédurale convenue entre les Parties — « Arrangement » du 2 mars 2004 — Contenu et portée — L'Uruguay ne s'y étant pas conformé, l'« arrangement » ne peut être considéré comme ayant eu pour effet de le dispenser du respect des obligations de nature procédurale — Accord créant le Groupe technique de haut niveau (GTAN) — Saisine de la Cour sur la base de l'article 12 ou de l'article 60 du statut de 1975 : distinction sans incidence — L'accord créant le GTAN a eu pour but de permettre aux négociations prévues à l'article 12 du statut de 1975 d'avoir lieu, mais il n'a pas dérogé à d'autres obligations de nature procédurale — En acceptant la création du GTAN, l'Argentine n'a renoncé ni aux droits de nature procédurale que lui reconnaît le statut, ni à invoquer la responsabilité de l'Uruguay ; l'Argentine n'a pas davantage consenti à suspendre l'application des dispositions procédurales du statut (article 57 de la convention de Vienne sur le droit des traités) — Obligation de négocier de bonne foi — Obligation de « non-construction » durant la période de négociation — Travaux préliminaires autorisés par l'Uruguay — Violation par l'Uruguay de l'obligation de négocier prévue à l'article 12 du statut de 1975.*

*Convention on the Law of Treaties — Distinction between taking account of other international rules in the interpretation of the 1975 Statute and the scope of the jurisdiction of the Court under Article 60 of the latter.*

*

*Alleged breach of procedural obligations.*

*Question of links between the procedural obligations and the substantive obligations — Object and purpose of the 1975 Statute — Optimum and rational utilization of the River Uruguay — Sustainable development — Co-operation between the parties in jointly managing the risks of damage to the environment — Existence of a functional link, in regard to prevention, between the procedural obligations and the substantive obligations — Responsibility in the event of breaches of either category.*

*Interrelation of the various procedural obligations laid down by Articles 7 to 12 of the 1975 Statute — Original Spanish text of Article 7 — Obligation to inform, notify and negotiate as an appropriate means of achieving the objective of optimum and rational utilization of the river as a shared resource — Legal personality of CARU — Central role of CARU in the joint management of the river and obligation of the parties to co-operate.*

*Obligation to inform CARU (Article 7, first paragraph, of the 1975 Statute) — Works subject to this obligation — Link between the obligation to inform CARU, co-operation between the parties and the obligation of prevention — Determination by CARU on a preliminary basis of whether there is a risk of significant damage to the other party — Content of the information to be transmitted to CARU — Obligation to inform CARU before issuing of the initial environmental authorization — Provision of information to CARU by private operators cannot substitute for the obligation to inform laid down by the 1975 Statute — Breach by Uruguay of the obligation to inform CARU.*

*Obligation to notify the plans to the other party (Article 7, second and third paragraphs, of the 1975 Statute) — Need for a full environmental impact assessment (EIA) — Notification of the EIA to the other party, through CARU, before any decision on the environmental viability of the plan — Breach by Uruguay of the obligation to notify the plans to Argentina.*

*Question of whether the Parties agreed to derogate from the procedural obligations — "Understanding" of 2 March 2004 — Content and scope — Since Uruguay did not comply with it, the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations — Agreement setting up the High-Level Technical Group (GTAN) — Referral to the Court on the basis of Article 12 or Article 60 of the 1975 Statute: no practical distinction — The agreement to set up the GTAN had the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute to take place, but did not derogate from other procedural obligations — In accepting the creation of the GTAN, Argentina did not give up the procedural rights belonging to it by virtue of the Statute, nor the possibility of invoking Uruguay's responsibility; nor did Argentina consent to suspending the operation of the procedural provisions of the Statute (Article 57 of the Vienna Convention on the Law of Treaties) — Obligation to negotiate in good faith — "No construction obligation" during the negotiation period — Preliminary work approved by Uruguay — Breach by Uruguay of the obligation to negotiate laid down by Article 12 of the 1975 Statute.*

*Obligations de l'Uruguay après l'expiration de la période de négociation — Portée de l'article 12 du statut de 1975 — Absence d'obligation de « non-construction » après l'expiration de la période de négociation et pendant la phase de règlement judiciaire.*

*

*Violations alléguées des obligations de fond.*

*Charge de la preuve — Approche de précaution et absence de renversement de la charge de la preuve — Preuve par expertise — Rapports établis à la demande des Parties — Indépendance des experts — Appréciation des faits par la Cour — Experts intervenus à l'audience en qualité de conseils — Question des témoins, experts et témoins-experts.*

*Utilisation rationnelle et optimale du fleuve Uruguay — Définissant le but du statut de 1975, l'article premier ne crée pas de droits ou obligations spécifiques — Obligation de se conformer aux obligations prescrites par le statut aux fins de la protection de l'environnement et de la gestion conjointe du fleuve — Fonction réglementaire de la CARU — Lien étroit entre l'utilisation équitable et raisonnable du fleuve comme ressource partagée et la nécessité, qui est au cœur du développement durable, de concilier le développement économique et la protection de l'environnement (article 27 du statut de 1975).*

*Obligation de veiller à ce que la gestion du sol et des forêts ne cause pas un préjudice au régime du fleuve ou à la qualité de ses eaux (article 35 du statut de 1975) — Allégations de l'Argentine non établies.*

*Obligation de coordonner les mesures propres à éviter une modification de l'équilibre écologique (article 36 du statut de 1975) — Exigence d'une action individuelle de chaque partie et d'une action concertée par l'intermédiaire de la CARU — Obligation de diligence requise (« due diligence ») — L'Argentine n'a pas démontré de manière convaincante que l'Uruguay a refusé de prendre part aux efforts de coordination prévus par l'article 36 du statut de 1975.*

*Obligation d'empêcher la pollution et de préserver le milieu aquatique — Contenu normatif de l'article 41 du statut de 1975 — Obligation pour chaque partie d'adopter des normes et mesures destinées à protéger et préserver le milieu aquatique et, en particulier, à empêcher la pollution — Les normes et mesures adoptées par chaque partie doivent être conformes aux accords internationaux applicables et, le cas échéant, en harmonie avec les directives et recommandations des organismes techniques internationaux — Obligation de diligence requise (« due diligence ») d'adopter des normes et mesures et de les mettre en œuvre — Définition de la pollution selon l'article 40 du statut de 1975 — Activité réglementaire de la CARU (article 56 du statut de 1975), complémentaire à celle de chaque partie — Digeste de la CARU — Règles à l'aune desquelles l'existence d'effets nocifs doit s'apprécier : statut de 1975, digeste de la CARU, droit interne de chacune des parties dans la mesure exigée par le statut de 1975.*

*Evaluation de l'impact sur l'environnement (EIE) — Obligation de procéder à une EIE — Portée et contenu de l'EIE — Renvoi au droit interne — Question du choix du site des usines comme élément de l'EIE — La Cour n'est pas convaincue par l'argument de l'Argentine selon lequel une évaluation des différents sites possibles n'a pas eu lieu — Capacité de réception des eaux du fleuve à Fray Bentos et inversions de courant — Les normes de la CARU relatives à la qualité des eaux tiennent compte des caractéristiques géomorphologiques et*

*Obligations of Uruguay following the end of the negotiation period — Scope of Article 12 of the 1975 Statute — Absence of a "no construction obligation" following the end of the negotiation period and during the judicial settlement phase.*

*

*Alleged breaches of substantive obligations.*

*Burden of proof — Precautionary approach without reversal of the burden of proof — Expert evidence — Reports commissioned by the Parties — Independence of experts — Consideration of the facts by the Court — Experts appearing as counsel at the hearings — Question of witnesses, experts and expert witnesses.*

*Optimum and rational utilization of the River Uruguay — Article 1 of the 1975 Statute sets out the purpose of the instrument and does not lay down specific rights and obligations — Obligation to comply with the obligations prescribed by the Statute for the protection of the environment and the joint management of the river — Regulatory function of CARU — Interconnectedness between equitable and reasonable utilization of the river as a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development (Article 27 of the 1975 Statute).*

*Obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35 of the 1975 Statute) — Contentions of Argentina not established.*

*Obligation to co-ordinate measures to avoid changes to the ecological balance (Article 36 of the 1975 Statute) — Requirement of individual action by each party and co-ordination through CARU — Obligation of due diligence — Argentina has not convincingly demonstrated that Uruguay has refused to engage in the co-ordination envisaged by Article 36 of the 1975 Statute.*

*Obligation to prevent pollution and preserve the aquatic environment — Normative content of Article 41 of the 1975 Statute — Obligation for each party to adopt rules and measures to protect and preserve the aquatic environment and, in particular, to prevent pollution — The rules and measures prescribed by each party must be in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies — Due diligence obligation to prescribe rules and measures and to apply them — Definition of pollution given in Article 40 of the 1975 Statute — Regulatory action of CARU (Article 56 of the 1975 Statute), complementing that of each party — CARU Digest — Rules by which the existence of any harmful effects is to be determined: 1975 Statute, CARU Digest, domestic law of each party within the limits prescribed by the 1975 Statute.*

*Environmental impact assessment (EIA) — Obligation to conduct an EIA — Scope and content of the EIA — Referral to domestic law — Question of the choice of mill site as part of the EIA — The Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out — Receiving capacity of the river at Fray Bentos and reverse flows — The CARU water quality standards take account of the geomorphological and hydrological characteristics of the river and the receiving capacity of its waters — Question*

*hydrologiques du fleuve et de la capacité de réception de ses eaux — Question de la consultation des populations concernées comme élément de l'EIE — Aucune obligation juridique de consulter les populations concernées ne découle des instruments invoqués par l'Argentine — Une consultation par l'Uruguay des populations concernées a bien eu lieu.*

*Techniques de production utilisées à l'usine Orion (Botnia) — Aucun élément ne vient à l'appui de la prétention de l'Argentine selon laquelle l'usine Orion (Botnia) n'appliquerait pas les meilleures techniques disponibles en matière de rejets d'effluents par tonne de pâte à papier produite — Il ne ressort pas des données réunies après la mise en service de l'usine Orion (Botnia) que ses rejets ont excédé les limites autorisées.*

*Impact des rejets de l'usine sur la qualité des eaux du fleuve — Contrôle et suivi postopérationnel — Oxygène dissous — Phosphore — Prolifération d'algues — Substances phénoliques — Présence de nonylphénols dans le milieu aquatique — Dioxines et furanes — Violations alléguées non établies.*

*Effets sur la diversité biologique — Eléments de preuve insuffisants pour conclure que l'Uruguay n'a pas respecté l'obligation de protéger le milieu aquatique, y compris la faune et la flore.*

*Pollution atmosphérique — Pollution indirecte par dépôt dans le milieu aquatique — Eléments de preuve insuffisants.*

*Sur la base des preuves présentées, absence de violation de l'article 41 du statut de 1975 par l'Uruguay.*

*Obligations continues : suivi et contrôle — Obligation des Parties de veiller à ce que la CARU puisse continûment exercer ses pouvoirs au titre du statut de 1975 — Obligation de l'Uruguay de poursuivre le contrôle et le suivi du fonctionnement de l'usine Orion (Botnia) — Obligation des Parties de poursuivre leur coopération par l'intermédiaire de la CARU.*

*

*Demandes présentées par les Parties dans leurs conclusions finales.*

*Demandes de l'Argentine — Violation des obligations de nature procédurale — Constat d'illicéité et satisfaction — Formes de réparation autres que l'indemnisation non exclues par le statut de 1975 — Restitution en tant que forme de réparation du préjudice — Définition — Limites — Caractère approprié de la forme de réparation par rapport au préjudice subi, compte tenu du fait illicite — Caractère inapproprié de la restitution sous la forme du démantèlement de l'usine Orion (Botnia) dans le cas d'une violation des seules obligations de nature procédurale — Absence de violation des obligations de fond et rejet des autres réclamations présentées par l'Argentine — Absence de circonstances spéciales requérant d'ordonner des assurances et garanties de non-répétition.*

*Demande de l'Uruguay visant à confirmer son droit de poursuivre l'exploitation de l'usine Orion (Botnia) — Absence de portée utile.*

*

*Obligation des Parties de coopérer entre elles selon les modalités prévues par le statut de 1975 afin d'assurer la réalisation de son objet et de son but — Action conjointe des Parties au sein de la CARU et établissement d'une réelle communauté d'intérêts et de droits dans la gestion du fleuve Uruguay et dans la protection de son environnement.*

*of consultation of the affected populations as part of the EIA — No legal obligation to consult the affected populations arises from the instruments invoked by Argentina — Consultation by Uruguay of the affected populations did indeed take place.*

*Production technology used in the Orion (Botnia) mill — No evidence to support Argentina's claim that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced — From the data collected after the start-up of the Orion (Botnia) mill, it does not appear that the discharges from it have exceeded the prescribed limits.*

*Impact of the discharges on the quality of the waters of the river — Post-operational monitoring — Dissolved oxygen — Phosphorus — Algal blooms — Phenolic substances — Presence of nonylphenols in the river environment — Dioxins and furans — Alleged breaches not established.*

*Effects on biodiversity — Insufficient evidence to conclude that Uruguay breached the obligation to protect the aquatic environment, including its fauna and flora.*

*Air pollution — Indirect pollution from deposits into the aquatic environment — Insufficient evidence.*

*On the basis of the evidence submitted, no breach by Uruguay of Article 41 of the 1975 Statute.*

*Continuing obligations: monitoring — Obligation of the Parties to enable CARU to exercise on a continuous basis the powers conferred on it by the 1975 Statute — Obligation of Uruguay to continue monitoring the operation of the Orion (Botnia) plant — Obligation of the Parties to continue their co-operation through CARU.*

*

*Claims made by the Parties in their final submissions.*

*Claims of Argentina — Breach of procedural obligations — Finding of wrongful conduct and satisfaction — Forms of reparation other than compensation not excluded by the 1975 Statute — Restitution as a form of reparation for injury — Definition — Limits — Form of reparation appropriate to the injury suffered, taking into account the nature of the wrongful act — Restitution in the form of the dismantling of the Orion (Botnia) mill not appropriate where only breaches of procedural obligations have occurred — No breach of substantive obligations and rejection of Argentina's other claims — No special circumstances requiring the ordering of assurances and guarantees of non-repetition.*

*Uruguay's request for confirmation of its right to continue operating the Orion (Botnia) plant — No practical significance.*

*

*Obligation of the Parties to co-operate with each other, on the terms set out in the 1975 Statute, to ensure the achievement of its object and purpose — Joint action of the Parties through CARU and establishment of a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.*

# ARRÊT

*Présents :* M. TOMKA, *vice-président, faisant fonction de président en l'affaire* ; MM. KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, *juges* ; MM. TORRES BERNÁRDEZ, VINUESA, *juges* ad hoc ; M. COUVREUR, *greffier*.

En l'affaire relative à des usines de pâte à papier sur le fleuve Uruguay,

*entre*

la République argentine,

représentée par

S. Exc. M^me^ Susana Ruiz Cerutti, ambassadeur, conseiller juridique du ministère des relations extérieures, du commerce international et du culte,

comme agent ;

S. Exc. M. Horacio A. Basabe, ambassadeur, directeur général de l'Institut du service extérieur de la nation, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte, membre de la Cour permanente d'arbitrage,

S. Exc. M. Santos Goñi Marenco, ambassadeur de la République argentine auprès du Royaume des Pays-Bas,

comme coagents ;

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

M. Philippe Sands, Q.C., professeur de droit international à l'University College de Londres, avocat, Matrix Chambers (Londres),

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre associé de l'Institut de droit international,

M^me^ Laurence Boisson de Chazournes, professeur de droit international à l'Université de Genève,

M. Alan Béraud, ministre à l'ambassade de la République argentine auprès de l'Union européenne, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte,

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

comme conseils et avocats ;

M. Homero Bibiloni, secrétaire d'Etat à l'environnement et au développement durable,

comme autorité gouvernementale ;

M. Esteban Lyons, directeur national du contrôle environnemental du secrétariat à l'environnement et au développement durable,

M. Howard Wheater, docteur en hydrologie de l'Université de Bristol, professeur d'hydrologie à l'Imperial College de Londres, directeur de l'Imperial College Environment Forum,

# JUDGMENT

*Present:* *Vice-President* TOMKA, *Acting President*; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc TORRES BERNÁRDEZ, VINUESA; *Registrar* COUVREUR.

In the case concerning pulp mills on the River Uruguay,

*between*

the Argentine Republic,

represented by

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

as Agent;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

Mr. Alan Béraud, Minister at the Embassy of the Argentine Republic to the European Union, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

Mr. Homero Bibiloni, Federal Secretary for the Environment and Sustainable Development,

as Governmental Authority;

Mr. Esteban Lyons, National Director of Environmental Control, Secretariat of the Environment and Sustainable Development,

Mr. Howard Wheater, Ph.D. in Hydrology from Bristol University, Professor of Hydrology at Imperial College and Director of the Imperial College Environment Forum,

M. Juan Carlos Colombo, docteur en océanographie de l'Université de Québec, professeur à la faculté des sciences et au musée de l'Université nationale de La Plata, directeur du laboratoire de chimie environnementale et de biogéochimie de l'Université nationale de La Plata,
M. Neil McIntyre, docteur en ingénierie environnementale, maître de conférences à l'Imperial College de Londres,
M^me^ Inés Camilloni, docteur en sciences atmosphériques, professeur de sciences atmosphériques à la faculté des sciences de l'Université de Buenos Aires, maître de recherche au conseil national de la recherche (CONICET),
M. Gabriel Raggio, docteur en sciences techniques de l'Ecole polytechnique fédérale de Zurich (ETHZ) (Suisse), consultant indépendant,

comme conseillers scientifiques et experts;

M. Holger Martinsen, ministre au bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M. Mario Oyarzábal, conseiller d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M. Fernando Marani, deuxième secrétaire à l'ambassade de la République argentine au Royaume des Pays-Bas,
M. Gabriel Herrera, secrétaire d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M^me^ Cynthia Mulville, secrétaire d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M^me^ Kate Cook, avocat, Matrix Chambers (Londres), spécialisée en droit de l'environnement et en droit du développement,
M^me^ Mara Tignino, docteur en droit, chercheur à l'Université de Genève,
M. Magnus Jesko Langer, assistant d'enseignement et de recherche à l'Institut de hautes études internationales et du développement de Genève,

comme conseillers juridiques,

*et*

la République orientale de l'Uruguay,

représentée par

S. Exc. M. Carlos Gianelli, ambassadeur de la République orientale de l'Uruguay auprès des Etats-Unis d'Amérique,

comme agent;

S. Exc. M. Carlos Mora Medero, ambassadeur de la République orientale de l'Uruguay auprès du Royaume des Pays-Bas,

comme coagent;

M. Alan Boyle, professeur de droit international à l'Université d'Edimbourg, membre du barreau d'Angleterre,
M. Luigi Condorelli, professeur à la faculté de droit de l'Université de Florence,

Mr. Juan Carlos Colombo, Ph.D. in Oceanography from the University of Quebec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,
Mr. Neil McIntyre, Ph.D. in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,
Ms Inés Camilloni, Ph.D. in Atmospheric Sciences, Professor of Atmospheric Sciences in the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),

Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,

as Scientific Advisers and Experts;

Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Mario Oyarzábal, Embassy Counsellor, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,
Mr. Gabriel Herrera, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Cynthia Mulville, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development,
Ms Mara Tignino, Ph.D. in Law, Researcher at the University of Geneva,
Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,

as Legal Advisers,

*and*

the Eastern Republic of Uruguay,

represented by

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

as Agent;

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,
Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et du Commonwealth du Massachusetts,
M. Stephen C. McCaffrey, professeur à la McGeorge School of Law de l'Université du Pacifique (Californie), ancien président de la Commission du droit international et rapporteur spécial aux fins des travaux de la Commission sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation,
M. Alberto Pérez Pérez, professeur à la faculté de droit de l'Université de la République (Montevideo),
M. Paul S. Reichler, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

comme conseils et avocats;

M. Marcelo Cousillas, conseiller juridique à la direction nationale de l'environnement, ministère du logement, de l'aménagement du territoire et de l'environnement,
M. César Rodriguez Zavalla, chef de cabinet au ministère des affaires étrangères,
M. Carlos Mata, directeur adjoint des affaires juridiques au ministère des affaires étrangères,
M. Marcelo Gerona, conseiller à l'ambassade de la République orientale de l'Uruguay au Royaume des Pays-Bas,
M. Eduardo Jiménez de Aréchaga, avocat, admis au barreau de la République orientale de l'Uruguay et membre du barreau de New York,
M. Adam Kahn, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
M. Andrew Loewenstein, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
M^me^ Analia Gonzalez, LL.M., cabinet Foley Hoag LLP, admise au barreau de la République orientale de l'Uruguay,
M^me^ Clara E. Brillembourg, cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de New York,
M^me^ Cicely Parseghian, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
M. Pierre Harcourt, doctorant à l'Université d'Edimbourg,
M. Paolo Palchetti, professeur associé à la faculté de droit de l'Université de Macerata,
M^me^ Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate à la McGeorge School of Law de l'Université du Pacifique (Californie), doctorante à l'Université de Murcie, admise au barreau d'Espagne,

comme conseils adjoints;

M^me^ Alicia Torres, directrice nationale de l'environnement au ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Eugenio Lorenzo, conseiller technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Cyro Croce, consultant technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,

Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Mr. Stephen C. McCaffrey, Professor at the McGeorge School of Law, University of the Pacific, California, former Chairman of the International Law Commission and Special Rapporteur for the Commission's work on the law of non-navigational uses of international watercourses,

Mr. Alberto Pérez Pérez, Professor in the Faculty of Law, University of the Republic, Montevideo,
Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Mr. Marcelo Cousillas, Legal Counsel at the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. César Rodriguez Zavalla, Chief of Cabinet, Ministry of Foreign Affairs,

Mr. Carlos Mata, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,
Mr. Marcelo Gerona, Counsellor at the Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands,
Mr. Eduardo Jiménez de Aréchaga, Attorney at Law, admitted to the Bar of the Eastern Republic of Uruguay and Member of the Bar of New York,
Mr. Adam Kahn, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Andrew Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Ms Analia Gonzalez, LL.M., Foley Hoag LLP, admitted to the Bar of the Eastern Republic of Uruguay,
Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,
Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Pierre Harcourt, Ph.D. candidate, University of Edinburgh,
Mr. Paolo Palchetti, Associate Professor at the School of Law, University of Macerata,
Ms Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate at the McGeorge School of Law, University of the Pacific, California, Ph.D. Candidate, University of Murcia, admitted to the Bar of Spain,

as Assistant Counsel;

Ms Alicia Torres, National Director for the Environment at the Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Eugenio Lorenzo, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Cyro Croce, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

M^me^ Raquel Piaggio, organisme public chargé de l'assainissement et de la distribution de l'eau (OSE), consultante technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Charles A. Menzie, Ph.D., Principal Scientist et directeur d'EcoSciences Practice chez Exponent, Inc., à Alexandria (Virginie),
M. Neil McCubbin, Eng., B.sc. (Eng.), 1st Class Honours (Glasgow), Associate au Royal College of Science and Technology de Glasgow,

comme conseillers scientifiques et experts,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

*rend l'arrêt suivant :*

1. Le 4 mai 2006, la République argentine (ci-après dénommée l'« Argentine ») a déposé au Greffe de la Cour une requête introduisant une instance contre la République orientale de l'Uruguay (ci-après dénommée l'« Uruguay ») au sujet d'un différend relatif à la violation, qu'aurait commise l'Uruguay, d'obligations découlant du statut du fleuve Uruguay (*Recueil des traités des Nations Unies (RTNU)*, vol. 1295, n° I-21425, p. 348), traité signé par l'Argentine et l'Uruguay à Salto (Uruguay) le 26 février 1975 et entré en vigueur le 18 septembre 1976 (ci-après le « statut de 1975 »); selon la requête, cette violation résulte de « l'autorisation de construction, [de] la construction et [de] l'éventuelle mise en service de deux usines de pâte à papier sur le fleuve Uruguay », l'Argentine invoquant plus particulièrement les « effets desdites activités sur la qualité des eaux du fleuve Uruguay et sa zone d'influence ».

Dans sa requête, l'Argentine, se référant au paragraphe 1 de l'article 36 du Statut de la Cour, entend fonder la compétence de celle-ci sur le premier paragraphe de l'article 60 du statut de 1975.

2. Conformément au paragraphe 2 de l'article 40 du Statut de la Cour, la requête a été immédiatement communiquée au Gouvernement uruguayen par le greffier. Conformément au paragraphe 3 de cet article, le Secrétaire général de l'Organisation des Nations Unies a été informé du dépôt de ladite requête.

3. Le 4 mai 2006, immédiatement après le dépôt de sa requête, l'Argentine a en outre présenté une demande en indication de mesures conservatoires sur la base de l'article 41 du Statut de la Cour et de l'article 73 de son Règlement. Conformément au paragraphe 2 de l'article 73 du Règlement, le greffier a immédiatement transmis au Gouvernement uruguayen une copie certifiée conforme de cette demande.

4. Le 2 juin 2006, l'Uruguay a fait tenir à la Cour un CD-ROM contenant la version électronique de deux volumes de documents relatifs à la demande en indication de mesures conservatoires présentée par l'Argentine, intitulés « Observations de l'Uruguay » (dont des exemplaires sous forme papier ont ensuite été reçus); copie de ces documents a immédiatement été transmise à l'Argentine.

5. Le 2 juin 2006, l'Argentine a fait parvenir à la Cour divers documents, dont un enregistrement vidéo, et, le 6 juin 2006, elle lui en a fait parvenir de nouveaux; copie de chaque série de documents a immédiatement été transmise à l'Uruguay.

6. Les 6 et 7 juin 2006, diverses communications ont été reçues des Parties,

Ms Raquel Piaggio, State Agency for Sanitary Works (OSE), Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mr. Charles A. Menzie, Ph.D., Principal Scientist and Director of the Eco-Sciences Practice at Exponent, Inc., Alexandria, Virginia,
Mr. Neil McCubbin, Eng., B.Sc. (Eng.), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, *Treaty Series (UNTS)*, Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. In accordance with paragraph 3 of that Article, the Secretary-General of the United Nations was notified of the filing of the Application.

3. On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

4. On 2 June 2006, Uruguay transmitted to the Court a CD-ROM containing the electronic version of two volumes of documents relating to the Argentine request for the indication of provisional measures, entitled "Observations of Uruguay" (of which paper copies were subsequently received); a copy of these documents was immediately sent to Argentina.

5. On 2 June 2006, Argentina transmitted to the Court various documents, including a video recording, and, on 6 June 2006, it transmitted further documents; copies of each series of documents were immediately sent to Uruguay.

6. On 6 and 7 June 2006, various communications were received from the

par lesquelles chacune a présenté à la Cour certaines observations sur les documents déposés par l'autre. L'Uruguay a fait objection à la présentation de l'enregistrement vidéo déposé par l'Argentine. La Cour a décidé de ne pas autoriser la présentation de cet enregistrement à l'audience.

7. La Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire. L'Argentine a désigné M. Raúl Emilio Vinuesa, et l'Uruguay M. Santiago Torres Bernárdez.

8. Par ordonnance du 13 juillet 2006, la Cour, après avoir entendu les Parties, a conclu «que les circonstances, telles qu'elles se présent[ai]ent [alors] à [elle], n['étaient] pas de nature à exiger l'exercice de son pouvoir d'indiquer des mesures conservatoires en vertu de l'article 41 du Statut».

9. Par une autre ordonnance du même jour, la Cour, compte tenu des vues des Parties, a fixé au 15 janvier 2007 et au 20 juillet 2007, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire de l'Argentine et d'un contre-mémoire de l'Uruguay; ces pièces ont été dûment déposées dans les délais ainsi prescrits.

10. Le 29 novembre 2006, l'Uruguay, invoquant l'article 41 du Statut et l'article 73 du Règlement, a présenté à son tour une demande en indication de mesures conservatoires. Conformément au paragraphe 2 de l'article 73 du Règlement, le greffier a immédiatement fait tenir au Gouvernement argentin une copie certifiée conforme de cette demande.

11. Le 14 décembre 2006, l'Uruguay a fait parvenir à la Cour un volume de documents relatifs à la demande en indication de mesures conservatoires, intitulé «Observations de l'Uruguay»; copie de ces documents a immédiatement été transmise à l'Argentine.

12. Le 18 décembre 2006, avant l'ouverture de la procédure orale, l'Argentine a fait parvenir à la Cour un volume de documents relatifs à la demande en indication de mesures conservatoires présentée par l'Uruguay; le greffier a immédiatement transmis au Gouvernement uruguayen une copie de ces documents.

13. Par ordonnance du 23 janvier 2007, la Cour, après avoir entendu les Parties, a conclu «que les circonstances, telles qu'elles se présent[ai]ent [alors] à [elle], n['étaient] pas de nature à exiger l'exercice de son pouvoir d'indiquer des mesures conservatoires en vertu de l'article 41 du Statut».

14. Par ordonnance du 14 septembre 2007, la Cour, compte tenu de l'accord des Parties et des circonstances de l'espèce, a autorisé la présentation d'une réplique par l'Argentine et d'une duplique par l'Uruguay, et fixé respectivement au 29 janvier 2008 et au 29 juillet 2008 les dates d'expiration des délais pour le dépôt de ces pièces. La réplique de l'Argentine et la duplique de l'Uruguay ont été dûment déposées dans les délais ainsi prescrits.

15. Par lettres datées respectivement du 16 juin 2009 et du 17 juin 2009, les Gouvernements de l'Uruguay et de l'Argentine ont fait connaître à la Cour qu'ils étaient parvenus à un accord à l'effet de produire des documents nouveaux en application de l'article 56 du Règlement. Par lettres du 23 juin 2009, le greffier a informé les Parties que la Cour avait décidé de les autoriser à procéder comme elles en étaient convenues. Ces nouveaux documents ont été dûment déposés dans le délai convenu.

16. Le 15 juillet 2009, chacune des Parties a, conformément à l'accord intervenu entre elles et avec l'autorisation de la Cour, présenté certaines observations sur les documents nouveaux déposés par la Partie adverse. Chaque Partie a également déposé certains documents à l'appui desdites observations.

Parties, whereby each Party presented the Court with certain observations on the documents submitted by the other Party. Uruguay objected to the production of the video recording submitted by Argentina. The Court decided not to authorize the production of that recording at the hearings.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

8. By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

9. By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

10. On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Argentine Government.

11. On 14 December 2006, Uruguay transmitted to the Court a volume of documents concerning the request for the indication of provisional measures, entitled "Observations of Uruguay"; a copy of these documents was immediately sent to Argentina.

12. On 18 December 2006, before the opening of the oral proceedings, Argentina transmitted to the Court a volume of documents concerning Uruguay's request for the indication of provisional measures; the Registrar immediately sent a copy of these documents to the Government of Uruguay.

13. By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

14. By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

15. By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

16. On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

17. Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé que des exemplaires des pièces de procédure et des documents annexés seraient rendus accessibles au public à l'ouverture de la procédure orale.

18. Par lettre du 15 septembre 2009, l'Uruguay, se référant au paragraphe 4 de l'article 56 du Règlement et à l'Instruction de procédure IX *bis*, a communiqué à la Cour des documents faisant partie de publications facilement accessibles sur lesquels il entendait s'appuyer au cours de la procédure orale. L'Argentine n'a formulé aucune objection au sujet de ces documents.

19. Par lettre du 25 septembre 2009, le Gouvernement argentin, se référant à l'article 56 du Règlement et au paragraphe 2 de l'Instruction de procédure IX, a adressé au Greffe des documents nouveaux qu'il souhaitait produire. Par lettre du 28 septembre 2009, le Gouvernement uruguayen a informé la Cour qu'il s'opposait à la production desdits documents. Il a indiqué en outre que si, néanmoins, la Cour autorisait que les documents en question soient versés au dossier de l'affaire, il présenterait des observations à leur sujet et soumettrait certains documents à l'appui de ces observations. Par lettres en date du 28 septembre 2009, le greffier a porté à la connaissance des Parties que la Cour n'avait pas estimé que la production des documents nouveaux présentés par le Gouvernement argentin était nécessaire, au sens du paragraphe 2 de l'article 56 du Règlement, et qu'elle n'avait par ailleurs pas identifié de circonstance exceptionnelle (Instruction de procédure IX, paragraphe 3) qui eût justifié leur production à ce stade de la procédure.

20. Des audiences publiques ont été tenues entre le 14 septembre 2009 et le 2 octobre 2009, au cours desquelles ont été entendus en leurs plaidoiries et réponses:

*Pour l'Argentine:* S. Exc. M^me^ Susana Ruiz Cerutti,
M. Alain Pellet,
M. Philippe Sands,
M. Howard Wheater,
M^me^ Laurence Boisson de Chazournes,
M. Marcelo Kohen,
M. Alan Béraud,
M. Juan Carlos Colombo,
M. Daniel Müller.

*Pour l'Uruguay:* S. Exc. M. Carlos Gianelli,
M. Alan Boyle,
M. Paul S. Reichler,
M. Neil McCubbin,
M. Stephen C. McCaffrey,
M. Lawrence H. Martin,
M. Luigi Condorelli.

21. A l'audience, des questions ont été posées aux Parties par des membres de la Cour, auxquelles il a été répondu oralement et par écrit conformément au paragraphe 4 de l'article 61 du Règlement. Conformément à l'article 72 du Règlement, l'une des Parties a présenté des observations écrites sur une réponse fournie par écrit par l'autre Partie et reçue après la clôture de la procédure orale.

*

17. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

18. By letter of 15 September 2009, Uruguay, referring to Article 56, paragraph 4, of the Rules of Court and to Practice Direction IX*bis*, communicated documents to the Court, forming part of publications readily available, on which it intended to rely during the oral proceedings. Argentina made no objection with regard to these documents.

19. By letter of 25 September 2009, the Argentine Government, referring to Article 56 of the Rules of Court and to Practice Direction IX, paragraph 2, sent new documents to the Registry which it wished to produce. By letter of 28 September 2009, the Government of Uruguay informed the Court that it was opposed to the production of these documents. It further indicated that if, nevertheless, the Court decided to admit the documents in question into the record of the case, it would present comments on them and submit documents in support of those comments. By letters dated 28 September 2009, the Registrar informed the Parties that the Court did not consider the production of the new documents submitted by the Argentine Government to be necessary within the meaning of Article 56, paragraph 2, of the Rules of Court, and that it had not moreover identified any exceptional circumstance (Practice Direction IX, paragraph 3) which justified their production at that stage of the proceedings.

20. Public hearings were held between 14 September 2009 and 2 October 2009, at which the Court heard the oral arguments and replies of:

*For Argentina:* H.E. Ms Susana Ruiz Cerutti,
Mr. Alain Pellet,
Mr. Philippe Sands,
Mr. Howard Wheater,
Ms Laurence Boisson de Chazournes,
Mr. Marcelo Kohen,
Mr. Alan Béraud,
Mr. Juan Carlos Colombo,
Mr. Daniel Müller.

*For Uruguay:* H.E. Mr. Carlos Gianelli,
Mr. Alan Boyle,
Mr. Paul S. Reichler,
Mr. Neil McCubbin,
Mr. Stephen C. McCaffrey,
Mr. Lawrence H. Martin,
Mr. Luigi Condorelli.

21. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

*

22. Dans la requête, les demandes ci-après ont été formulées par l'Argentine :

« Sur la base de l'exposé des faits et des moyens juridiques qui précèdent, l'Argentine, tout en se réservant le droit de compléter, d'amender ou de modifier la présente requête pendant la suite de la procédure, prie la Cour de dire et juger :

1. que l'Uruguay a manqué aux obligations lui incombant en vertu du statut de 1975 et des autres règles de droit international auxquelles ce statut renvoie, y compris mais pas exclusivement :
   *a)* l'obligation de prendre toute mesure nécessaire à l'utilisation rationnelle et optimale du fleuve Uruguay ;
   *b)* l'obligation d'informer préalablement la CARU et l'Argentine ;
   *c)* l'obligation de se conformer aux procédures prévues par le chapitre II du statut de 1975 ;
   *d)* l'obligation de prendre toutes mesures nécessaires pour préserver le milieu aquatique et d'empêcher la pollution et l'obligation de protéger la biodiversité et les pêcheries, y compris l'obligation de procéder à une étude d'impact sur l'environnement, complète et objective ;
   *e)* les obligations de coopération en matière de prévention de la pollution et de la protection de la biodiversité et des pêcheries ; et
2. que, par son comportement, l'Uruguay a engagé sa responsabilité internationale à l'égard de l'Argentine ;
3. que l'Uruguay est tenu de cesser son comportement illicite et de respecter scrupuleusement à l'avenir les obligations lui incombant ; et
4. que l'Uruguay est tenu de réparer intégralement le préjudice causé par le non-respect des obligations lui incombant.

L'Argentine se réserve le droit de préciser ou modifier les présentes demandes dans une étape ultérieure de la procédure. »

23. Au cours de la procédure écrite, les conclusions ci-après ont été présentées par les Parties :

*Au nom du Gouvernement de l'Argentine,*

dans le mémoire :

« Pour l'ensemble des raisons exposées dans le présent mémoire, la République argentine prie la Cour internationale de Justice de bien vouloir :

1. constater que, en autorisant unilatéralement la construction des usines de pâte à papier CMB et Orion et les installations annexes de celle-ci sur la rive gauche du fleuve Uruguay en violation des obligations découlant du statut du 26 février 1975, la République orientale de l'Uruguay a commis les faits internationalement illicites énumérés aux chapitres IV et V du présent mémoire, qui engagent sa responsabilité internationale ;
2. dire et juger que, en conséquence, la République orientale de l'Uruguay doit :
   i) immédiatement cesser les faits internationalement illicites mentionnés ci-dessus ;
   ii) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975 ;

22. In its Application, the following claims were made by Argentina:

"On the basis of the foregoing statement of facts and law, Argentina, while reserving the right to supplement, amend or modify the present Application in the course of the subsequent procedure, requests the Court to adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
   *(a)* the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
   *(b)* the obligation of prior notification to CARU and to Argentina;
   *(c)* the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
   *(d)* the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
   *(e)* the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

Argentina reserves the right to amplify or amend these requests at a subsequent stage of the proceedings."

23. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Argentina,*

in the Memorial:

"For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

1. to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) cease immediately the internationally wrongful acts referred to above;
   (ii) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration des faits internationalement illicites mentionnés ci-dessus;

iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité.

La République argentine se réserve la possibilité de compléter et amender le cas échéant les présentes conclusions, notamment en fonction de l'évolution de la situation. Il en irait ainsi tout spécialement si l'Uruguay aggravait le différend[1], notamment si l'usine Orion devait être mise en service avant la fin de la présente procédure.

---

[1] Voir l'ordonnance de la Cour du 13 juillet 2006 sur la demande en indication de mesures conservatoires de l'Argentine, par. 82.»

dans la réplique:

«Pour l'ensemble des raisons exposées dans son mémoire, qu'elle maintient intégralement, et dans la présente réplique, la République argentine prie la Cour internationale de Justice de bien vouloir:

1) constater qu'en autorisant

— la construction de l'usine CMB,
— la construction et la mise en service de l'usine Orion et de ses installations connexes sur la rive gauche du fleuve Uruguay,

la République orientale de l'Uruguay a violé les obligations lui incombant en vertu du statut du fleuve Uruguay du 26 février 1975 et engagé sa responsabilité internationale;

2) dire et juger que, en conséquence, la République orientale de l'Uruguay doit:

i) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975;
ii) immédiatement cesser les faits internationalement illicites par lesquels elle a engagé sa responsabilité;
iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de ces faits internationalement illicites;
iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité.

(iii) re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of the development of the situation. This would in particular apply if Uruguay were to aggravate the dispute[1], for example if the Orion mill were to be commissioned before the end of these proceedings.

---

[1] See the Order of the Court of 13 July 2006 on Argentina's request for the indication of provisional measures, para. 82."

in the Reply:

"For all the reasons described in its Memorial, which it fully stands by, and in the present Reply, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

   — the construction of the CMB mill;
   — the construction and commissioning of the Orion mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

La République argentine se réserve la possibilité de compléter et amender le cas échéant les présentes conclusions au vu des développements ultérieurs de l'affaire.»

*Au nom du Gouvernement de l'Uruguay,*

dans le contre-mémoire:

«Sur la base des faits et arguments exposés ci-dessus, et se réservant le droit de compléter ou de modifier les présentes conclusions, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine.»

dans la duplique:

«Compte tenu de tout ce qui précède, il y a lieu de conclure que:

*a)* l'Argentine n'a établi l'existence, pour le fleuve ou son écosystème, d'aucun préjudice, ou risque de préjudice, qui résulterait des violations qu'aurait commises l'Uruguay des obligations de fond lui incombant en vertu du statut de 1975 et suffirait à justifier le démantèlement de l'usine Botnia;

*b)* un tel démantèlement causerait à l'économie uruguayenne un préjudice considérable sous forme de pertes d'emplois et de revenus;

*c)* à la lumière des points *a)* et *b)*, le remède consistant à démolir l'usine se traduirait donc par des coûts disproportionnellement élevés et ne doit pas être accordé;

*d)* si la Cour estime, nonobstant toutes les preuves contraires, que l'Uruguay a violé les obligations procédurales lui incombant envers l'Argentine, elle peut rendre un jugement déclaratoire à cet effet, qui constituerait une forme de satisfaction adéquate;

*e)* si la Cour estime, nonobstant toutes les preuves contraires, que l'usine ne satisfait pas pleinement à l'obligation incombant à l'Uruguay de protéger le fleuve ou son milieu aquatique, elle peut ordonner à l'Uruguay de prendre toute autre mesure de protection nécessaire pour faire en sorte que l'usine réponde aux obligations de fond imposées par le statut;

*f)* si la Cour estime, nonobstant toutes les preuves contraires, que l'Uruguay a effectivement causé un dommage au fleuve ou à l'Argentine, elle peut condamner l'Uruguay à indemniser cette dernière au titre des articles 42 et 43 du statut; et

*g)* la Cour doit faire une déclaration énonçant clairement que les Parties sont tenues de veiller au plein respect de tous les droits en litige en l'espèce, y compris celui de l'Uruguay de continuer à exploiter l'usine Botnia conformément aux dispositions du statut de 1975.

*Conclusions*

Sur la base des faits et arguments exposés ci-dessus, et se réservant le droit de compléter ou de modifier les présentes conclusions, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine et de lui reconnaître le droit de continuer à exploiter l'usine Botnia conformément aux dispositions du statut de 1975.»

24. Au cours de la procédure orale, les conclusions finales ci-après ont été présentées par les Parties:

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of subsequent developments in the case."

*On behalf of the Government of Uruguay,*

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected."

In the Rejoinder:

"Based on all the above, it can be concluded that:

*(a)* Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;

*(b)* the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;

*(c)* in light of points *(a)* and *(b)*, the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;

*(d)* if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;

*(e)* if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay's obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute's substantive requirements;

*(f)* if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and

*(g)* the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

*Submissions*

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

24. At the oral proceedings, the following final submissions were presented by the Parties:

*Au nom du Gouvernement de l'Argentine,*

à l'audience du 29 septembre 2009 :

« Pour l'ensemble des raisons exposées dans son mémoire, dans sa réplique et lors de la procédure orale, qu'elle maintient intégralement, la République argentine prie la Cour internationale de Justice de bien vouloir :

1) constater qu'en autorisant

— la construction de l'usine ENCE,
— la construction et la mise en service de l'usine Botnia et de ses installations connexes sur la rive gauche du fleuve Uruguay,

la République orientale de l'Uruguay a violé les obligations lui incombant en vertu du statut du fleuve Uruguay du 26 février 1975 et engagé sa responsabilité internationale ;

2) dire et juger que, en conséquence, la République orientale de l'Uruguay doit :

i) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975 ;
ii) immédiatement cesser les faits internationalement illicites par lesquels elle a engagé sa responsabilité ;
iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de ces faits internationalement illicites ;
iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance ;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité. »

*Au nom du Gouvernement de l'Uruguay,*

à l'audience du 2 octobre 2009 :

« Sur la base des faits et arguments exposés dans le contre-mémoire de l'Uruguay, dans sa duplique et au cours de la procédure orale, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine et de confirmer le droit de l'Uruguay de poursuivre l'exploitation de l'usine Botnia conformément aux dispositions du statut de 1975. »

* * *

## I. Cadre juridique et faits de l'espèce

25. Le différend soumis à la Cour se rapporte au projet de construction, autorisé par l'Uruguay, d'une usine de pâte à papier, ainsi qu'à la construction et à la mise en service, également autorisées par

*On behalf of the Government of Argentina,*

at the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing
   — the construction of the ENCE mill;
   — the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;
   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;
   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;
   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;
   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

*On behalf of the Government of Uruguay,*

at the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

* * *

## I. Legal Framework and Facts of the Case

25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay,

l'Uruguay, d'une autre usine de pâte à papier, le long du fleuve Uruguay (voir croquis n° 1, p. 33, pour le contexte géographique général). Après avoir présenté les instruments juridiques relatifs au fleuve Uruguay qui lient les Parties, la Cour rappellera les principaux faits de l'espèce.

### *A. Cadre juridique*

26. La frontière entre l'Argentine et l'Uruguay sur le fleuve Uruguay est définie par le traité bilatéral conclu à cet effet à Montevideo le 7 avril 1961 (*RTNU*, vol. 635, n° 9074, p. 99). Les articles premier à 4 de ce traité délimitent la frontière des Etats contractants sur le fleuve et leur attribuent certains îles et îlots qui occupent son lit. Les articles 5 et 6 sont relatifs au régime de navigation sur le fleuve. L'article 7 envisage la conclusion par les parties d'un «code de l'utilisation du fleuve» portant sur différents éléments, dont la conservation des ressources biologiques et la prévention de la pollution des eaux du fleuve. Les articles 8 à 10 prévoient certaines obligations relatives aux îles et îlots ainsi qu'à leurs habitants.

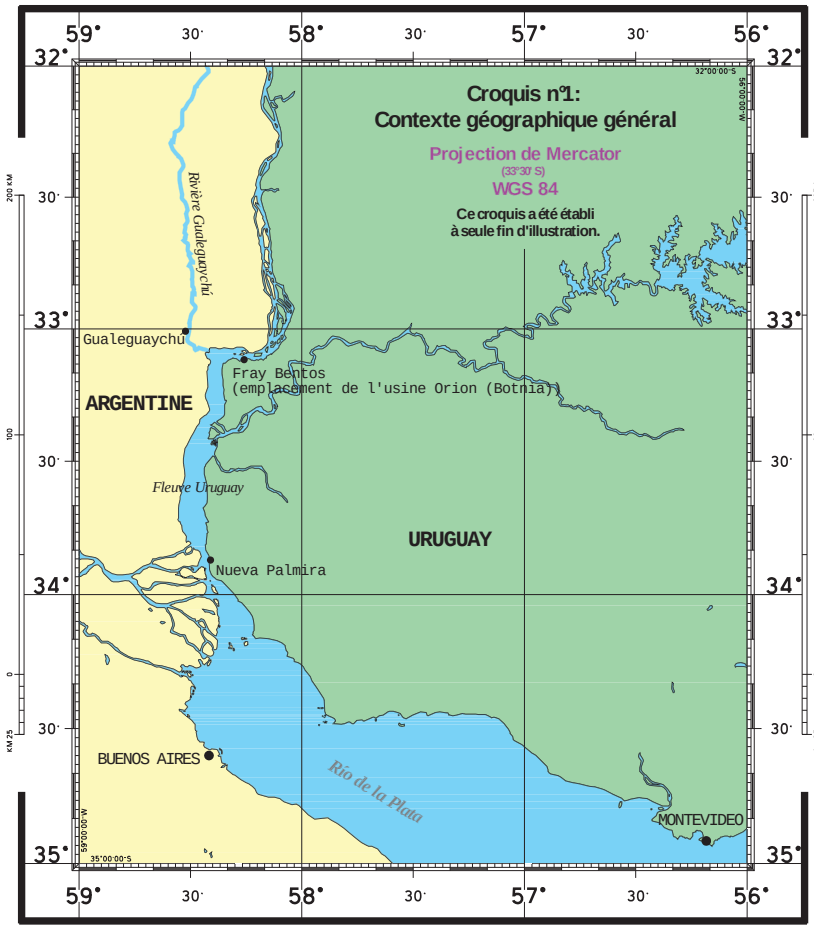
27. Le «code de l'utilisation du fleuve» envisagé par l'article 7 du traité de 1961 a été institué par le statut de 1975 (voir paragraphe 1 ci-dessus). L'article premier du statut de 1975 précise que les parties l'adoptent «à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay, dans le strict respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties». Après avoir ainsi défini son but (article premier) et aussi précisé la portée de certains de ses termes (article 2), le statut de 1975 énonce des règles relatives à la navigation et aux ouvrages sur le fleuve (chapitre II, articles 3 à 13), au pilotage (chapitre III, articles 14 à 16), aux facilités portuaires, au chargement et au déchargement de marchandises (chapitre IV, articles 17 et 18), au sauvetage de la vie humaine (chapitre V, articles 19 à 23) et de biens matériels (chapitre VI, articles 24 à 26), à l'utilisation des eaux du fleuve (chapitre VII, articles 27 à 29), aux ressources du lit et du sous-sol (chapitre VIII, articles 30 à 34), à la conservation, l'utilisation et l'exploitation d'autres ressources naturelles (chapitre IX, articles 35 à 39), à la pollution (chapitre X, articles 40 à 43), à la recherche scientifique (chapitre XI, articles 44 et 45), ainsi qu'aux différentes compétences des parties sur le fleuve et sur les navires l'empruntant (chapitre XII, articles 46 à 48). Le statut de 1975 institue la commission administrative du fleuve Uruguay (ci-après la «CARU», selon l'acronyme espagnol de «Comisión Administradora del Río Uruguay») (chapitre XIII, articles 49 à 57), avant de prévoir une procédure de conciliation (chapitre XIV, articles 58 et 59) et de règlement judiciaire des différends (chapitre XV, article 60). Le statut de 1975 contient enfin des dispositions transitoires (chapitre XVI, articles 61 et 62) et finales (chapitre XVII, article 63).

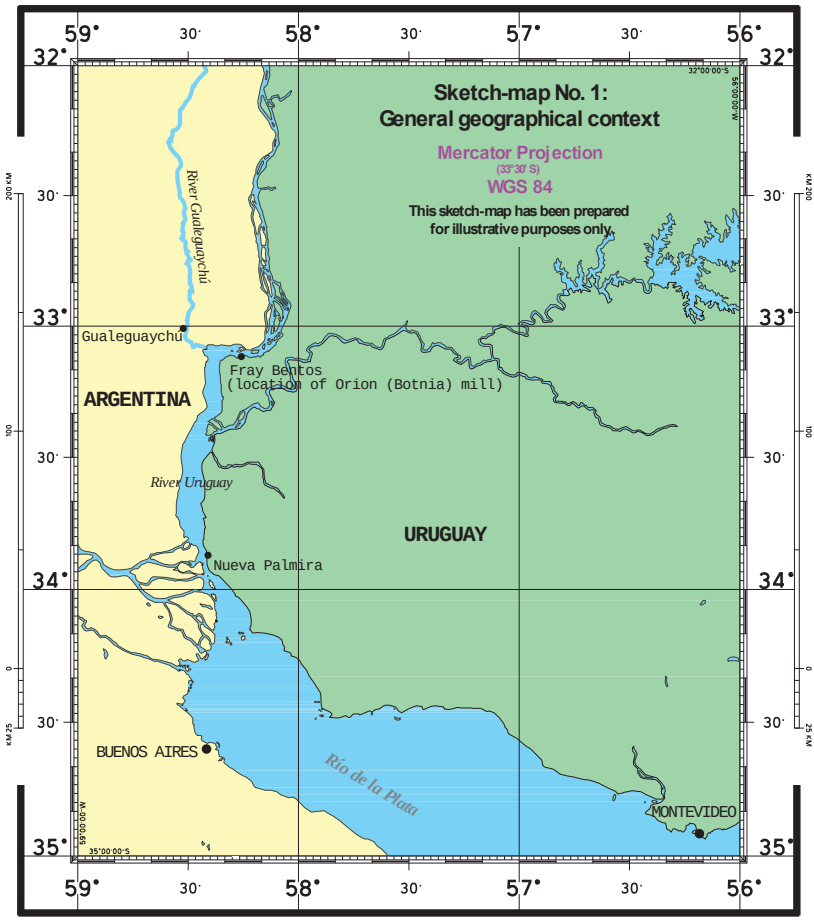
on the River Uruguay (see sketch-map No. 1 on p. 33 for the general geographical context). After identifying the legal instruments concerning the River Uruguay by which the Parties are bound, the Court will set out the main facts of the case.

### *A. Legal Framework*

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (*UNTS*, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties". After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter "CARU", from the Spanish acronym for "Comisión Administradora del Río Uruguay") (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions.


Croquis n°1:
Contexte géographique général
Projection de Mercator
(33°30' S)
WGS 84
Ce croquis a été établi
à seule fin d'illustration.
Rivière Gualeguaychú
Gualeguaychú
Fray Bentos
(emplacement de l'usine Orion (Botnia))
ARGENTINE
Fleuve Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
58°
57°
56°
32°
33°
34°
35°
30'


Sketch-map No. 1:
General geographical context
Mercator Projection
(33°30' S)
WGS 84
This sketch-map has been prepared
for illustrative purposes only.
River Gualeguaychú
Gualeguaychú
Fray Bentos
(location of Orion (Botnia) mill)
ARGENTINA
River Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
30'
58°
30'
57°
30'
56°
32°
33°
34°
35°

### *B. Le projet CMB (ENCE)*

28. La première usine de pâte à papier à l'origine du différend a été projetée par la société « Celulosas de M'Bopicuá S.A. » (ci-après « CMB »), créée à l'initiative de la société espagnole ENCE (acronyme espagnol de « Empresa Nacional de Celulosas de España », ci-après « ENCE »). Cette usine, ci-après l'usine « CMB (ENCE) », devait être construite sur la rive gauche du fleuve Uruguay, dans le département uruguayen de Río Negro, en face de la région argentine de Gualeguaychú, plus précisément à l'est de la ville de Fray Bentos, près du pont international « General San Martín » (voir croquis n° 2, p. 35).

29. Le 22 juillet 2002, les promoteurs de ce projet industriel entreprirent des démarches auprès des autorités uruguayennes et présentèrent à la direction nationale de l'environnement de l'Uruguay (ci-après la « DINAMA », selon l'acronyme espagnol de « Dirección Nacional de Medio Ambiente ») une évaluation de l'impact sur l'environnement (« EIE », selon l'abréviation utilisée par les Parties) s'y rapportant. A la même époque, les représentants de CMB, société spécialement créée afin de construire l'usine CMB (ENCE), informèrent le président de la CARU de ce projet. Le président de la CARU écrivit le 17 octobre 2002 au ministre uruguayen de l'environnement afin d'obtenir copie de l'évaluation de l'impact sur l'environnement concernant le projet CMB (ENCE) soumise par les promoteurs de ce projet industriel. Cette demande fut réitérée le 21 avril 2003. Le 14 mai 2003, l'Uruguay remit à la CARU un document intitulé « Etude de l'impact sur l'environnement, Celulosas de M'Bopicuá. Résumé de diffusion ». Un mois plus tard, la sous-commission de la CARU chargée de la qualité des eaux et de la prévention de la pollution prit connaissance du document transmis par l'Uruguay et suggéra d'en remettre copie à ses conseillers techniques en sollicitant leur opinion. Des copies furent également remises aux délégations des Parties.

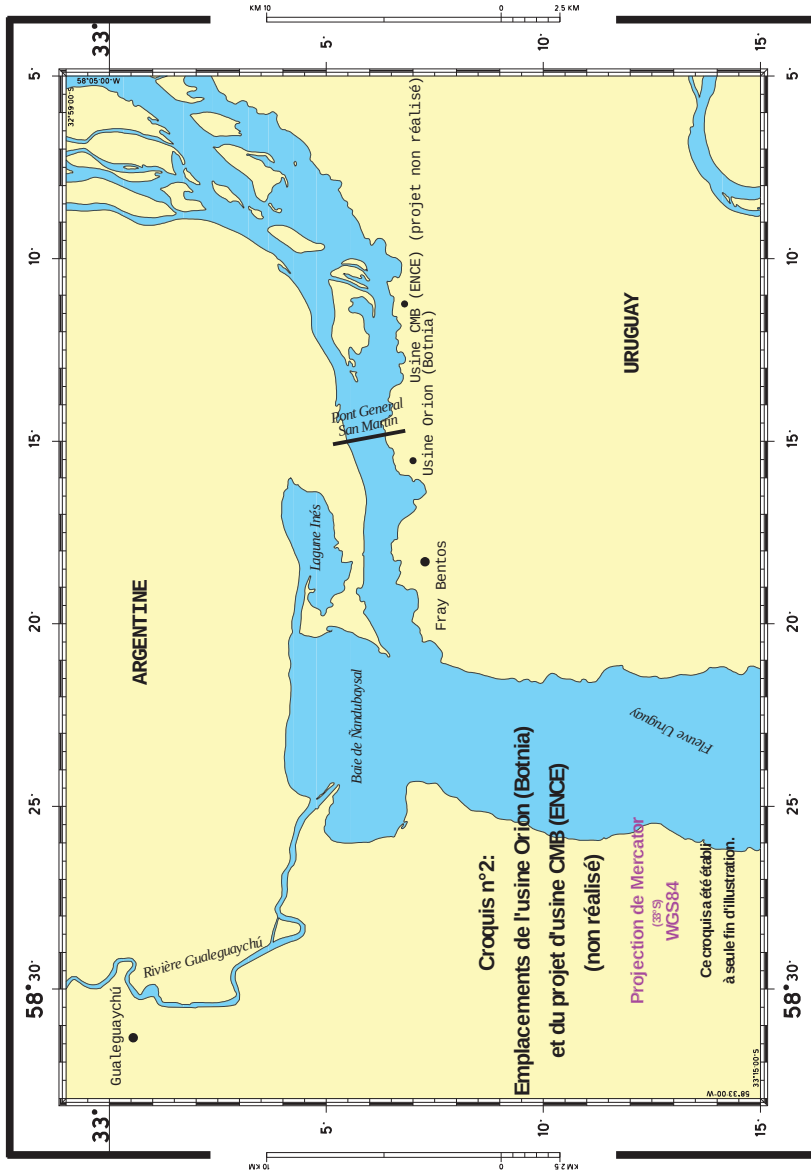
30. Une séance publique de discussion relative à la demande d'autorisation environnementale présentée par CMB eut lieu le 21 juillet 2003 dans la ville de Fray Bentos, en présence du conseiller juridique et du secrétaire technique de la CARU. Le 15 août 2003, la CARU pria l'Uruguay de lui transmettre des informations complémentaires sur différents points au sujet de l'usine CMB (ENCE) en projet. Cette demande fut réitérée le 12 septembre 2003. Le 2 octobre 2003, la DINAMA soumit son rapport d'évaluation au ministère uruguayen du logement, de l'aménagement du territoire et de l'environnement (ci-après le « MVOTMA », selon l'abréviation espagnole de « Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente »), et lui recommanda d'accorder à CMB l'autorisation environnementale préalable (« AAP », selon l'abréviation espagnole d'« Autorización Ambiental Previa »), sous certaines conditions. Le 8 octobre 2003, la CARU fut informée par la délégation uruguayenne que la DINAMA devait incessamment lui adresser un rapport sur le projet CMB (ENCE).

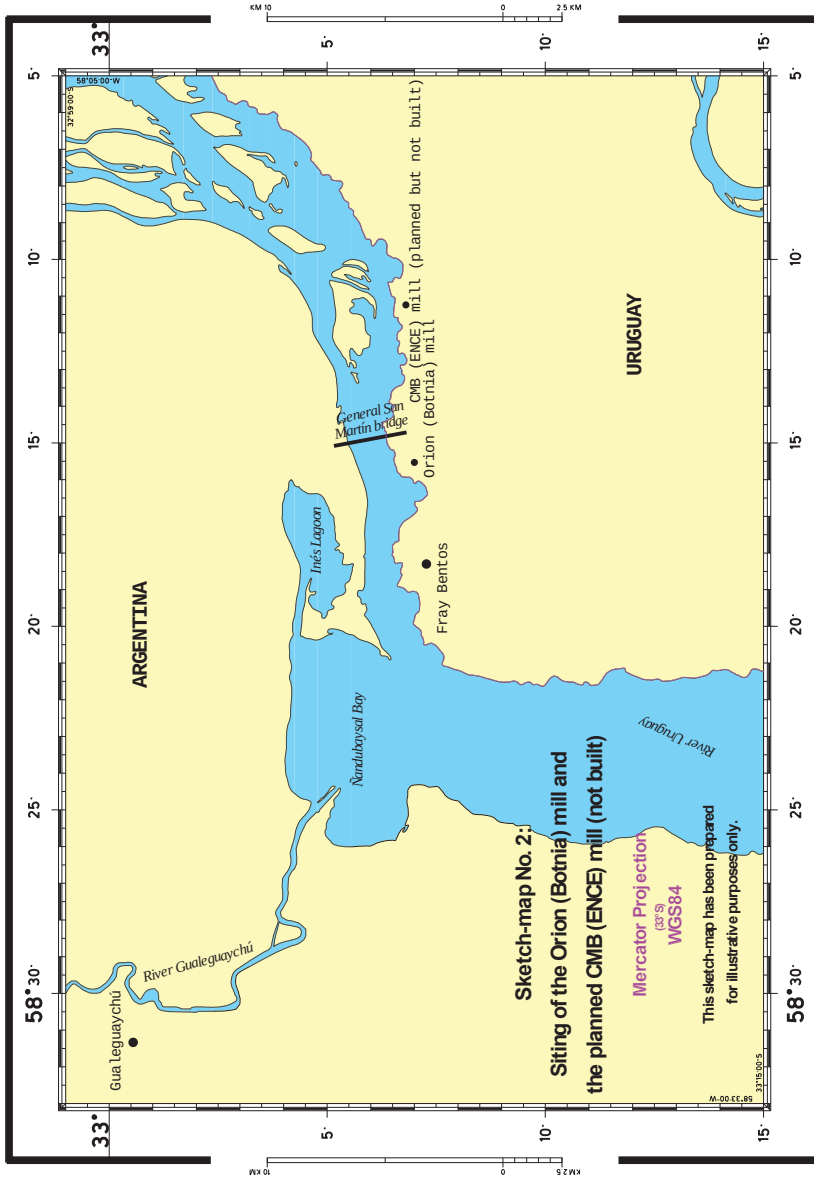
### *B. CMB (ENCE) Project*

28. The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martín" international bridge (see sketch-map No. 2 on p. 35).

29. On 22 July 2002, the promoters of this industrial project approached the Uruguayan authorities and submitted an environmental impact assessment ("EIA" according to the abbreviation used by the Parties) of the plan to Uruguay's National Directorate for the Environment (hereinafter "DINAMA", from the Spanish acronym for "Dirección Nacional de Medio Ambiente"). During the same period, representatives of CMB, which had been specially formed to build the CMB (ENCE) mill, informed the President of CARU of the project. The President of CARU wrote to the Uruguayan Minister of the Environment on 17 October 2002 seeking a copy of the environmental impact assessment of the CMB (ENCE) project submitted by the promoters of this industrial project. This request was reiterated on 21 April 2003. On 14 May 2003, Uruguay submitted to CARU a document entitled "Environmental Impact Study, Celulosas de M'Bopicuá. Summary for public release". One month later, the CARU Subcommittee on Water Quality and Pollution Control took notice of the document transmitted by Uruguay and suggested that a copy thereof be sent to its technical advisers for their opinions. Copies were also provided to the Parties' delegations.

30. A public hearing, attended by CARU's Legal Adviser and its technical secretary, was held on 21 July 2003 in the city of Fray Bentos concerning CMB's application for an environmental authorization. On 15 August 2003, CARU asked Uruguay for further information on various points concerning the planned CMB (ENCE) mill. This request was reiterated on 12 September 2003. On 2 October 2003, DINAMA submitted its assessment report to the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA", from the Spanish abbreviation for "Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente"), recommending that CMB be granted an initial environmental authorization ("AAP" according to the Spanish abbreviation for "Autorización Ambiental Previa") subject to certain conditions. On 8 October 2003, CARU was informed by the Uruguayan delegation that DINAMA would very shortly send CARU a report on the CMB (ENCE) project.


KM 10
0
2.5 KM
33°
5'
10'
15'
58°05'00"W
32°59'00"S
ARGENTINE
URUGUAY
Pont General San Martin
Usine Orion (Botnia)
Usine CMB (ENCE) (projet non réalisé)
Fray Bentos
Laguna Inés
Baie de Nandubaysal
Fleuve Uruguay
Rivière Gualeguaychú
Gualeguaychú
58°30'
20'
25'
Croquis n°2:
Emplacements de l'usine Orion (Botnia)
et du projet d'usine CMB (ENCE)
(non réalisé)
Projection de Mercator
(38°S)
WGS84
Ce croquis a été établi
à seule fin d'illustration.
58°33'00"W
33°15'00"S
10 KM
0
KM 2.5


Sketch-map No. 2:
Siting of the Orion (Botnia) mill and
the planned CMB (ENCE) mill (not built)
Mercator Projection
(33°S)
WGS84
This sketch-map has been prepared
for illustrative purposes only.
ARGENTINA
URUGUAY
Gualeguaychú
River Gualeguaychú
Ñandubaysal Bay
Inés Lagoon
General San
Martín bridge
Orion (Botnia) mill
CMB (ENCE) mill (planned but not built)
Fray Bentos
River Uruguay
58°30'
33°
KM 10
0
2.5 KM
10 KM
KM 2.5

31. Le 9 octobre 2003, le MVOTMA délivra une autorisation environnementale préalable à CMB en vue de la construction de l'usine CMB (ENCE). Le même jour, les présidents de l'Argentine et de l'Uruguay se rencontrèrent à Anchorena (Colonia, Uruguay). L'Argentine soutient que le président de l'Uruguay, M. Jorge Battle, aurait à cette occasion promis à son homologue argentin, M. Néstor Kirchner, qu'aucune autorisation ne serait délivrée tant qu'il n'aurait pas été répondu aux préoccupations environnementales de l'Argentine. L'Uruguay conteste cette présentation des faits et affirme qu'à l'occasion de cette réunion les Parties seraient convenues de traiter du projet CMB (ENCE) en dehors de la procédure prévue aux articles 7 à 12 du statut de 1975, tandis que l'Argentine aurait indiqué ne pas s'opposer au projet en lui-même. L'Argentine conteste ces affirmations.

32. Le lendemain de la rencontre entre les chefs d'Etat de l'Argentine et de l'Uruguay, la CARU se déclara prête à reprendre les analyses techniques relatives au projet CMB (ENCE) dès que l'Uruguay aurait transmis les documents en attente. Le 17 octobre 2003, la CARU tint une séance plénière extraordinaire à la demande de l'Argentine; celle-ci s'y plaignit de la délivrance par l'Uruguay, le 9 octobre 2003, de l'autorisation environnementale préalable. A la suite de cette réunion extraordinaire, la CARU suspendit ses activités durant plus de six mois, faute d'accord entre les Parties sur la mise en œuvre du mécanisme de consultation prévu par le statut de 1975.

33. Le 27 octobre 2003, l'Uruguay transmit à l'Argentine des copies de l'évaluation de l'impact sur l'environnement déposée par ENCE le 22 juillet 2002, du rapport final d'évaluation de la DINAMA du 2 octobre 2003 et de l'autorisation environnementale préalable du 9 octobre 2003. L'Argentine réagit à cet envoi en indiquant que, selon elle, l'article 7 du statut de 1975 n'avait pas été respecté et que les documents transmis semblaient être insuffisants pour pouvoir émettre un avis technique sur l'impact sur l'environnement du projet. Le 7 novembre 2003, comme suite à une demande du ministère des relations extérieures de l'Argentine, l'Uruguay communiqua à l'Argentine une copie de l'ensemble du dossier du ministère uruguayen de l'environnement relatif au projet CMB (ENCE). Le 23 février 2004, l'Argentine transmit l'ensemble de ces documents uruguayens à la CARU.

34. Le 2 mars 2004, les ministres des affaires étrangères des deux Parties se rencontrèrent à Buenos Aires. Le 15 mai 2004, la CARU reprit ses travaux à l'occasion d'une séance plénière extraordinaire au cours de laquelle elle prit acte de l'«arrangement» ministériel intervenu le 2 mars 2004. Les Parties divergent toutefois quant au contenu de cet «arrangement». La Cour ne manquera pas d'y revenir lorsqu'elle se penchera sur les allégations de l'Argentine concernant la méconnaissance par l'Uruguay de ses obligations de nature procédurale aux termes du statut de 1975 (voir paragraphes 67 à 158).

35. Donnant suite à la réunion extraordinaire de la CARU du 15 mai 2004, sa sous-commission en charge de la qualité des eaux et de la

31. On 9 October 2003, MVOTMA issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill. On the same date the Presidents of Argentina and Uruguay met at Anchorena (Colonia, Uruguay). Argentina maintains that the President of Uruguay, Jorge Battle, then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed. Uruguay challenges this version of the facts and contends that the Parties agreed at that meeting to deal with the CMB (ENCE) project otherwise than through the procedure under Articles 7 to 12 of the 1975 Statute and that Argentina let it be known that it was not opposed to the project per se. Argentina disputes these assertions.

32. The day after the meeting between the Heads of State of Argentina and Uruguay, CARU declared its willingness to resume the technical analyses of the CMB (ENCE) project as soon as Uruguay transmitted the awaited documents. On 17 October 2003, CARU held an extraordinary plenary meeting at the request of Argentina, at which Argentina complained of Uruguay's granting on 9 October 2003 of the initial environmental authorization. Following the extraordinary meeting CARU suspended work for more than six months, as the Parties could not agree on how to implement the consultation mechanism established by the 1975 Statute.

33. On 27 October 2003, Uruguay transmitted to Argentina copies of the environmental impact assessment submitted by ENCE on 22 July 2002, of DINAMA's final assessment report dated 2 October 2003 and of the initial environmental authorization of 9 October 2003. Argentina reacted by expressing its view that Article 7 of the 1975 Statute had not been observed and that the transmitted documents did not appear adequate to allow for a technical opinion to be expressed on the environmental impact of the project. On 7 November 2003, further to a request from the Ministry of Foreign Affairs of Argentina, Uruguay provided Argentina with a copy of the Uruguayan Ministry of the Environment's entire file on the CMB (ENCE) project. On 23 February 2004, Argentina forwarded all of this documentation received from Uruguay to CARU.

34. On 2 March 2004, the Parties' Ministers for Foreign Affairs met in Buenos Aires. On 15 May 2004, CARU resumed its work at an extraordinary plenary meeting during which it took note of the ministerial "understanding" which was reached on 2 March 2004. The Parties are at odds over the content of this "understanding". The Court will return to this when it considers Argentina's claims as to Uruguay's breach of its procedural obligations under the 1975 Statute (see paragraphs 67 to 158).

35. Following up on CARU's extraordinary meeting of 15 May 2004, the CARU Subcommittee on Water Quality and Pollution Control pre-

prévention de la pollution prépara un plan de contrôle et de suivi (monitoring) de la qualité des eaux dans la zone des usines de pâte à papier (ci-après plan «PROCEL», selon l'acronyme espagnol de «Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas»). Ce plan fut approuvé par la CARU le 12 novembre 2004.

36. Le 28 novembre 2005, l'Uruguay autorisa le commencement des travaux préparatoires en vue de la construction de l'usine CMB (ENCE) (nivellement du terrain). Le 28 mars 2006, les promoteurs de ce projet industriel décidèrent de suspendre ces travaux durant quatre-vingt-dix jours. Ils annoncèrent, le 21 septembre 2006, leur intention de ne pas construire l'usine projetée à l'emplacement envisagé sur la rive du fleuve Uruguay.

### *C. L'usine Orion (Botnia)*

37. Le deuxième projet industriel à l'origine du différend porté devant la Cour est dû à l'initiative des sociétés de droit uruguayen «Botnia S.A.» et «Botnia Fray Bentos S.A.» (ci-après «Botnia»), lesquelles ont été spécialement créées à cette fin dès 2003 par la société finlandaise Oy Metsä-Botnia AB. Dénommée «Orion», cette seconde usine de pâte à papier (ci-après l'usine «Orion (Botnia)») a été construite sur la rive gauche du fleuve Uruguay, à quelques kilomètres en aval de l'emplacement prévu pour l'usine CMB (ENCE), également à proximité de la ville de Fray Bentos (voir croquis n° 2, p. 35). Elle est exploitée et en fonctionnement depuis le 9 novembre 2007.

38. Ayant, à la fin de l'année 2003, informé les autorités uruguayennes de leur projet industriel, les promoteurs les saisirent, le 31 mars 2004, d'une demande d'autorisation environnementale préalable, qu'ils complétèrent le 7 avril 2004. Quelques semaines plus tard, les 29 et 30 avril 2004, une rencontre officieuse eut lieu entre des membres de la CARU et des représentants de la société Botnia. A la suite de cette réunion, la sous-commission chargée de la qualité des eaux et de la prévention de la pollution de la CARU suggéra, le 18 juin 2004, que Botnia complète les informations fournies lors de cette réunion. Le 19 octobre 2004, lors d'une autre réunion avec les représentants de Botnia, la CARU jugea à nouveau nécessaire d'obtenir un complément d'information au sujet de la demande d'autorisation environnementale préalable déposée par Botnia auprès de la DINAMA. Le 12 novembre 2004, en même temps que d'approuver le plan de contrôle et de suivi de la qualité des eaux proposé par sa sous-commission en charge de la qualité des eaux et de la prévention de la pollution (voir paragraphe 35 ci-dessus), la CARU décida, sur proposition de la même sous-commission, de demander à l'Uruguay un complément d'information sur la demande d'autorisation environnementale préalable. Cette demande d'information complémentaire fut transmise à l'Uruguay par une note de la CARU en date du 16 novembre 2004.

39. La DINAMA organisa le 21 décembre 2004 une séance publique

pared a plan for monitoring water quality in the area of the pulp mills (hereinafter the "PROCEL" plan from the Spanish acronym for "Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas"). CARU approved the plan on 12 November 2004.

36. On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

### *C. Orion (Botnia) Mill*

37. The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos (see sketch-map No. 2 on p. 35). It has been operational and functioning since 9 November 2007.

38. After informing the Uruguayan authorities of this industrial project in late 2003, the project promoters submitted an application to them for an initial environmental authorization on 31 March 2004 and supplemented it on 7 April 2004. Several weeks later, on 29 and 30 April 2004, CARU members and Botnia representatives met informally. Following that meeting, CARU's Subcommittee on Water Quality and Pollution Control suggested on 18 June 2004 that Botnia expand on the information provided at the meeting. On 19 October 2004, CARU held another meeting with Botnia representatives and again expressed the need for further information on Botnia's application to DINAMA for an initial environmental authorization. On 12 November 2004, when approving the water quality monitoring plan put forward by the CARU Subcommittee on Water Quality and Pollution Control (see paragraph 35 above), CARU decided, on the proposal of that subcommittee, to ask Uruguay to provide further information on the application for an initial environmental authorization. CARU transmitted this request for further information to Uruguay by note dated 16 November 2004.

39. On 21 December 2004 DINAMA held a public hearing, attended

de discussion à Fray Bentos sur le projet Orion (Botnia), en présence d'un conseiller de la CARU. Le 11 février 2005, la DINAMA adopta son évaluation de l'impact sur l'environnement relative à l'usine Orion (Botnia) en projet et recommanda l'octroi de l'autorisation environnementale préalable, moyennant certaines conditions. Cette autorisation préalable fut délivrée à la société Botnia le 14 février 2005 par le MVOTMA, en vue de la construction de l'usine Orion (Botnia) et d'un terminal portuaire adjacent. Le 11 mars 2005, lors d'une réunion de la CARU, l'Argentine contesta le bien-fondé de la délivrance de l'autorisation environnementale préalable au regard des obligations de nature procédurale prévues par le statut de 1975. L'Argentine réitéra cette position lors de la réunion de la CARU du 6 mai 2005. Le 12 avril 2005, l'Uruguay avait entre-temps autorisé le défrichement du futur site de l'usine et le nivellement de ce terrain.

40. Le 31 mai 2005, donnant suite à un accord intervenu le 5 mai 2005 entre les présidents des deux Parties, les ministres des affaires étrangères des deux Etats procédèrent à la création d'un groupe technique de haut niveau (ci-après le «GTAN», selon l'abréviation espagnole de «Grupo Técnico de Alto Nivel»). Ce groupe fut chargé de résoudre les différends relatifs aux usines CMB (ENCE) et Orion (Botnia) dans un délai de cent quatre-vingts jours. Le GTAN tint douze réunions entre le 3 août 2005 et le 30 janvier 2006, les Parties s'échangeant différents documents dans le cadre de ce processus bilatéral. Le 31 janvier 2006, l'Uruguay constata l'échec des négociations entreprises dans le cadre du GTAN; l'Argentine fit de même le 3 février 2006. La Cour reviendra plus loin sur la portée de ce processus convenu entre les Parties (voir paragraphes 132 à 149).

41. Le 26 juin 2005, l'Argentine s'adressa au président de la Banque internationale pour la reconstruction et le développement pour lui exprimer sa préoccupation face à la possibilité de voir la Société financière internationale (ci-après la «SFI») contribuer au financement des usines de pâte à papier en projet. La SFI décida néanmoins d'apporter son soutien financier à l'usine Orion (Botnia), non sans avoir chargé la société EcoMetrix, spécialisée en expertises environnementales et industrielles, de lui présenter différents rapports techniques sur l'usine en projet et l'évaluation de son impact sur l'environnement. EcoMetrix fut également chargée par la SFI d'assurer pour son compte le suivi environnemental de l'usine dès sa mise en service.

42. Le 5 juillet 2005, l'Uruguay autorisa la société Botnia à construire un port adjacent à l'usine Orion (Botnia). Cette autorisation fut transmise à la CARU le 15 août 2005. Le 22 août 2005, l'Uruguay autorisa la construction d'une cheminée et des fondations en béton de l'usine Orion (Botnia). D'autres autorisations furent accordées à mesure de l'avancement de la construction de cette usine, notamment en ce qui concerne les installations de traitement des déchets. Le 13 octobre 2005, l'Uruguay transmit à la CARU des documents complémentaires au sujet du terminal portuaire adjacent à l'usine Orion (Botnia).

by a CARU adviser, on the Orion (Botnia) project in Fray Bentos. DINAMA adopted its environmental impact study of the planned Orion (Botnia) mill on 11 February 2005 and recommended that the initial environmental authorization be granted, subject to certain conditions. MVOTMA issued the initial authorization to Botnia on 14 February 2005 for the construction of the Orion (Botnia) mill and an adjacent port terminal. At a CARU meeting on 11 March 2005, Argentina questioned whether the granting of the initial environmental authorization was well-founded in view of the procedural obligations laid down in the 1975 Statute. Argentina reiterated this position at the CARU meeting on 6 May 2005. On 12 April 2005, Uruguay had in the meantime authorized the clearance of the future mill site and the associated groundworks.

40. On 31 May 2005, in pursuance of an agreement made on 5 May 2005 by the Presidents of the two Parties, their Ministers for Foreign Affairs created a High-Level Technical Group (hereinafter the "GTAN", from the Spanish abbreviation for "Grupo Técnico de Alto Nivel"), which was given responsibility for resolving the disputes over the CMB (ENCE) and Orion (Botnia) mills within 180 days. The GTAN held twelve meetings between 3 August 2005 and 30 January 2006, with the Parties exchanging various documents in the context of this bilateral process. On 31 January 2006, Uruguay determined that the negotiations undertaken within the GTAN had failed; Argentina did likewise on 3 February 2006. The Court will return later to the significance of this process agreed on by the Parties (see paragraphs 132 to 149).

41. On 26 June 2005, Argentina wrote to the President of the International Bank for Reconstruction and Development to express its concern at the possibility of the International Finance Corporation (hereinafter the "IFC") contributing to the financing of the planned pulp mills. The IFC nevertheless decided to provide financial support for the Orion (Botnia) mill, but did commission EcoMetrix, a consultancy specializing in environmental and industrial matters, to prepare various technical reports on the planned mill and an environmental impact assessment of it. EcoMetrix was also engaged by the IFC to carry out environmental monitoring on the IFC's behalf of the plant once it had been placed in service.

42. On 5 July 2005, Uruguay authorized Botnia to build a port adjacent to the Orion (Botnia) mill. This authorization was transmitted to CARU on 15 August 2005. On 22 August 2005, Uruguay authorized the construction of a chimney and concrete foundations for the Orion (Botnia) mill. Further authorizations were granted as the construction of this mill proceeded, for example in respect of the waste treatment installations. On 13 October 2005, Uruguay transmitted additional documentation to CARU concerning the port terminal adjacent to the Orion (Botnia) mill.

A plusieurs reprises, et notamment lors de réunions de la CARU, l'Argentine demanda la suspension des premiers travaux relatifs à l'usine Orion (Botnia), ainsi que de ceux relatifs à l'usine CMB (ENCE). A l'occasion d'une rencontre entre les chefs d'Etat des Parties à Santiago du Chili le 11 mars 2006, le président uruguayen demanda aux sociétés ENCE et Botnia de suspendre la construction des usines. ENCE suspendit les travaux durant quatre-vingt-dix jours (voir paragraphe 36 ci-dessus); Botnia, durant dix jours.

43. L'Argentine a saisi la Cour du présent différend par une requête en date du 4 mai 2006. Le 24 août 2006, l'Uruguay autorisa la mise en service du terminal portuaire adjacent à l'usine Orion (Botnia), ce dont il informa la CARU le 4 septembre 2006. Le 12 septembre 2006, l'Uruguay autorisa la société Botnia à prélever et utiliser les eaux du fleuve à des fins industrielles et notifia officiellement cette autorisation à la CARU le 17 octobre 2006. En novembre 2006, à l'occasion du sommet des chefs d'Etat et de gouvernement des pays ibéro-américains qui se tint à Montevideo, le roi d'Espagne fut sollicité afin de tenter de rapprocher les positions des Parties; une issue négociée au différend ne put toutefois être trouvée dans ce cadre. Le 8 novembre 2007, l'Uruguay autorisa la mise en service de l'usine Orion (Botnia), qui devint opérationnelle le lendemain. En décembre 2009, la société Oy Metsä-Botnia AB transféra à une autre société finlandaise, UPM, sa participation dans l'usine Orion (Botnia).

*

44. L'Uruguay a par ailleurs autorisé la société Ontur International S.A. à construire et à exploiter un terminal portuaire à Nueva Palmira. Celui-ci a été inauguré en août 2007, l'Uruguay ayant transmis à la CARU, le 16 novembre 2007, la copie de l'autorisation de mise en service du terminal portuaire.

45. Dans leurs écritures, les Parties se sont opposées au sujet de la régularité de la délivrance des autorisations uruguayennes relatives à ce terminal portuaire au regard des obligations de nature procédurale prévues par le statut de 1975. La Cour n'estime toutefois pas nécessaire de retracer précisément les faits ayant conduit à la construction du terminal de Nueva Palmira, considérant que ce complexe portuaire ne fait pas partie de l'objet du différend porté devant elle. L'Argentine n'a en effet à aucun moment visé explicitement le terminal portuaire de Nueva Palmira dans les demandes formulées dans sa requête, ni dans les conclusions de son mémoire ou de sa réplique (voir paragraphes 22 et 23 ci-dessus). Dans ses conclusions finales présentées à l'audience du 29 septembre 2009, l'Argentine a à nouveau limité l'objet de ses demandes à l'autorisation de construction de l'usine CMB (ENCE), ainsi qu'aux autorisations de construction et de mise en service de «l'usine Botnia et ... ses installations connexes sur la rive gauche du fleuve Uruguay». La Cour ne saurait considérer le terminal portuaire de Nueva Palmira, situé à une centaine

Argentina repeatedly asked, including at CARU meetings, that the initial work connected with the Orion (Botnia) mill and the CMB (ENCE) mill should be suspended. At a meeting between the Heads of State of the Parties at Santiago de Chile on 11 March 2006, Uruguay's President asked ENCE and Botnia to suspend construction of the mills. ENCE suspended work for 90 days (see paragraph 36 above), Botnia for ten.

43. Argentina referred the present dispute to the Court by Application dated 4 May 2006. On 24 August 2006, Uruguay authorized the commissioning of the port terminal adjacent to the Orion (Botnia) mill and gave CARU notice of this on 4 September 2006. On 12 September 2006, Uruguay authorized Botnia to extract and use water from the river for industrial purposes and formally notified CARU of its authorization on 17 October 2006. At the summit of Heads of State and Government of the Ibero-American countries held in Montevideo in November 2006, the King of Spain was asked to endeavour to reconcile the positions of the Parties; a negotiated resolution of the dispute did not however result. On 8 November 2007, Uruguay authorized the commissioning of the Orion (Botnia) mill and it began operating the next day. In December 2009, Oy Metsä-Botnia AB transferred its interest in the Orion (Botnia) mill to UPM, another Finnish company.

*

44. In addition, Uruguay authorized Ontur International S.A. to build and operate a port terminal at Nueva Palmira. The terminal was inaugurated in August 2007 and, on 16 November 2007, Uruguay transmitted to CARU a copy of the authorization for its commissioning.

45. In their written pleadings the Parties have debated whether, in light of the procedural obligations laid down in the 1975 Statute, the authorizations for the port terminal were properly issued by Uruguay. The Court deems it unnecessary to review the detailed facts leading up to the construction of the Nueva Palmira terminal, being of the view that these port facilities do not fall within the scope of the subject of the dispute before it. Indeed, nowhere in the claims asserted in its Application or in the submissions in its Memorial or Reply (see paragraphs 22 and 23 above) did Argentina explicitly refer to the port terminal at Nueva Palmira. In its final submissions presented at the hearing on 29 September 2009, Argentina again limited the subject-matter of its claims to the authorization of the construction of the CMB (ENCE) mill and the authorization of the construction and commissioning of "the Botnia mill and its associated facilities on the left bank of the River Uruguay". The Court does not consider the port terminal at Nueva Palmira, which lies some 100 km south of Fray Bentos, downstream of the Orion (Botnia)

de kilomètres au sud de Fray Bentos, en aval de l'usine Orion (Botnia) (voir croquis n° 1, p. 33), et également utilisé par d'autres opérateurs économiques, comme constituant une installation «connexe» à cette dernière.

46. Le différend soumis à la Cour concerne l'interprétation et l'application du statut de 1975. Il porte, en particulier, sur la question de savoir, d'une part, si l'Uruguay s'est conformé aux obligations de nature procédurale qui sont les siennes en vertu du statut de 1975 en accordant des autorisations en vue de la construction de l'usine CMB (ENCE) ainsi que de la construction et de la mise en service de l'usine Orion (Botnia) et du port qui lui est adjacent, et, d'autre part, si l'Uruguay s'est acquitté des obligations de fond lui incombant en vertu du statut de 1975 depuis la mise en service de l'usine Orion (Botnia) au mois de novembre 2007.

* *

47. Ayant ainsi rappelé le contexte dans lequel s'inscrit le différend entre les Parties, la Cour se penchera sur le fondement et l'étendue de sa compétence, y compris sur les questions relatives au droit applicable au présent différend (voir paragraphes 48 à 66). Elle examinera ensuite les allégations de l'Argentine relatives à la violation par l'Uruguay des obligations de nature procédurale (voir paragraphes 67 à 158) et de fond (voir paragraphes 159 à 266) prévues par le statut de 1975. La Cour répondra enfin aux demandes présentées par les Parties dans leurs conclusions finales (voir paragraphes 267 à 280).

* *

## II. Étendue de la compétence de la Cour

48. Les Parties s'accordent pour fonder la compétence de la Cour sur le paragraphe 1 de l'article 36 du Statut de la Cour et sur le premier paragraphe de l'article 60 du statut du fleuve Uruguay de 1975. Celui-ci se lit comme suit: «Tout différend concernant l'interprétation ou l'application du traité[1] et du statut qui ne pourrait être réglé par négociation directe peut être soumis par l'une ou l'autre des parties à la Cour internationale de Justice.» Elles divergent sur la question de savoir si toutes les demandes de l'Argentine entrent dans les prévisions de cette clause.

49. L'Uruguay reconnaît que la compétence de la Cour au titre de la clause compromissoire s'étend aux demandes concernant toute pollution ou tout type de dommage causé, en violation du statut de 1975, au fleuve Uruguay ou aux organismes qu'il abrite. L'Uruguay reconnaît également que les demandes relatives à l'effet allégué de l'exploitation de l'usine de

[1] Il s'agit du traité de Montevideo relatif à la frontière sur l'Uruguay du 7 avril 1961 (*RTNU*, vol. 635, n° 9074, p. 99; note de bas de page ajoutée).

mill (see sketch-map No. 1 on p. 33), and is used by other economic operators as well, to be a facility "associated" with the mill.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

* *

47. Having thus related the circumstances surrounding the dispute between the Parties, the Court will consider the basis and scope of its jurisdiction, including questions relating to the law applicable to the present dispute (see paragraphs 48 to 66). It will then examine Argentina's allegations of breaches by Uruguay of procedural obligations (see paragraphs 67 to 158) and substantive obligations (see paragraphs 159 to 266) laid down in the 1975 Statute. Lastly, the Court will respond to the claims presented by the Parties in their final submissions (see paragraphs 267 to 280).

* *

## II. Scope of the Court's Jurisdiction

48. The Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, paragraph 1, of the 1975 Statute. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

49. Uruguay acknowledges that the Court's jurisdiction under the compromissory clause extends to claims concerning any pollution or type of harm caused to the River Uruguay, or to organisms living there, in violation of the 1975 Statute. Uruguay also acknowledges that claims concerning the alleged impact of the operation of the pulp mill on the

[1] The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (*UNTS*, Vol. 635, No. 9074, p. 98; footnote added).

pâte à papier sur la qualité des eaux du fleuve sont couvertes par la clause compromissoire. Il estime en revanche que cette clause ne permet pas à l'Argentine de présenter des demandes portant sur tout type de dommage environnemental. L'Uruguay affirme en outre que les allégations argentines visant la pollution atmosphérique, les nuisances sonores, visuelles et autres prétendument causées par l'usine Orion (Botnia), ainsi que les effets spécifiques que celle-ci aurait eus sur le secteur du tourisme, ne concernent pas l'interprétation ou l'application du statut de 1975, la Cour étant dès lors sans compétence pour en connaître.

L'Uruguay concède néanmoins qu'une pollution atmosphérique qui aurait des effets préjudiciables sur la qualité des eaux du fleuve ou sur le milieu aquatique entrerait dans le champ de compétence de la Cour.

50. L'Argentine soutient que la position de l'Uruguay quant à l'étendue de la compétence de la Cour est trop restrictive. Elle affirme que le statut de 1975 a été conclu pour protéger non seulement la qualité des eaux du fleuve, mais plus généralement le «régime» et les zones d'influence de celui-ci. Se fondant sur l'article 36 du statut de 1975, qui fait obligation aux parties de coordonner les mesures propres à éviter une modification de l'équilibre écologique et contenir les facteurs nocifs sur le fleuve et dans ses zones d'influence, l'Argentine argue que la Cour est également compétente pour connaître de demandes relatives à la pollution atmosphérique, et même à la pollution sonore et «visuelle». Elle prétend en outre que les mauvaises odeurs produites par l'usine Orion (Botnia) ont un impact sur les utilisations récréatives du fleuve, en particulier à la station balnéaire de Gualeguaychú, située sur sa rive. Cette demande, selon l'Argentine, relève également de la compétence de la Cour.

51. La Cour, lorsqu'elle examinera les différentes allégations ou demandes avancées par l'Argentine, devra déterminer si celles-ci concernent «l'interprétation ou l'application» du statut de 1975, sa compétence couvrant, aux termes de l'article 60 dudit statut, «[t]out différend concernant l'interprétation ou l'application du traité [de 1961] et du statut [de 1975]» et l'Argentine n'ayant, par ailleurs, pas prétendu que l'Uruguay ait violé des obligations découlant du traité de 1961.

52. Pour déterminer si l'Uruguay a violé les obligations lui incombant en vertu du statut de 1975, comme le soutient l'Argentine, la Cour devra interpréter les dispositions de ce statut et en déterminer le champ d'application *ratione materiae*.

Seules les demandes que l'Argentine a formulées en se fondant sur les dispositions du statut de 1975 relèvent de la compétence de la Cour *ratione materiae* en vertu de la clause compromissoire contenue à l'article 60. Bien que l'Argentine, à l'appui de ses demandes relatives à la pollution sonore et «visuelle» qu'aurait causée l'usine de pâte à papier, ait invoqué la disposition contenue à l'article 36 du statut de 1975, la Cour ne voit rien dans celle-ci qui puisse venir fonder lesdites demandes. Le libellé clair de l'article 36, qui prévoit que «[l]es parties coordonnent, par l'intermédiaire de la commission, les mesures propres à éviter une modification de l'équilibre écologique et à contenir les fléaux et autres facteurs

quality of the waters of the river fall within the compromissory clause. On the other hand, Uruguay takes the position that Argentina cannot rely on the compromissory clause to submit claims regarding every type of environmental damage. Uruguay further argues that Argentina's contentions concerning air pollution, noise, visual and general nuisance, as well as the specific impact on the tourism sector, allegedly caused by the Orion (Botnia) mill, do not concern the interpretation or the application of the 1975 Statute, and the Court therefore lacks jurisdiction over them.

Uruguay nevertheless does concede that air pollution which has harmful effects on the quality of the waters of the river or on the aquatic environment would fall within the jurisdiction of the Court.

50. Argentina maintains that Uruguay's position on the scope of the Court's jurisdiction is too narrow. It contends that the 1975 Statute was entered into with a view to protect not only the quality of the waters of the river but more generally its "régime" and the areas affected by it. Relying on Article 36 of the 1975 Statute, which lays out the obligation of the parties to co-ordinate measures to avoid any change in the ecological balance and to control harmful factors in the river and the areas affected by it, Argentina asserts that the Court has jurisdiction also with respect to claims concerning air pollution and even noise and "visual" pollution. Moreover, Argentina contends that bad odours caused by the Orion (Botnia) mill negatively affect the use of the river for recreational purposes, particularly in the Gualeguaychú resort on its bank of the river. This claim, according to Argentina, also falls within the Court's jurisdiction.

51. The Court, when addressing various allegations or claims advanced by Argentina, will have to determine whether they concern "the interpretation or application" of the 1975 Statute, as its jurisdiction under Article 60 thereof covers "[a]ny dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute". Argentina has made no claim to the effect that Uruguay violated obligations under the 1961 Treaty.

52. In order to determine whether Uruguay has breached its obligations under the 1975 Statute, as alleged by Argentina, the Court will have to interpret its provisions and to determine their scope *ratione materiae*.

Only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction *ratione materiae* under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt

nocifs sur le fleuve et dans ses zones d'influence», ne laisse aucun doute sur le fait que, contrairement à ce qu'affirme l'Argentine, cette pollution sonore et visuelle n'est pas couverte par la disposition. La Cour ne voit en outre dans le statut aucune autre disposition qui puisse venir fonder de telles demandes; dès lors, les demandes relatives à la pollution sonore et visuelle ne relèvent manifestement pas de la compétence que lui confère l'article 60.

De même, aucune disposition du statut de 1975 ne traite de la question des «mauvaises odeurs» dont tire grief l'Argentine. En conséquence, et pour les mêmes raisons, la demande relative à l'impact qu'auraient ces odeurs sur le tourisme en Argentine échappe également à la compétence de la Cour. Celle-ci note que, quand bien même de telles odeurs entreraient dans le cadre de la pollution atmosphérique, qu'elle examinera aux paragraphes 263 et 264 ci-dessous, l'Argentine n'a fourni aucun élément de preuve quant à la relation qui existerait entre les mauvaises odeurs alléguées et le milieu aquatique du fleuve.

53. Qualifiant les articles premier et 41 du statut de 1975 de «clauses de renvoi», l'Argentine estime que de telles clauses ont pour effet d'incorporer dans cet instrument les obligations que les Parties tiennent du droit international général et d'un certain nombre de conventions multilatérales relatives à la protection de l'environnement. Dès lors, estime-t-elle, la Cour a compétence pour déterminer si l'Uruguay s'est conformé aux obligations lui incombant en vertu de certaines conventions internationales.

54. La Cour se penchera donc maintenant sur la question de savoir si la compétence que lui confère l'article 60 du statut de 1975 couvre également les obligations des Parties découlant d'accords internationaux et du droit international général invoqués par l'Argentine, et sur le rôle de ces accords et du droit international général dans le contexte de la présente affaire.

55. L'Argentine affirme que le droit applicable au différend dont la Cour est saisie est le statut de 1975, complété pour son application et son interprétation par divers principes coutumiers et traités en vigueur entre les Parties, auxquels le statut renvoie. Se fondant sur la règle d'interprétation des traités énoncée à l'article 31, paragraphe 3, alinéa *c)*, de la convention de Vienne sur le droit des traités, l'Argentine soutient notamment que le statut de 1975 doit être interprété à la lumière des principes qui règlent le droit des cours d'eau internationaux et des principes du droit international assurant la protection de l'environnement. Elle affirme que l'interprétation du statut de 1975 doit tenir compte de toute «règle pertinente» de droit international applicable dans les relations entre les Parties, pour rester d'actualité et refléter l'évolution des normes environnementales. L'Argentine mentionne à ce titre les principes de l'utilisation équitable, raisonnable et non dommageable des cours d'eau internationaux, les principes de développement durable, de prévention et de précaution, et la nécessité de conduire une évaluation de l'impact sur l'environnement. Elle soutient que ces règles et principes servent à l'interpréta-

that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction. Even if bad odours were to be subsumed under the issue of air pollution, which will be addressed in paragraphs 263 and 264 below, the Court notes that Argentina has submitted no evidence as to any relationship between the alleged bad odours and the aquatic environment of the river.

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as "referral clauses", Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 *(c)* of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all "relevant rules" of international law applicable in the relations between the Parties, so that the Statute's interpretation remains current and evolves in accordance with changes in environmental standards. In this connection Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles

tion dynamique du statut de 1975, bien qu'ils ne viennent pas se substituer à celui-ci ni en amoindrir la portée.

56. L'Argentine considère de plus que la Cour doit faire respecter les obligations conventionnelles liant les Parties auxquelles renvoient les articles premier et 41, alinéa *a)*, du statut de 1975. Elle soutient que les «clauses de renvoi» contenues dans ces articles permettent l'incorporation et l'application d'obligations découlant d'autres traités et engagements internationaux liant les Parties. A cet effet, l'Argentine mentionne la convention de 1973 sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction (ci-après dénommée la «convention CITES»), la convention de Ramsar de 1971 sur les zones humides d'importance internationale (ci-après dénommée la «convention de Ramsar»), la convention des Nations Unies de 1992 sur la diversité biologique (ci-après dénommée la «convention sur la diversité biologique») et la convention de Stockholm de 2001 sur les polluants organiques persistants (ci-après dénommée la «convention POP»). Selon elle, ces obligations conventionnelles s'ajoutent aux droits et obligations découlant du statut de 1975, et il convient, lors de l'examen de l'application de celui-ci, de s'assurer qu'elles ont bien été respectées. L'Argentine soutient que ce n'est qu'en cas de «dispositions plus précises du statut [de 1975] *(lex specialis)*» y dérogeant que les instruments auxquels le statut renvoie ne devraient pas être appliqués.

57. L'Uruguay considère de même que l'interprétation du statut de 1975 doit se faire à la lumière du droit international général, et constate l'accord des Parties à cet égard. Il soutient toutefois que l'interprétation qu'il développe est conforme aux différents principes généraux du droit des cours d'eau internationaux et du droit de l'environnement, même s'il a de ces principes une compréhension qui n'est pas tout à fait la même que celle de l'Argentine. L'Uruguay estime que la question de savoir si les articles premier et 41, alinéa *a)*, du statut de 1975 peuvent être compris comme renvoyant à d'autres traités en vigueur entre les Parties est dépourvue de pertinence en l'espèce, soit que les conventions invoquées par l'Argentine seraient sans pertinence, soit qu'aucune violation d'autres obligations conventionnelles ne pourrait lui être reprochée. En tout état de cause, la Cour serait sans compétence pour statuer sur des allégations de violations d'obligations internationales non prévues par le statut de 1975.

58. La Cour examinera d'abord la question de savoir si les articles premier et 41, alinéa *a)*, peuvent être interprétés comme incorporant dans le statut de 1975 les obligations incombant aux Parties en vertu des différents traités multilatéraux sur lesquels l'Argentine fait fond.

59. L'article premier du statut de 1975 se lit comme suit:

> «Les parties adoptent le présent statut, conformément aux dispositions de l'article 7 du traité relatif à la frontière sur l'Uruguay du 7 avril 1961, à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay, dans le strict

are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties' treaty obligations referred to in Articles 1 and 41 *(a)* of the 1975 Statute. Argentina maintains that the "referral clauses" contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"), the 1992 United Nations Convention on Biological Diversity (hereinafter the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the "POPs Convention"). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where "more specific rules of the [1975] Statute *(lex specialis)*" derogate from them that the instruments to which the Statute refers should not be applied.

57. Uruguay likewise considers that the 1975 Statute must be interpreted in the light of general international law and it observes that the Parties concur on this point. It maintains however that its interpretation of the 1975 Statute accords with the various general principles of the law of international watercourses and of international environmental law, even if its understanding of these principles does not entirely correspond to that of Argentina. Uruguay considers that whether Articles 1 and 41 *(a)* of the 1975 Statute can be read as a referral to other treaties in force between the Parties has no bearing in the present case, because conventions relied on by Argentina are either irrelevant, or Uruguay cannot be found to have violated any other conventional obligations. In any event, the Court would lack jurisdiction to rule on alleged breaches of international obligations which are not contained in the 1975 Statute.

58. The Court will first address the issue whether Articles 1 and 41 *(a)* can be read as incorporating into the 1975 Statute the obligations of the Parties under the various multilateral conventions relied upon by Argentina.

59. Article 1 of the 1975 Statute reads as follows:

> "The parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, in order to establish the joint machinery necessary for the optimum and rational utilization

> respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties.» (*RTNU*, vol. 1295, n° I-21425, p. 348; note de bas de page omise.)

L'article premier définit le but du statut de 1975: les Parties l'ont conclu à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay. L'article contient certes une référence aux «droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties», mais l'on ne saurait en déduire que les Parties cherchaient à faire du respect des obligations qu'elles tenaient d'autres traités l'un des devoirs leur incombant en vertu du statut de 1975; la référence à d'autres traités met plutôt l'accent sur le fait que l'adoption du statut intervient conformément aux dispositions de l'article 7 du traité de 1961 *et* «*dans le strict respect* des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties» (les italiques sont de la Cour). Si la conjonction «et» n'apparaît pas dans les traductions anglaise et française du statut de 1975, telles que publiées dans le *Recueil des traités des Nations Unies* (*ibid.*, p. 340 et 348), elle figure dans la version espagnole, qui est celle faisant foi. Le texte espagnol se lit comme suit:

> «Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes.» (*Ibid.*, p. 332; les italiques sont de la Cour.)

La présence de la conjonction dans le texte espagnol donne à penser que la clause relative au «strict respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties» est liée, et doit être rattachée, à la première partie de l'article premier («[l]es parties adoptent le présent statut, conformément aux dispositions de l'article 7 du traité relatif à la frontière sur l'Uruguay»).

60. Une autre observation s'impose en ce qui concerne le texte de l'article premier du statut de 1975. Celui-ci mentionne les «traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties» («tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes» dans l'original espagnol; les italiques sont de la Cour). Dans sa traduction anglaise, ce passage se lit «treaties and other international agreements in force for *each* of the parties» (les italiques sont de la Cour).

Le fait que l'article premier n'exige pas que les «traités et autres enga-

> of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties." (*UNTS*, Vol. 1295, No. I-21425, p. 340; footnote omitted.)

Article 1 sets out the purpose of the 1975 Statute. The Parties concluded it in order to establish the joint machinery necessary for the rational and optimum utilization of the River Uruguay. It is true that this article contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties". This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty *and* "*in strict observance* of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). While the conjunction "and" is missing from the English and French translations of the 1975 Statute, as published in the *United Nations Treaty Series* (*ibid.*, p. 340 and p. 348), it is contained in the Spanish text of the Statute, which is the authentic text and reads as follows:

> "Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes." (*Ibid.*, p. 332; emphasis added.)

The presence of the conjunction in the Spanish text suggests that the clause "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" is linked to and is to be read with the first part of Article 1, i.e., "[t]he parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay".

60. There is one additional element in the language of Article 1 of the 1975 Statute which should be noted. It mentions "treaties and other international agreements in force for *each* of the parties" (in Spanish original "tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes"; emphasis added). In the French translation, this part of Article 1 reads "traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties" (emphasis added).

The fact that Article 1 does not require that the "treaties and other

gements internationaux» soient en vigueur entre les *deux* parties indique ainsi clairement que le statut de 1975 tient compte des engagements antérieurs pertinents de chacune des parties.

61. L'article 41 du statut de 1975, dont l'alinéa *a)* constitue, pour l'Argentine, une autre «clause de renvoi» incorporant dans le statut les obligations découlant d'engagements internationaux, se lit comme suit:

> «Sans préjudice des fonctions assignées à la commission en la matière, les parties s'obligent:
>
> *a)* à protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution *en établissant [l]es normes et en adoptant les mesures appropriées, conformément* aux accords internationaux applicables et, le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux;
>
> *b)* à ne pas abaisser, dans leurs systèmes juridiques respectifs:
>
> 1) les normes techniques en vigueur pour prévenir la pollution des eaux, et
> 2) les pénalités établies pour les infractions;
>
> *c)* à s'informer mutuellement des normes qu'elles se proposent d'établir en matière de pollution des eaux, en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.» (Les italiques sont de la Cour.)

62. La Cour fait observer que les mots «adoptant ... appropriées» [«adopting appropriate»] ne figurent pas dans la version anglaise, alors qu'ils sont présents dans le texte original espagnol («dictando las normas y adoptando las medidas apropiadas»). Pour la Cour, qui s'appuie sur le texte original espagnol, il est difficile de voir comment cette disposition pourrait être interprétée comme une clause de renvoi ayant pour effet d'incorporer dans le champ d'application du statut de 1975 les obligations des parties découlant des accords internationaux et autres normes visées.

La clause figurant à l'alinéa *a)* de l'article 41 a pour but la protection et la préservation du milieu aquatique, chacune des parties devant à cet effet édicter des normes et adopter des mesures appropriées. L'alinéa *a)* de l'article 41 distingue entre les accords internationaux applicables, d'une part, et les directives et recommandations des organismes techniques internationaux, d'autre part. Les premiers sont juridiquement contraignants et, par conséquent, les normes et réglementations édictées en droit interne et les mesures adoptées par les Etats doivent leur être conformes; les secondes, qui ne lient pas formellement les Etats, doivent être prises en compte par ces derniers, pour autant qu'elles sont pertinentes, de manière que les mesures, les normes et les réglementations internes adoptées soient compatibles («con adecuación») avec ces directives et recommandations. L'article 41, toutefois, n'incorpore pas dans le statut de 1975 les accords internationaux en tant que tels, mais impose aux

international agreements" should be in force between the *two* parties thus clearly indicates that the 1975 Statute takes account of the prior commitments of each of the parties which have a bearing on it.

61. Article 41 of the 1975 Statute, paragraph *(a)* of which Argentina considers as constituting another "referral clause" incorporating the obligations under international agreements into the Statute, reads as follows:

> "Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> *(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, *by prescribing appropriate rules and [adopting appropriate] measures in accordance* with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
>
> *(b)* not to reduce in their respective legal systems:
>
> 1) the technical requirements in force for preventing water pollution, and
> 2) the severity of the penalties established for violations;
>
> *(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems." (Emphasis added.)

62. The Court observes that the words "adopting appropriate" do not appear in the English translation while they appear in the original Spanish text ("dictando las normas y adoptando las medidas apropiadas"). Basing itself on the original Spanish text, it is difficult for the Court to see how this provision could be construed as a "referral clause" having the effect of incorporating the obligations of the parties under international agreements and other norms envisaged within the ambit of the 1975 Statute.

The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and

parties l'obligation d'exercer leurs pouvoirs de réglementation, en conformité avec les accords internationaux applicables, aux fins de la protection et de la préservation du milieu aquatique du fleuve Uruguay. Aux termes de l'alinéa *b)* de l'article 41, les normes mises en place pour prévenir la pollution des eaux et la sévérité des «pénalités» ne doivent pas être abaissées. Enfin, l'alinéa *c)* de l'article 41 concerne l'obligation faite à chacune des parties d'informer l'autre des normes qu'elle se propose d'établir en matière de pollution des eaux.

63. La Cour en conclut que rien, dans le texte de l'article 41 du statut de 1975, ne vient étayer la thèse selon laquelle cet article constituerait une «clause de renvoi». En conséquence, les différentes conventions multilatérales invoquées par l'Argentine ne sont pas, comme telles, incorporées dans le statut de 1975. Pour cette raison, elles ne relèvent pas de la clause compromissoire et la Cour n'a pas compétence pour trancher la question de savoir si l'Uruguay a rempli les obligations lui incombant en vertu de ces instruments.

64. La Cour examinera ensuite brièvement comment le statut de 1975 doit être interprété. Si les vues des Parties concordent en ce qui concerne l'origine du statut et le contexte historique dans lequel il s'insère, elles divergent quant à sa nature et à son économie générale ainsi que quant aux obligations de nature procédurale et de fond qu'il énonce.

Les Parties conviennent cependant que le statut de 1975 doit être interprété conformément aux règles de droit international coutumier relatives à l'interprétation des traités, telles que codifiées à l'article 31 de la convention de Vienne sur le droit des traités.

65. La Cour s'est référée à ces règles lorsqu'elle a été appelée à interpréter les dispositions de traités et d'accords internationaux conclus avant l'entrée en vigueur de la convention de Vienne en 1980 (voir, par exemple, les affaires du *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21, par. 41, et de l'*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1059, par. 18).

Le statut de 1975 est lui aussi un traité antérieur à l'entrée en vigueur de la convention de Vienne sur le droit des traités. Pour en interpréter les termes, la Cour se référera aux règles coutumières d'interprétation des traités telles qu'elles ressortent de l'article 31 de la convention de Vienne. Le statut de 1975 doit donc être «interprété de bonne foi suivant le sens ordinaire à attribuer [à ses] termes ... dans leur contexte et à la lumière de son objet et de son but». L'interprétation prendra aussi en compte, outre le contexte, «toute règle pertinente de droit international applicable dans les relations entre les parties».

66. La prise en considération, aux fins de l'interprétation du statut de 1975, des règles pertinentes de droit international applicables dans les relations entre les Parties, qu'il s'agisse de règles de droit international général ou de règles contenues dans les conventions multilatérales auxquelles les deux Etats sont parties, est toutefois sans incidence sur l'éten-

preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

63. The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18).

The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".

66. In the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties, whether these are rules of general international law or contained in multilateral conventions to which the two States are parties, nevertheless has no bearing on the scope of the jurisdiction conferred on the

due de la compétence conférée à la Cour en vertu de l'article 60 du statut de 1975, qui demeure circonscrite aux différends concernant l'interprétation ou l'application du statut.

* *

## III. La violation alléguée des obligations de nature procédurale

67. La requête déposée par l'Argentine le 4 mai 2006 porte sur la violation alléguée par l'Uruguay des obligations tant de nature procédurale que de fond prévues par le statut de 1975. La Cour commencera par examiner la violation alléguée des obligations de nature procédurale prévues par les articles 7 à 12 du statut de 1975 au sujet des projets relatifs aux usines CMB (ENCE) et Orion (Botnia), ainsi qu'aux installations connexes de cette dernière, sur la rive gauche du fleuve Uruguay, près de la ville de Fray Bentos.

68. L'Argentine considère que les obligations de nature procédurale sont intrinsèquement liées aux obligations de fond prévues par le statut de 1975, et qu'un manquement aux premières entraîne un manquement aux secondes.

S'agissant des obligations de nature procédurale, elles constitueraient, selon l'Argentine, un ensemble intégré et indissociable, au sein duquel la CARU jouerait, en tant qu'organisation, un rôle essentiel.

Il en découlerait, selon l'Argentine, que l'Uruguay ne pourrait invoquer d'autres arrangements procéduraux pour déroger aux obligations de nature procédurale prévues par le statut de 1975, en dehors du consentement des deux Parties.

69. A l'issue du mécanisme procédural prévu par ce statut, et faute d'accord entre les Parties, celles-ci n'auraient, selon l'Argentine, d'autre choix que de saisir la Cour, aux termes des articles 12 et 60 du statut, l'Uruguay ne pouvant procéder à la construction des usines projetées tant que la Cour n'aurait pas rendu son arrêt.

70. Dans le fil de l'argumentation avancée par le demandeur, la Cour examinera successivement les quatre points suivants: les liens entre les obligations de nature procédurale et les obligations de fond (A), les obligations de nature procédurale et leur articulation (B), la question de savoir si les Parties sont convenues de déroger aux obligations de nature procédurale prévues par le statut de 1975 (C) et les obligations de l'Uruguay au terme de la période de négociation (D).

### *A. Les liens entre les obligations de nature procédurale et les obligations de fond*

71. L'Argentine soutient que les dispositions de nature procédurale, prévues aux articles 7 à 12 du statut de 1975, ont pour objectif d'assurer

Court under Article 60 of the 1975 Statute, which remains confined to disputes concerning the interpretation or application of the Statute.

* *

## III. The Alleged Breach of Procedural Obligations

67. The Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute. The Court will start by considering the alleged breach of procedural obligations under Articles 7 to 12 of the 1975 Statute, in relation to the (CMB) ENCE and Orion (Botnia) mill projects and the facilities associated with the latter, on the left bank of the River Uruguay near the city of Fray Bentos.

68. Argentina takes the view that the procedural obligations were intrinsically linked to the substantive obligations laid down by the 1975 Statute, and that a breach of the former entailed a breach of the latter.

With regard to the procedural obligations, these are said by Argentina to constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role.

Consequently, according to Argentina, Uruguay could not invoke other procedural arrangements so as to derogate from the procedural obligations laid down by the 1975 Statute, except by mutual consent.

69. Argentina argues that, at the end of the procedural mechanism provided for by the 1975 Statute, and in the absence of agreement between the Parties, the latter have no choice but to submit the matter to the Court under the terms of Articles 12 and 60 of the Statute, with Uruguay being unable to proceed with the construction of the planned mills until the Court has delivered its Judgment.

70. Following the lines of the argument put forward by the Applicant, the Court will examine in turn the following four points: the links between the procedural obligations and the substantive obligations (A); the procedural obligations and their interrelation with each other (B); whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (C); and Uruguay's obligations at the end of the negotiation period (D).

### *A. The Links between the Procedural Obligations and the Substantive Obligations*

71. Argentina maintains that the procedural provisions laid down in Articles 7 to 12 of the 1975 Statute are aimed at ensuring "the optimum

«l'utilisation rationnelle et optimale du fleuve» (article premier), au même titre que les dispositions relatives à l'utilisation des eaux, à la conservation, à l'utilisation et à l'exploitation d'autres ressources naturelles, à la pollution et à la recherche. L'objectif serait également d'empêcher que les Parties ne puissent agir unilatéralement et sans égard aux utilisations antérieures ou actuelles du fleuve. Toute méconnaissance de ces mécanismes entraînerait dès lors, selon l'Argentine, une atteinte à l'objet et au but du statut de 1975; en effet, «l'utilisation rationnelle et optimale du fleuve» ne serait pas assurée, car celle-ci ne pourrait se réaliser que conformément aux procédures établies par le statut.

72. Il s'ensuivrait, selon l'Argentine, qu'une violation des obligations de nature procédurale entraînerait automatiquement celle des obligations de fond, dans la mesure où les deux catégories d'obligations sont indivisibles. Une telle position trouverait un appui dans l'ordonnance de la Cour du 13 juillet 2006, selon laquelle le statut de 1975 a créé «un régime complet».

73. L'Uruguay considère également que les obligations de nature procédurale sont destinées à faciliter la mise en œuvre des obligations de fond car les premières constituent un moyen et non une fin. Il souligne, de même, que l'article premier du statut de 1975 définit l'objet et le but de celui-ci.

74. Mais l'Uruguay rejette, comme artificielle, l'argumentation de l'Argentine, en ce qu'elle tend à confondre les questions de procédure et de fond dans le but de faire croire que la violation des obligations de nature procédurale se traduirait nécessairement par celle des obligations de fond. Il appartiendrait à la Cour, selon l'Uruguay, d'apprécier la violation, en elle-même, de chacune de ces catégories d'obligations et d'en tirer les conséquences qui s'imposent dans chaque cas en matière de responsabilité et de réparation.

75. La Cour relève que l'objet et le but du statut de 1975, inscrits à l'article premier, consistent, pour les Parties, à parvenir à «l'utilisation rationnelle et optimale du fleuve Uruguay» au moyen des «mécanismes communs» de coopération, constitués aussi bien par la CARU que par les dispositions de nature procédurale des articles 7 à 12 du statut.

La Cour a souligné à ce propos, dans son ordonnance du 13 juillet 2006, qu'une telle utilisation devrait permettre un développement durable qui tienne compte «de la nécessité de garantir la protection continue de l'environnement du fleuve ainsi que le droit au développement économique des Etats riverains» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 80).

76. Dans l'affaire *Gabčíkovo-Nagymaros*, la Cour, après avoir rappelé que «[l]e concept de développement durable traduit bien cette nécessité de concilier développement économique et protection de l'environnement», a ajouté que «[c]e sont les Parties elles-mêmes qui doivent trouver d'un commun accord une solution qui tienne compte des objectifs du

and rational utilization of the [r]iver" (Article 1), just as are the provisions concerning use of water, the conservation, utilization and development of other natural resources, pollution and research. The aim is also said to be to prevent the Parties from acting unilaterally and without regard for earlier or current uses of the river. According to Argentina, any disregarding of this machinery would therefore undermine the object and purpose of the 1975 Statute; indeed the "optimum and rational utilization of the [r]iver" would not be ensured, as this could only be achieved in accordance with the procedures laid down under the Statute.

72. It follows, according to Argentina, that a breach of the procedural obligations automatically entails a breach of the substantive obligations, since the two categories of obligations are indivisible. Such a position is said to be supported by the Order of the Court of 13 July 2006, according to which the 1975 Statute created "a comprehensive régime".

73. Uruguay similarly takes the view that the procedural obligations are intended to facilitate the performance of the substantive obligations, the former being a means rather than an end. It too points out that Article 1 of the 1975 Statute defines its object and purpose.

74. However, Uruguay rejects Argentina's argument as artificial, since it appears to mix procedural and substantive questions with the aim of creating the belief that the breach of procedural obligations necessarily entails the breach of substantive ones. According to Uruguay, it is for the Court to determine the breach, in itself, of each of these categories of obligations, and to draw the necessary conclusions in each case in terms of responsibility and reparation.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 80).

76. In the *Gabčikovo-Nagymaros* case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", added that "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty" (*Gabčíkovo-*

traité» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140 et 141).

77. La Cour estime que c'est en coopérant que les Etats concernés peuvent gérer en commun les risques de dommages à l'environnement qui pourraient être générés par les projets initiés par l'un ou l'autre d'entre eux, de manière à prévenir les dommages en question, à travers la mise en œuvre des obligations tant de nature procédurale que de fond prévues par le statut de 1975. Cependant, alors que les obligations de fond sont libellées le plus souvent en termes généraux, les obligations de nature procédurale sont plus circonscrites et précises afin de faciliter la mise en œuvre du statut à travers une concertation permanente entre les parties concernées. La Cour a qualifié le régime institué par le statut de 1975 de «régime complet et novateur» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 81), dans la mesure où les deux catégories d'obligations susmentionnées se complètent parfaitement, afin que les parties puissent réaliser l'objet du statut tel qu'elles l'ont fixé en son article premier.

78. La Cour note que le statut de 1975 a créé la CARU et mis en place des procédures en liaison avec cette institution, afin que les parties puissent s'acquitter de leurs obligations de fond. Mais le statut n'indique nulle part qu'une partie pourrait s'acquitter de ses obligations de fond en respectant seulement ses obligations de nature procédurale, ni qu'une violation des obligations de nature procédurale emporterait automatiquement celle des obligations de fond.

De même, ce n'est pas parce que les parties auraient respecté leurs obligations de fond qu'elles seraient censées avoir respecté *ipso facto* leurs obligations de nature procédurale, ou qu'elles seraient dispensées de le faire. D'ailleurs, le lien entre ces deux catégories d'obligations peut être rompu, dans les faits, lorsqu'une partie qui n'aurait pas respecté ses obligations de nature procédurale renoncerait ensuite à la réalisation de l'activité projetée.

79. La Cour considère, en conséquence de ce qui précède, qu'il existe certes un lien fonctionnel, relatif à la prévention, entre les deux catégories d'obligations prévues par le statut de 1975, mais que ce lien n'empêche pas que les Etats parties soient appelés à répondre séparément des unes et des autres, selon leur contenu propre, et à assumer, s'il y a lieu, la responsabilité qui découlerait, selon le cas, de leur violation.

### *B. Les obligations de nature procédurale et leur articulation*

80. Le statut de 1975 prévoit à la charge de la partie qui projette certaines activités, énumérées au premier alinéa de l'article 7, des obligations de nature procédurale dont le contenu, l'articulation et les délais sont précisés aux articles 7 à 12 comme suit:

*Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, paras. 140-141).

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

78. The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.

Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

79. The Court considers, as a result of the above, that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

### *B. The Procedural Obligations and Their Interrelation*

80. The 1975 Statute imposes on a party which is planning certain activities, set out in Article 7, first paragraph, procedural obligations whose content, interrelation and time-limits are specified as follows in Articles 7 to 12:

«*Article 7*

La partie qui projette de construire de nouveaux chenaux, de modifier ou d'altérer de manière significative les chenaux existants ou de réaliser tous autres ouvrages suffisamment importants pour affecter la navigation, le régime du fleuve ou la qualité de ses eaux, en informe la commission administrative, laquelle détermine sommairement, dans un délai maximum de 30 jours, si le projet peut causer un préjudice sensible à l'autre partie.

S'il en est ainsi décidé ou si une décision n'intervient pas à cet égard, la partie intéressée notifie le projet à l'autre partie par l'intermédiaire de la commission.

La notification énonce les aspects essentiels de l'ouvrage et, le cas échéant, son mode de fonctionnement et les autres données techniques permettant à la partie à laquelle la notification est adressée d'évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux.

*Article 8*

La partie notifiée dispose d'un délai de 180 jours pour se prononcer sur le projet, à compter du jour où sa délégation à la commission a reçu la notification.

Au cas où la notification mentionnée à l'article 7 serait incomplète, la partie notifiée disposera de 30 jours pour le faire savoir, par l'intermédiaire de la commission, à la partie qui projette de construire l'ouvrage.

Le délai de 180 jours susmentionné commence à courir à partir du jour où la délégation de la partie notifiée a reçu la documentation complète.

Ce délai peut être prorogé de façon raisonnable par la commission si la complexité du projet l'exige.

*Article 9*

Si la partie notifiée ne formule pas d'objections ou ne répond pas dans le délai prévu à l'article 8, l'autre partie peut construire ou autoriser la construction de l'ouvrage projeté.

*Article 10*

La partie notifiée a le droit d'inspecter les ouvrages en construction pour vérifier s'ils sont conformes au projet présenté.

*Article 11*

Si la partie notifiée aboutit à la conclusion que l'exécution de l'ouvrage ou le programme d'opérations peut causer un préjudice sensible à la navigation, au régime du fleuve ou à la qualité de ses eaux, elle en informe l'autre partie par l'intermédiaire de la commission dans le délai de 180 jours fixé à l'article 8.

La communication précise quels sont les aspects de l'ouvrage ou

"*Article 7*

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters.

*Article 8*

The notified party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification.

Should the documentation referred to in Article 7 be incomplete, the notified party shall have 30 days in which to so inform, through the Commission, the party which plans to carry out the work.

The period of 180 days mentioned above shall begin on the date on which the delegation of the notified party receives the full documentation.

This period may be extended at the discretion of the Commission if the complexity of the plan so requires.

*Article 9*

If the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned.

*Article 10*

The notified party shall have the right to inspect the works being carried out in order to determine whether they conform to the plan submitted.

*Article 11*

Should the notified party come to the conclusion that the execution of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, it shall so notify the other party, through the Commission, within the period of 180 days established in Article 8.

Such notification shall specify which aspects of the work or the

du programme d'opérations qui peuvent causer un préjudice sensible à la navigation, au régime du fleuve ou à la qualité de ses eaux, les raisons techniques qui permettent d'arriver à cette conclusion et les modifications qu'elle suggère d'apporter au projet ou au programme d'opérations.

*Article 12*

Si les parties n'aboutissent pas à un accord dans un délai de 180 jours à compter de la communication visée à l'article 11, la procédure indiquée au chapitre XV est applicable.»

81. L'original espagnol de l'article 7 du statut de 1975 se lit ainsi:

«La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas.»

La Cour relève que, comme l'original espagnol, la traduction française de cet article (voir paragraphe 80 ci-dessus) distingue l'obligation d'informer («comunicar») la CARU au sujet des projets entrant dans son champ d'application (premier alinéa) de celle de les notifier («notificar») à l'autre partie (deuxième alinéa). En revanche, la traduction anglaise utilise indistinctement le verbe «notify» au sujet de ces deux obligations. Afin de se conformer au texte original espagnol, la Cour utilisera dans les deux versions linguistiques du présent arrêt le verbe «informer» pour l'obligation prescrite par le premier alinéa de l'article 7 et le verbe «notifier» pour celle des deuxième et troisième alinéas.

La Cour considère que les obligations d'informer, de notifier et de négocier constituent un moyen approprié, accepté par les Parties, de parvenir à l'objectif qu'elles se sont fixé à l'article premier du statut de 1975. Ces obligations s'avèrent d'autant plus indispensables lorsqu'il s'agit, comme dans le cas du fleuve Uruguay, d'une ressource partagée qui ne peut être protégée que par le biais d'une coopération étroite et continue entre les riverains.

82. Selon l'Argentine, en ne respectant pas la première obligation (premier alinéa de l'article 7 du statut) de saisine de la CARU, l'Uruguay a

programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations.

*Article 12*

Should the parties fail to reach agreement within 180 days following the notification referred to in Article 11, the procedure indicated in Chapter XV shall be followed."

81. The original Spanish text of Article 7 of the 1975 Statute reads as follows:

"La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas."

The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform ("comunicar") CARU of any plan falling within its purview (first paragraph) and the obligation to notify ("notificar") the other party (second paragraph). By contrast, the English translation uses the same verb "notify" in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb "inform" for the obligation set out in the first paragraph of Article 7 and the verb "notify" for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

82. According to Argentina, by failing to comply with the initial obligation (Article 7, first paragraph, of the 1975 Statute) to refer the matter

mis en échec l'ensemble des procédures prévues aux articles 7 à 12 du statut. Par ailleurs, en ne lui notifiant pas les projets des usines CMB (ENCE) et Orion (Botnia), par l'intermédiaire de la CARU, avec toute la documentation nécessaire, l'Uruguay n'aurait pas respecté les deuxième et troisième alinéas de l'article 7. L'Argentine ajoute que des contacts informels qu'elle-même ou la CARU ont pu avoir avec les sociétés concernées ne peuvent tenir lieu de saisine de la CARU et de notification des projets par l'intermédiaire de cette commission. L'Argentine en conclut que l'Uruguay a violé l'ensemble des obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut.

L'Uruguay, de son côté, considère que la saisine de la CARU n'est pas aussi contraignante que le soutient l'Argentine et que les parties peuvent convenir, d'un commun accord, d'emprunter d'autres voies, en recourant à d'autres arrangements de nature procédurale, pour engager la coopération entre elles. Il en déduit qu'il n'a pas enfreint les obligations de nature procédurale prévues par le statut, même s'il s'en est acquitté sans suivre à la lettre le processus formel qui y est décrit.

83. La Cour examinera d'abord la nature et le rôle de la CARU, puis se penchera sur la question de savoir si l'Uruguay a respecté son obligation d'informer la CARU de ses projets et celle de les notifier à l'Argentine.

*1. La nature et le rôle de la CARU*

84. L'Uruguay estime que la CARU, au même titre que les autres commissions fluviales, n'est pas un organisme doté d'une volonté autonome, mais plutôt un mécanisme établi pour faciliter la coopération entre les Parties. Il ajoute que les Etats qui ont créé ces commissions fluviales sont libres de s'écarter du mécanisme commun, lorsque cela sert leurs objectifs, et qu'ils le font souvent. Selon l'Uruguay, dès lors que la CARU n'est pas habilitée à agir en dehors de la volonté des Parties, celles-ci sont libres de faire directement ce qu'elles avaient décidé de faire par l'intermédiaire de cette commission, et elles peuvent convenir notamment de ne pas l'informer ainsi que cela est prévu à l'article 7 du statut de 1975. L'Uruguay affirme que c'est précisément ce qui s'est passé dans le cas d'espèce : les deux Etats se sont entendus pour se dispenser de l'examen sommaire de la CARU et passer immédiatement à des entretiens directs.

85. Pour l'Argentine, en revanche, le statut de 1975 n'est pas un simple traité bilatéral imposant des obligations synallagmatiques aux parties ; il institutionnalise une coopération permanente et étroite, dont la CARU est l'élément central et incontournable. La CARU constitue, de l'avis de l'Argentine, l'organe clef de coordination entre les parties dans à peu près tous les domaines couverts par le statut. En ne s'acquittant pas de ses obligations à cet égard, l'Uruguay remettrait profondément en question le statut de 1975.

86. La Cour rappelle qu'elle a déjà qualifié la CARU de

to CARU, Uruguay frustrated all the procedures laid down in Articles 7 to 12 of the Statute. In addition, by failing to notify Argentina of the plans for the CMB (ENCE) and Orion (Botnia) mills, through CARU, with all the necessary documentation, Uruguay is said not to have complied with Article 7, second and third paragraphs. Argentina adds that informal contacts which it or CARU may have had with the companies in question cannot serve as a substitute for Uruguay referring the matter to CARU and notifying Argentina of the projects through the Commission. Argentina concludes that Uruguay has breached all of its procedural obligations under the terms of Articles 7 to 12 of the 1975 Statute.

Uruguay, for its part, considers that referring the matter to CARU does not impose so great a constraint as Argentina contends and that the parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation. It concludes from this that it has not breached the procedural obligations laid down by the 1975 Statute, even if it has performed them without following to the letter the formal process set out therein.

83. The Court will first examine the nature and role of CARU, and then consider whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

*1. The nature and role of CARU*

84. Uruguay takes the view that CARU, like other river commissions, is not a body with autonomous powers, but rather a mechanism established to facilitate co-operation between the Parties. It adds that the States which have created these river commissions are free to go outside the joint mechanism when it suits their purposes, and that they often do so. According to Uruguay, since CARU is not empowered to act outside the will of the Parties, the latter are free to do directly what they have decided to do through the Commission, and in particular may agree not to inform it in the manner provided for in Article 7 of the 1975 Statute. Uruguay maintains that that is precisely what happened in the present case: the two States agreed to dispense with the preliminary review by CARU and to proceed immediately to direct negotiations.

85. For Argentina, on the other hand, the 1975 Statute is not merely a bilateral treaty imposing reciprocal obligations on the parties; it establishes an institutional framework for close and ongoing co-operation, the core and essence of which is CARU. For Argentina, CARU is the key body for co-ordination between the Parties in virtually all areas covered by the 1975 Statute. By failing to fulfil its obligations in this respect, Uruguay is said to be calling the 1975 Statute fundamentally into question.

86. The Court recalls that it has already described CARU as

> «mécanisme commun doté de fonctions réglementaires, administratives, techniques, de gestion et de conciliation…, à laquelle a été confiée la bonne application des dispositions du statut de 1975 régissant la gestion des ressources fluviales partagées, ... mécanisme ... [qui] occupe une place très importante dans le régime de ce traité» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133-134, par. 81).

87. La Cour relève tout d'abord que, conformément à l'article 50 du statut de 1975, la CARU «jouit de la personnalité juridique dans l'accomplissement de son mandat» et que les parties audit statut se sont engagées à lui attribuer «les ressources nécessaires, ainsi que tous les éléments et facilités indispensables à son fonctionnement». Il en découle que, loin d'être une simple courroie de transmission entre les parties, la CARU a une existence propre et permanente; elle exerce des droits et est tenue à des devoirs pour s'acquitter des fonctions qui lui sont conférées par le statut de 1975.

88. Certes, les décisions de la commission doivent être adoptées d'un commun accord par les deux riverains (article 55), mais leur préparation et leur mise en œuvre relèvent d'un secrétariat dont les fonctionnaires jouissent de privilèges et d'immunités. D'autre part, la CARU peut décentraliser ses différentes fonctions en créant les organes subsidiaires qui lui sont nécessaires (article 52).

89. La Cour observe que, comme toute organisation internationale dotée de la personnalité juridique, la CARU est habilitée à exercer les compétences qui lui sont reconnues par le statut de 1975 et qui sont nécessaires à la réalisation de l'objet et du but de celui-ci, soit «l'utilisation rationnelle et optimale du fleuve» (article premier). Ainsi que la Cour l'a souligné,

> «[l]es organisations internationales sont régies par «le principe de spécialité», c'est-à-dire dotées par les Etats qui les créent de compétences d'attribution dont les limites sont fonction des intérêts communs que ceux-ci leur donnent pour mission de promouvoir» (*Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 78, par. 25).

Cela est naturellement vrai aussi pour les organisations qui, comme la CARU, ne comportent que deux Etats membres.

90. La CARU servant de cadre de concertation entre les parties, notamment pour les projets d'ouvrages envisagés au premier alinéa de l'article 7 du statut de 1975, aucune d'entre elles ne peut sortir unilatéralement et au moment qu'elle juge opportun de ce cadre et lui substituer d'autres canaux de communication. En créant la CARU et en la dotant de tous les moyens nécessaires à son fonctionnement, les parties ont entendu donner les meilleures garanties de stabilité, de continuité et

> "a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; . . . [a] mechanism [which] constitutes a very important part of that treaty régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 133-134, para. 81).

87. The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

88. While the decisions of the Commission must be adopted by common accord between the riparian States (Article 55), these are prepared and implemented by a secretariat whose staff enjoy privileges and immunities. Moreover, CARU is able to decentralize its various functions by setting up whatever subsidiary bodies it deems necessary (Article 52).

89. The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1). As the Court has pointed out,

> "[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25).

This also applies of course to organizations, which like CARU, only have two member States.

90. Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effective-

d'efficacité à leur volonté de coopérer à «l'utilisation rationnelle et optimale du fleuve».

91. C'est pour cette raison que la CARU joue un rôle central dans le statut de 1975 et ne peut être réduite à un simple mécanisme facultatif mis à la disposition des parties que chacune d'entre elles pourrait utiliser à sa guise. La CARU intervient à tous les niveaux de l'utilisation du fleuve, qu'il s'agisse de la prévention des dommages transfrontières susceptibles de découler des activités projetées; de l'utilisation des eaux, au sujet de laquelle elle reçoit les rapports des parties et vérifie si la somme des utilisations ne cause pas un préjudice sensible (articles 27 et 28); de la prévention de la modification de l'équilibre écologique (article 36); des études et des recherches de caractère scientifique effectuées par une partie dans la juridiction de l'autre (article 44); de l'exercice du droit de police (article 46) et du droit de navigation (article 48).

92. Par ailleurs, la CARU a reçu comme fonction d'édicter des normes réglementaires dans un grand nombre de domaines liés à la gestion commune du fleuve et énumérés à l'article 56 du statut de 1975. Enfin, la commission peut servir d'instance de conciliation pour tout litige né entre les parties, sur proposition de l'une d'entre elles (article 58).

93. Dès lors, la Cour considère que, de par l'ampleur et la diversité des fonctions qu'elles ont confiées à la CARU, les Parties ont entendu faire de cette organisation internationale un élément central dans l'accomplissement de leurs obligations de coopérer édictées par le statut de 1975.

### *2. L'obligation de l'Uruguay d'informer la CARU*

94. La Cour note que l'obligation de l'Etat d'origine de l'activité projetée d'informer la CARU constitue la première étape de l'ensemble du mécanisme procédural qui permet aux deux parties de réaliser l'objet du statut de 1975, à savoir «l'utilisation rationnelle et optimale du fleuve Uruguay». Cette étape, prévue au premier alinéa de l'article 7, consiste, pour l'Etat d'origine de l'activité projetée, à en informer la CARU pour que celle-ci puisse déterminer «sommairement», dans un délai maximum de trente jours, si le projet peut causer un préjudice sensible à l'autre partie.

95. Pour que le reste de la procédure puisse se poursuivre, les deux parties ont posé comme conditions alternatives, dans le statut de 1975, que l'activité projetée par l'une soit susceptible, selon la CARU, de causer un préjudice sensible à l'autre, faisant naître à la charge de la première une obligation de prévention, afin d'éliminer ou de réduire au minimum le risque, en consultation avec la seconde; ou que la CARU, dûment informée, ne prenne pas de décision à ce sujet dans le délai prescrit.

96. La Cour constate que les deux Parties s'accordent à considérer que les deux usines projetées étaient des ouvrages suffisamment importants pour entrer dans le champ d'application de l'article 7 du statut de 1975

ness for their desire to co-operate in ensuring "the optimum and rational utilization of the River Uruguay".

91. That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river, whether concerning the prevention of transboundary harm that may result from planned activities; the use of water, on which it receives reports from the parties and verifies whether the developments taken together are liable to cause significant damage (Articles 27 and 28); the avoidance of any change in the ecological balance (Article 36); scientific studies and research carried out by one party within the jurisdiction of the other (Article 44); the exercise of the right of law enforcement (Article 46); or the right of navigation (Article 48).

92. Furthermore, CARU has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute. Lastly, at the proposal of either party, the Commission can act as a conciliation body in any dispute which may arise between the parties (Article 58).

93. Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

*2. Uruguay's obligation to inform CARU*

94. The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

95. To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

96. The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been

et, partant, pour que la CARU dût en être informée. Il en est de même pour le projet de construction du terminal portuaire de Fray Bentos à l'usage exclusif de l'usine Orion (Botnia), qui incluait des opérations de dragage et d'utilisation du lit du fleuve.

97. La Cour relève cependant que les Parties sont en désaccord sur l'existence d'une obligation d'informer la CARU au sujet du prélèvement et de l'utilisation, par l'usine Orion (Botnia), de l'eau du fleuve à des fins industrielles. L'Argentine estime que l'autorisation octroyée par le ministère du transport et des travaux publics uruguayen, le 12 septembre 2006, concerne une activité suffisamment importante («entidad suficiente») pour affecter le régime du fleuve ou la qualité de ses eaux, et que l'Uruguay aurait dû suivre, à ce sujet, la procédure prévue aux articles 7 à 12 du statut de 1975. Pour sa part, l'Uruguay soutient que cette activité fait partie intégrante de l'ensemble du projet de l'usine Orion (Botnia) et que le statut n'exige pas d'informer la CARU à chaque étape de l'avancement de l'ouvrage projeté.

98. La Cour relève que, si les Parties s'accordent pour reconnaître que la CARU devait être informée des deux projets d'usines et du projet de construction du terminal portuaire de Fray Bentos, elles s'opposent néanmoins quant au contenu de l'information qui devait être adressée à la CARU et quant au moment auquel elle devait avoir lieu.

99. L'Argentine a soutenu que le contenu de l'obligation d'information doit être déterminé à la lumière de l'objectif de celle-ci, soit la prévention des atteintes à la navigation, au régime du fleuve ou à la qualité des eaux. Le projet dont la CARU doit être informée peut, selon l'Argentine, n'être pas très avancé car il s'agit seulement de permettre à la commission de «déterminer sommairement» dans un délai très bref de trente jours si ce projet «peut causer un préjudice sensible à l'autre partie». Ce serait seulement dans la phase procédurale suivante que l'obligation d'informer serait plus complète. L'information de la CARU doit cependant, de l'avis de l'Argentine, intervenir préalablement à l'autorisation et à la construction d'un projet sur le fleuve Uruguay.

100. Reprenant les termes du premier alinéa de l'article 7 du statut de 1975, l'Uruguay en donne une autre interprétation, estimant que l'information prévue par cette disposition ne peut être transmise à la CARU aux tout premiers stades de la planification, car la commission ne pourrait disposer des éléments suffisants pour déterminer si le projet est susceptible ou non de causer un préjudice sensible à l'autre Etat. Pour cela, il faudrait, selon l'Uruguay, que le projet ait atteint un stade où l'on dispose à son sujet de toutes les informations techniques. L'Uruguay tend, comme la Cour y reviendra plus loin, à lier le contenu de l'information au moment où elle devrait être fournie, soit même après l'octroi par l'Etat concerné de l'autorisation environnementale préalable.

101. La Cour observe que le principe de prévention, en tant que règle coutumière, trouve son origine dans la diligence requise («due diligence») de l'Etat sur son territoire. Il s'agit de «l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits

informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the river bed.

97. However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill. Argentina takes the view that the authorization granted by the Uruguayan Ministry of Transport and Public Works on 12 September 2006 concerns an activity of sufficient importance ("entidad suficiente") to affect the régime of the river or the quality of its waters and that, in this matter, Uruguay should have followed the procedure laid down in Articles 7 to 12 of the 1975 Statute. For its part, Uruguay maintains that this activity forms an integral part of the Orion (Botnia) mill project as a whole, and that the 1975 Statute does not require CARU to be informed of each step in furtherance of the planned works.

98. The Court points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

99. Argentina has argued that the content of the obligation to inform must be determined in the light of its objective, which is to prevent threats to navigation, the régime of the river or the quality of the waters. According to Argentina, the plan which CARU must be informed of may be at a very early stage, since it is simply a matter of allowing the Commission to "determine on a preliminary basis", within a very short period of 30 days, whether the plan "might cause significant damage to the other party". It is only in the following phase of the procedure that the substance of the obligation to inform is said to become more extensive. In Argentina's view, however, CARU must be informed prior to the authorization or implementation of a project on the River Uruguay.

100. Citing the terms of Article 7, first paragraph, of the 1975 Statute, Uruguay gives a different interpretation of it, taking the view that the requirement to inform CARU specified by this provision cannot occur in the very early stages of planning, because there could not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other State. For that, according to Uruguay, the project would have to have reached a stage where all the technical data on it are available. As the Court will consider further below, Uruguay seeks to link the content of the information to the time when it should be provided, which may even be after the State concerned has granted an initial environmental authorization.

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu*

d'autres Etats» (*Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 22). En effet, l'Etat est tenu de mettre en œuvre tous les moyens à sa disposition pour éviter que les activités qui se déroulent sur son territoire, ou sur tout espace relevant de sa juridiction, ne causent un préjudice sensible à l'environnement d'un autre Etat. La Cour a établi que cette obligation «fait maintenant partie du corps de règles du droit international de l'environnement» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29).

102. L'obligation d'informer la CARU permet, selon la Cour, de déclencher la coopération entre les Parties, nécessaire pour la mise en œuvre de l'obligation de prévention. Cette première étape procédurale a pour conséquence de soustraire à l'application du statut de 1975 les activités qui apparaîtraient ne causer un dommage qu'à l'Etat sur le territoire duquel elles s'exercent.

103. La Cour observe qu'en ce qui concerne le fleuve Uruguay, qui constitue une ressource partagée, le «préjudice sensible à l'autre partie» (premier alinéa de l'article 7 du statut de 1975) peut résulter d'une atteinte à la navigation, au régime du fleuve ou à la qualité de ses eaux. D'ailleurs, l'article 27 du statut de 1975 souligne que

> «[l]e droit de chaque partie d'utiliser les eaux du fleuve, à l'intérieur de sa juridiction, à des fins ménagères, sanitaires, industrielles et agricoles, s'exerce sans préjudice de l'application de la procédure prévue aux articles 7 à 12 lorsque cette utilisation est suffisamment importante pour affecter le régime du fleuve ou la qualité de ses eaux».

104. La Cour note que, conformément aux termes du premier alinéa de l'article 7 du statut de 1975, l'information qui doit être adressée à la CARU, à ce premier stade de la procédure, doit lui permettre de déterminer sommairement et rapidement si le projet peut causer un préjudice sensible à l'autre partie. Il s'agit à ce stade, pour la CARU, de décider si le projet relève ou non de la procédure de coopération prévue par le statut et non de se prononcer sur son impact réel sur le fleuve et la qualité des eaux. C'est ce qui explique, de l'avis de la Cour, la différence entre la terminologie du premier alinéa de l'article 7, relative à l'obligation d'informer la CARU, et celle du troisième alinéa de cet article, qui concerne le contenu de la notification qui doit être adressée à un stade ultérieur à l'autre partie et est destinée à «évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux».

105. La Cour considère que l'Etat qui projette les activités visées à l'article 7 du statut est tenu d'en informer la CARU dès qu'il est en possession d'un projet suffisamment élaboré pour permettre à la commission de déterminer sommairement, en application du premier alinéa de cette disposition, si cette activité risque de causer un préjudice sensible à l'autre partie. A ce stade, l'information fournie ne consistera pas nécessairement

*Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).

102. In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

103. The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates that:

> "[t]he right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

104. The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters. This explains, in the opinion of the Court, the difference between the terminology of the first paragraph of Article 7, concerning the requirement to inform CARU, and that of the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it "to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

105. The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not neces-

en une évaluation complète de l'impact sur l'environnement du projet, qui exige souvent davantage de temps et de moyens. Cela étant, si une information plus complète est disponible, elle doit bien entendu être transmise à la CARU, afin que celle-ci puisse procéder dans les meilleures conditions à son examen sommaire. En tout état de cause, l'obligation d'informer la CARU intervient à un stade où l'autorité compétente a été saisie du projet en vue de la délivrance de l'autorisation environnementale préalable, et avant la délivrance de ladite autorisation.

106. La Cour relève que, dans le cas d'espèce, l'Uruguay n'a pas transmis à la CARU l'information requise par le premier alinéa de l'article 7, concernant les usines CMB (ENCE) et Orion (Botnia), malgré les demandes qui lui avaient été adressées à plusieurs reprises par la commission, en particulier les 17 octobre 2002 et 21 avril 2003, au sujet de l'usine CMB (ENCE), et le 16 novembre 2004, au sujet de l'usine Orion (Botnia). L'Uruguay s'est contenté d'adresser à la CARU, le 14 mai 2003, un résumé de diffusion de l'évaluation de l'impact sur l'environnement concernant l'usine CMB (ENCE). La CARU a estimé ce document insuffisant et a demandé à nouveau à l'Uruguay, les 15 août 2003 et 12 septembre 2003, un complément d'information. Par ailleurs, aucun document n'a été transmis à la CARU par l'Uruguay au sujet de l'usine Orion (Botnia). Ainsi, les autorisations environnementales préalables ont été délivrées par l'Uruguay le 9 octobre 2003 à CMB et le 14 février 2005 à Botnia, sans respecter la procédure prévue au premier alinéa de l'article 7. L'Uruguay s'est donc prononcé sur l'impact sur l'environnement des projets sans associer la CARU, se limitant ainsi à donner effet au troisième alinéa de l'article 17 du décret uruguayen n° 435/994, du 21 septembre 1994, portant règlement d'évaluation de l'impact sur l'environnement, selon lequel le ministère du logement, de l'aménagement du territoire et de l'environnement peut accorder l'autorisation environnementale préalable pour autant que les impacts négatifs du projet sur l'environnement restent dans des limites acceptables.

107. La Cour relève en outre que l'Uruguay a accordé, le 12 avril 2005, une autorisation à la société Botnia pour la première phase de construction du projet d'usine Orion et, le 5 juillet 2005, un permis pour construire un port à son usage exclusif et utiliser le lit du fleuve à des fins industrielles, sans avoir préalablement informé la CARU de ces projets.

108. En ce qui concerne le prélèvement et l'utilisation de l'eau du fleuve qui auraient dû, selon l'Argentine, donner lieu à une information préalable de la CARU, la Cour estime qu'il s'agit là d'une activité qui fait partie intégrante de la mise en service de l'usine Orion (Botnia), et qui ne nécessitait donc pas une saisine distincte de la CARU.

109. L'Uruguay soutient cependant que la CARU avait parfaitement connaissance des projets d'usines avant la délivrance des autorisations environnementales préalables, par le biais des représentants d'ENCE, le 8 juillet 2002, et au plus tard le 29 avril 2004, par ceux de Botnia. L'Argentine estime, pour sa part, que ces prétendus agissements privés,

sarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

106. The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to Article 17, third paragraph, of Uruguayan Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation, according to which the Ministry of Housing, Land Use Planning and Environmental Affairs may grant the initial environmental authorization provided that the adverse environmental impacts of the project remain within acceptable limits.

107. The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance.

108. With regard to the extraction and use of water from the river, of which CARU should have first been informed, according to Argentina, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

109. However, Uruguay maintains that CARU was made aware of the plans for the mills by representatives of ENCE on 8 July 2002, and no later than 29 April 2004 by representatives of Botnia, before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have

quels qu'ils soient, ne constituent pas l'exécution de l'obligation imposée aux Parties par le premier alinéa de l'article 7.

110. La Cour considère que les informations sur les projets d'usines parvenues à la CARU de la part des entreprises concernées ou d'autres sources non gouvernementales ne peuvent tenir lieu de l'obligation d'informer, prévue au premier alinéa de l'article 7 du statut de 1975, qui est à la charge de la partie qui projette de construire les ouvrages visés par cette disposition. De la même manière, dans l'affaire relative à *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France)*, la Cour a observé que

> «[s]i Djibouti a certes pu disposer en fin de compte de certaines informations à travers la presse, un tel mode de diffusion d'informations ne saurait être pris en compte aux fins de l'application de l'article 17 [de la convention d'entraide judiciaire entre les deux pays prévoyant que «tout refus d'entraide judiciaire sera motivé»]» (*arrêt, C.I.J. Recueil 2008*, p. 231, par. 150).

111. En conséquence, la Cour conclut de ce qui précède que l'Uruguay, en n'informant pas la CARU des travaux projetés avant la délivrance de l'autorisation environnementale préalable pour chacune des usines et pour le terminal portuaire adjacent à l'usine Orion (Botnia), n'a pas respecté l'obligation que lui impose le premier alinéa de l'article 7 du statut de 1975.

*3. L'obligation de l'Uruguay de notifier les projets à l'autre partie*

112. La Cour note qu'aux termes du deuxième alinéa de l'article 7 du statut de 1975, au cas où la CARU décide que le projet peut causer un préjudice sensible à l'autre partie ou si une décision n'intervient pas à cet égard, «la partie intéressée notifie le projet à l'autre partie par l'intermédiaire de la commission».

Le troisième alinéa de l'article 7 du statut détaille le contenu de cette notification qui

> «énonce les aspects essentiels de l'ouvrage et ... les autres données techniques permettant à la partie à laquelle la notification est adressée d'évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux».

113. L'obligation de notifier est destinée, selon la Cour, à créer les conditions d'une coopération fructueuse entre les parties leur permettant, sur la base d'une information aussi complète que possible, d'évaluer l'impact du projet sur le fleuve et, s'il y a lieu, de négocier les aménagements nécessaires pour prévenir les préjudices éventuels qu'il pourrait causer.

114. L'article 8 prévoit un délai de cent quatre-vingts jours, qui peut être prorogé par la commission, pour que la partie qui a reçu la notifica-

taken, do not constitute performance of the obligation imposed on the Parties by Article 7, first paragraph.

110. The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (*Judgment, I.C.J. Reports 2008*, p. 231, para. 150).

111. Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

*3. Uruguay's obligation to notify the plans to the other party*

112. The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission".

Article 7, third paragraph, of the 1975 Statute sets out in detail the content of this notification, which

> "shall describe the main aspects of the work and . . . any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

113. In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

114. Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with

tion puisse se prononcer sur le projet, à charge pour elle de demander à l'autre partie, par l'intermédiaire de la commission, de compléter au besoin la documentation qu'elle lui a adressée.

Faute d'objection de la part de la partie destinataire de la notification, l'autre partie peut procéder à la construction de l'ouvrage ou l'autoriser (article 9). Dans le cas contraire, la première informe la seconde des aspects de l'ouvrage qui peuvent lui causer préjudice et des modifications qu'elle suggère (article 11), ouvrant ainsi une période de négociation, avec un nouveau délai de cent quatre-vingts jours pour parvenir à un accord (article 12).

115. L'obligation de notifier est donc essentielle dans le processus qui doit mener les parties à se concerter pour évaluer les risques du projet et négocier les modifications éventuelles susceptibles de les éliminer ou d'en limiter au minimum les effets.

116. Les Parties conviennent de la nécessité de disposer d'une évaluation de l'impact sur l'environnement complète pour apprécier le préjudice sensible qui pourrait être causé par un projet.

117. L'Uruguay considère que de telles évaluations sont intervenues conformément à sa législation (décret n° 435/994, du 21 septembre 1994, portant règlement d'évaluation de l'impact sur l'environnement), qu'elles ont été soumises à l'appréciation de la DINAMA et qu'elles ont été transmises à l'Argentine le 7 novembre 2003 pour le projet CMB (ENCE) et le 19 août 2005 pour le projet Orion (Botnia). Selon l'Uruguay, la DINAMA a demandé aux entreprises concernées tous les suppléments d'information nécessaires pour compléter les évaluations de l'impact sur l'environnement initiales qui lui ont été soumises, et ce n'est que quand elle a été satisfaite qu'elle a proposé au ministère de l'environnement de délivrer les autorisations environnementales préalables demandées, qui l'ont été à CMB le 9 octobre 2003 et à Botnia le 14 février 2005.

L'Uruguay soutient qu'il n'était pas tenu de transmettre à l'Argentine les évaluations de l'impact sur l'environnement avant de délivrer aux entreprises les autorisations environnementales préalables, celles-ci ayant été établies sur la base de sa législation en la matière.

118. L'Argentine, pour sa part, souligne tout d'abord que les évaluations de l'impact sur l'environnement qui lui ont été transmises par l'Uruguay étaient incomplètes, notamment en ce qu'elles ne prévoyaient pas de sites alternatifs pour l'implantation des usines et qu'elles ne contenaient pas de consultation des populations concernées. La Cour reviendra plus loin sur les conditions de fond auxquelles doivent satisfaire les évaluations de l'impact sur l'environnement (voir paragraphes 203 à 219).

D'autre part, sur le plan procédural, l'Argentine estime que les autorisations environnementales préalables n'auraient pas dû être accordées aux entreprises avant qu'elle n'ait reçu les évaluations de l'impact sur l'environnement complètes et qu'elle n'ait pu exercer les droits qui lui sont reconnus à ce sujet par les articles 7 à 11 du statut de 1975.

119. La Cour relève que les évaluations de l'impact sur l'environnement, nécessaires pour se prononcer sur tout projet susceptible de causer

the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

115. The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

116. The Parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

117. Uruguay takes the view that such assessments were carried out in accordance with its legislation (Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation), submitted to DINAMA for consideration and transmitted to Argentina on 7 November 2003 in the case of the CMB (ENCE) project and on 19 August 2005 for the Orion (Botnia) project. According to Uruguay, DINAMA asked the companies concerned for all the additional information that was required to supplement the original environmental impact assessments submitted to it, and only when it was satisfied did it propose to the Ministry of the Environment that the initial environmental authorizations requested should be issued, which they were to CMB on 9 October 2003 and to Botnia on 14 February 2005.

Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause sig-

des préjudices sensibles transfrontières à un autre Etat, doivent être notifiées, selon les deuxième et troisième alinéas de l'article 7 du statut de 1975, par la partie concernée à l'autre partie, par l'intermédiaire de la CARU. Cette notification est destinée à permettre à la partie qui en est le destinataire de participer au processus visant à s'assurer que l'évaluation est complète, pour qu'elle puisse ensuite apprécier, en toute connaissance de cause, le projet et ses effets (article 8 du statut de 1975).

120. La Cour observe que cette notification doit intervenir avant que l'Etat intéressé ne décide de la viabilité environnementale du projet, compte dûment tenu de l'évaluation de l'impact sur l'environnement qui lui a été présentée.

121. Dans le cas d'espèce, la Cour relève que les notifications à l'Argentine des évaluations de l'impact sur l'environnement relatives aux usines CMB (ENCE) et Orion (Botnia) n'ont pas eu lieu par l'intermédiaire de la CARU, et que l'Uruguay n'a transmis à l'Argentine ces évaluations qu'après avoir délivré les autorisations environnementales préalables pour les deux usines concernées. Ainsi, en ce qui concerne l'usine CMB (ENCE), la notification du dossier à l'Argentine est intervenue les 27 octobre et 7 novembre 2003, alors que l'autorisation environnementale préalable avait déjà été délivrée le 9 octobre 2003. En ce qui concerne l'usine Orion (Botnia), le dossier a été transmis à l'Argentine entre août 2005 et janvier 2006, alors que l'autorisation environnementale préalable avait été octroyée le 14 février 2005. L'Uruguay n'aurait pas dû, avant la notification, délivrer les autorisations environnementales préalables et les permis de construction sur la base des évaluations de l'impact sur l'environnement présentées à la DINAMA. En effet, ce faisant, l'Uruguay a donné la priorité à sa propre législation sur les obligations de nature procédurale qu'il tenait du statut de 1975 et a méconnu la règle coutumière bien établie, reflétée à l'article 27 de la convention de Vienne sur le droit des traités, aux termes duquel «[u]ne partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d'un traité».

122. La Cour conclut de ce qui précède que l'Uruguay n'a pas respecté l'obligation de notifier les projets à l'Argentine au travers de la CARU, prévue aux deuxième et troisième alinéas de l'article 7 du statut de 1975.

### *C. Les Parties sont-elles convenues de déroger aux obligations de nature procédurale prévues dans le statut de 1975?*

123. Ayant ainsi examiné les obligations de nature procédurale établies par le statut de 1975, la Cour se penchera à présent sur le point de savoir si les Parties sont convenues, par accord entre elles, d'y déroger, comme le prétend l'Uruguay.

124. Les Parties se réfèrent à cet égard aux deux «accords» intervenus le 2 mars 2004 et le 5 mai 2005. Elles développent cependant des positions divergentes quant à leur contenu et à leur portée.

nificant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

121. In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question. Thus in the case of CMB (ENCE), the matter was notified to Argentina on 27 October and 7 November 2003, whereas the initial environmental authorization had already been issued on 9 October 2003. In the case of Orion (Botnia), the file was transmitted to Argentina between August 2005 and January 2006, whereas the initial environmental authorization had been granted on 14 February 2005. Uruguay ought not, prior to notification, to have issued the initial environmental authorizations and the authorizations for construction on the basis of the environmental impact assessments submitted to DINAMA. Indeed by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute and disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

### *C. Whether the Parties Agreed to Derogate from the Procedural Obligations Set Out in the 1975 Statute*

123. Having thus examined the procedural obligations laid down by the 1975 Statute, the Court now turns to the question of whether the Parties agreed, by mutual consent, to derogate from them, as alleged by Uruguay.

124. In this respect the Parties refer to two "agreements" reached on 2 March 2004 and 5 May 2005; however, they hold divergent views regarding their scope and content.

*1. L'« arrangement » du 2 mars 2004 entre l'Argentine et l'Uruguay*

125. La Cour rappelle que, à la suite de la délivrance par l'Uruguay de l'autorisation environnementale préalable à CMB, sans que la CARU ait pu exercer, à cet égard, les fonctions qui lui sont attribuées par le statut de 1975, les ministres des affaires étrangères des Parties se sont mis d'accord, le 2 mars 2004, sur la procédure à suivre, ainsi que cela est reflété dans le procès-verbal de la séance extraordinaire de la CARU en date du 15 mai 2004. L'extrait pertinent de ce procès-verbal se lit comme suit en espagnol :

> «II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
>
> . . . . . .
>
> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya.» (Les italiques sont dans l'original.)

L'Argentine et l'Uruguay ont respectivement fourni à la Cour une traduction française et une traduction anglaise de ce procès-verbal. Compte tenu des divergences existant entre ces deux traductions, la Cour utilisera la traduction suivante :

> «II) Le 2 mars 2004, les ministres des affaires étrangères de l'Argentine et de l'Uruguay se sont entendus quant à la façon de procéder en la matière, à savoir que le Gouvernement uruguayen fournira l'information relative à la construction de l'usine et que, s'agissant de la phase opérationnelle, la CARU procédera au suivi de la qualité des eaux conformément à son statut.
>
> . . . . . .
>
> I) Les deux délégations ont réaffirmé l'arrangement auquel étaient parvenus les ministres des affaires étrangères de la République argentine et de la République orientale de l'Uruguay le 2 mars 2004, en vertu duquel l'Uruguay communiquera les informations relatives à la construction de l'usine, parmi lesquelles le plan de gestion environnementale. Il s'ensuit que *la CARU recevra* les plans de gestion envi-

*1. The "understanding" of 2 March 2004 between Argentina and Uruguay*

125. The Court recalls that, after the issuing of the initial environmental authorization to CMB by Uruguay, without CARU having been able to carry out the functions assigned to it in this context by the 1975 Statute, the Foreign Ministers of the Parties agreed on 2 March 2004 on the procedure to be followed, as described in the minutes of the extraordinary meeting of CARU of 15 May 2004. The relevant extract from those minutes reads as follows in Spanish:

> "II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
>
> . . . . . .
>
> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya." (Emphasis in the original.)

Argentina and Uruguay have provided the Court, respectively, with French and English translations of these minutes. In view of the discrepancies between those two translations, the Court will use the following translation:

> "(II) On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on how to proceed in the matter, namely, that the Uruguayan Government would provide information on the construction of the mill and that, in terms of the operational phase, CARU would carry out monitoring of water quality in accordance with its Statute.
>
> . . . . . .
>
> (I) Both delegations reaffirmed the arrangement which had been come to by the Foreign Ministers of the Republic of Argentina and the Eastern Republic of Uruguay on 2 March 2004, whereby Uruguay would communicate information on the construction of the mill, including the environmental management plan. As a result, *CARU would receive* the environmental management plans for the

ronnementale relatifs à la construction et à l'exploitation de l'usine soumis par l'entreprise au Gouvernement uruguayen, une fois qu'ils auront été transmis à la CARU par la délégation uruguayenne.» (Les italiques sont dans l'original.) *[Traduction de la Cour.]*

126. L'Uruguay considère que, en vertu de cet «arrangement», les Parties sont convenues de la marche à suivre, concernant le projet CMB (ENCE), en dehors de la CARU, et que rien, que ce soit d'un point de vue juridique ou logique, ne les empêchait de déroger, dans le cadre d'un accord bilatéral approprié, aux procédures énoncées par le statut de 1975.

Un tel «arrangement», selon l'Uruguay, se limitait à la transmission à la CARU des plans de gestion environnementale relatifs à la construction et à l'exploitation de l'usine CMB (ENCE). Il aurait mis un terme, de la sorte, à tout différend avec l'Argentine concernant la procédure prévue à l'article 7 du statut de 1975. Enfin, l'Uruguay soutient que l'«arrangement» du 2 mars 2004 sur le projet CMB (ENCE) a été par la suite étendu au projet Orion (Botnia) dans la mesure où le plan PROCEL, établi par la sous-commission chargée de la qualité des eaux de la CARU et mettant en œuvre cet accord, était relatif à l'activité des «deux usines», CMB (ENCE) et Orion (Botnia), le pluriel étant utilisé dans le titre du rapport de la sous-commission et dans son texte.

127. L'Argentine, de son côté, soutient que l'«arrangement» intervenu entre les deux ministres, le 2 mars 2004, était destiné à faire respecter la procédure prévue par le statut de 1975 et à réintroduire ainsi le projet CMB (ENCE) au sein de la CARU, mettant fin au différend relatif à la compétence de la CARU pour connaître du projet. L'Argentine aurait réitéré devant les instances de la CARU n'avoir pas renoncé aux droits qu'elle tenait de l'article 7, même si elle a accepté que le différend qui l'opposait à ce sujet à l'Uruguay aurait pu s'éteindre si la procédure envisagée dans l'«arrangement» du 2 mars 2004 avait été menée à son terme.

Or, selon l'Argentine, l'Uruguay n'a jamais transmis à la CARU les informations requises, comme il s'y était engagé dans l'«arrangement» du 2 mars 2004. Elle a rejeté par ailleurs l'extension de l'«arrangement» du 2 mars 2004 à l'usine Orion (Botnia); la mention des deux futures usines par le plan PROCEL ne signifierait nullement, selon elle, la renonciation au respect de la procédure prévue par le statut de 1975.

128. La Cour relève tout d'abord que, si l'existence de l'«arrangement» du 2 mars 2004, consigné au procès-verbal de la CARU, n'a pas été contestée par les Parties, celles-ci s'opposent, en revanche, sur son contenu et sa portée. Quels que soient sa dénomination particulière et l'instrument dans lequel il est consigné (le procès-verbal de la commission), cet «arrangement» liait les Parties dans la mesure où elles y avaient consenti, et elles devaient s'y conformer de bonne foi. Celles-ci étaient habilitées à s'écarter des procédures prévues par le statut de 1975, à l'occasion d'un projet donné, par l'effet d'un accord bilatéral approprié.

construction and operation of the mill provided by the company to the Uruguayan Government, when these were forwarded to it by the Uruguayan delegation." (Emphasis in the original.) *[Translation by the Court.]*

126. Uruguay considers that, under the terms of this "understanding", the Parties agreed on the approach to be followed in respect of the CMB (ENCE) project, outside CARU, and that there was no reason in law or logic to prevent them derogating from the procedures outlined in the 1975 Statute pursuant to an appropriate bilateral agreement.

The said "understanding", according to Uruguay, only covered the transmission to CARU of the Environmental Management Plans for the construction and operation of the (CMB) ENCE mill. It supposedly thereby puts an end to any dispute with Argentina regarding the procedure laid down in Article 7 of the 1975 Statute. Lastly, Uruguay maintains that the "understanding" of 2 March 2004 on the (CMB) ENCE project was later extended to include the Orion (Botnia) project, since the PROCEL water quality monitoring plan put in place by CARU's Subcommittee on Water Quality to implement that "understanding" related to the activity of "both plants", the CMB (ENCE) and Orion (Botnia) mills, the plural having been used in the title and text of the Subcommittee's report.

127. Argentina, for its part, maintains that the "understanding" between the two Ministers of 2 March 2004 was intended to ensure compliance with the procedure laid down by the 1975 Statute and thus to reintroduce the CMB (ENCE) project within CARU, ending the dispute on CARU's jurisdiction to deal with the project. Argentina claims that it reiterated to the organs within CARU that it had not given up its rights under Article 7, although it accepted that the dispute between itself and Uruguay in this respect could have been resolved if the procedure contemplated in the "understanding" of 2 March 2004 had been brought to a conclusion.

According to Argentina, however, Uruguay never transmitted the required information to CARU as it undertook to do in the "understanding" of 2 March 2004. Argentina also denies that the "understanding" of 2 March 2004 was extended to the Orion (Botnia) mill; the reference to both future plants in the PROCEL plan does not in any way signify, in its view, the renunciation of the procedure laid down by the 1975 Statute.

128. The Court first notes that while the existence of the "understanding" of 2 March 2004, as minuted by CARU, has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether

La Cour rappelle que les Parties divergent sur la question de savoir si la procédure pour la communication de l'information prévue par l'«arrangement» devait, si elle était appliquée, se substituer à celle prévue par le statut de 1975. Quoi qu'il en soit, une telle substitution était conditionnée par le respect, de la part de l'Uruguay, de la nouvelle procédure prévue par l'«arrangement».

129. La Cour constate que l'information que l'Uruguay avait accepté de communiquer à la CARU dans l'«arrangement» du 2 mars 2004 ne l'a jamais été. Par conséquent, la Cour ne saurait accueillir la prétention de l'Uruguay selon laquelle l'«arrangement» aurait mis un terme au différend relatif à l'usine CMB (ENCE) qui l'opposait à l'Argentine, concernant la mise en œuvre de la procédure prévue à l'article 7 du statut de 1975.

130. Par ailleurs, la Cour observe que, lorsque cet «arrangement» est intervenu, il n'était question que du projet CMB (ENCE) et que, dès lors, il ne peut s'étendre, comme l'a prétendu l'Uruguay, au projet Orion (Botnia). Les deux usines n'ont été mentionnées qu'à partir de juillet 2004, dans le cadre du plan PROCEL. Or, ce plan ne concerne que les mesures de suivi et de contrôle de la qualité environnementale des eaux du fleuve dans les zones des usines de pâte à papier, mais non les procédures de l'article 7 du statut de 1975.

131. La Cour conclut que l'«arrangement» du 2 mars 2004 n'aurait eu pour effet d'exonérer l'Uruguay des obligations lui incombant en vertu de l'article 7 du statut de 1975, si tel était l'objectif de cet «arrangement», que si l'Uruguay s'y était conformé. De l'avis de la Cour, tel n'a pas été le cas. En conséquence, cet «arrangement» ne peut être considéré comme ayant eu pour effet de dispenser l'Uruguay du respect des obligations de nature procédurale prévues par le statut de 1975.

### *2. L'accord créant le Groupe technique de haut niveau (GTAN)*

132. La Cour note que, donnant suite à l'accord intervenu le 5 mai 2005 entre les présidents de l'Argentine et de l'Uruguay (voir paragraphe 40 ci-dessus), les ministères des affaires étrangères des deux Etats ont publié le 31 mai 2005 un communiqué de presse annonçant la création du Groupe technique de haut niveau, que les Parties désignent sous l'abréviation «GTAN». Aux termes de ce communiqué:

> «Suivant ce qui a été convenu entre MM. les Présidents de la République argentine et de la République orientale de l'Uruguay, les ministères des affaires étrangères des deux pays constituent, sous leur supervision, un groupe de techniciens, pour complément d'études et d'analyses, d'échanges d'information et de suivi des conséquences qu'aura, sur l'écosystème du fleuve qu'ils partagent, le fonctionnement des usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay.

the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

129. The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

130. Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

131. The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

*2. The agreement setting up the High-Level Technical Group (the GTAN)*

132. The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay (see paragraph 40 above), the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN. According to this communiqué:

> "In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, exchange of information and follow-up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River.

Le Groupe mentionné ... doit produire un premier rapport dans un délai de 180 jours.»

133. L'Uruguay considère ce communiqué de presse comme un accord liant les deux Etats, par lequel ils ont décidé de faire du GTAN l'organe au sein duquel se tiendraient les négociations directes entre les Parties, prévues par l'article 12 du statut de 1975, puisqu'il est destiné à l'analyse des effets sur l'environnement du «fonctionnement des usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay». L'Uruguay en déduit que les Parties étaient d'accord sur la construction des usines et qu'elles avaient circonscrit le litige, entre elles, aux risques environnementaux engendrés par leur fonctionnement. L'Uruguay en veut pour preuve la saisine de la Cour sur la base de l'article 12 du statut, qui permet à chacune des Parties de s'adresser à la Cour au cas où les négociations, au terme du délai de cent quatre-vingts jours, n'aboutissent pas.

Ainsi, selon l'Uruguay, l'accord contenu dans le communiqué de presse du 31 mai 2005, en ouvrant la voie aux négociations directes prévues à l'article 12, a couvert toutes les irrégularités éventuelles de procédure relatives aux articles 7 et suivants du statut de 1975. L'Uruguay rappelle qu'il a communiqué à l'Argentine, au cours des douze réunions que le GTAN a tenues, toutes les informations nécessaires, et qu'il a transmis le projet portuaire d'Orion (Botnia) à la CARU, comme convenu par les Parties lors de la première réunion du GTAN.

134. L'Uruguay fait observer, par ailleurs, que le statut de 1975 est silencieux sur le point de savoir si l'Etat d'origine du projet peut ou non le mettre en œuvre alors que les négociations sont en cours. Il admet qu'en vertu du droit international l'Etat d'origine doit s'abstenir de le faire au cours de cette période de négociation, mais il estime que cela ne concerne pas tous les travaux et qu'en particulier les travaux préparatoires sont autorisés. L'Uruguay admet avoir procédé à de tels travaux, notamment à la construction des fondations de l'usine Orion (Botnia), mais il ne s'agirait pas, selon lui, de faits accomplis empêchant les négociations d'aboutir. L'Uruguay considère, au demeurant, qu'il n'avait aucune obligation juridique de suspendre ne serait-ce qu'une partie des travaux du port.

135. L'Argentine estime qu'il ne peut être déduit des termes du communiqué de presse du 31 mai 2005 une quelconque acceptation, de sa part, de la construction des usines litigieuses. Elle affirme qu'en créant le GTAN les Parties n'ont pas décidé de le substituer à la CARU, mais l'ont conçu comme une enceinte de négociation coexistant avec celle-ci.

Contrairement à l'Uruguay, l'Argentine soutient que la Cour est saisie en cette affaire sur la base de l'article 60 et non de l'article 12 du statut de 1975, parce que l'Uruguay, par son comportement, a empêché qu'elle puisse l'être sur ce dernier fondement, dans la mesure où il aurait ignoré toute la procédure du chapitre II du statut. Il appartiendrait ainsi à la

This Group . . . is to produce an initial report within a period of 180 days."

133. Uruguay regards this press release as an agreement that binds the two States, whereby they decided to make the GTAN the body within which the direct negotiations between the Parties provided for by Article 12 of the 1975 Statute would take place, since its purpose was to analyse the effects on the environment of the "operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay". Uruguay infers from this that the Parties were agreed on the construction of the mills and that they had limited the extent of the dispute between them to the environmental risks caused by their operation. Uruguay sees proof of this in the referral to the Court on the basis of Article 12 of the 1975 Statute, which allows either Party to apply to the Court in the event of the negotiations failing to produce an agreement within the period of 180 days.

According to Uruguay, therefore, the agreement contained in the press release of 31 May 2005, by paving the way for the direct negotiations provided for in Article 12, covered any possible procedural irregularities in relation to Articles 7 *et seq.* of the 1975 Statute. Uruguay points out that it communicated all the necessary information to Argentina during the 12 meetings held by the GTAN and that it transmitted the Orion (Botnia) port project to CARU, as agreed by the Parties at the first meeting of the GTAN.

134. Uruguay further notes that the 1975 Statute is silent as to whether the notifying State may or may not implement a project while negotiations are ongoing. It acknowledges that, under international law, the initiating State must refrain from doing so during the period of negotiation, but takes the view that this does not apply to all work and, in particular, that preparatory work is permitted. Uruguay acknowledges that it carried out such work, for example construction of the foundations for the Orion (Botnia) mill, but in its view this did not involve faits accomplis which prevented the negotiations from reaching a conclusion. Uruguay also considers that it had no legal obligation to suspend any and all work on the port.

135. Argentina considers that no acceptance on its part of the construction of the disputed mills can be inferred from the terms of the press release of 31 May 2005. It submits that in creating the GTAN, the Parties did not decide to substitute it for CARU, but regarded it as a means of negotiation that would co-exist with the latter.

Contrary to Uruguay, Argentina takes the view that this matter has been submitted to the Court on the basis of Article 60 of the 1975 Statute and not of Article 12, since Uruguay, by its conduct, has prevented the latter from being used as a basis, having allegedly disregarded the entire procedure laid down in Chapter II of the Statute. Argentina therefore

Cour, selon l'Argentine, de se prononcer sur l'ensemble des violations du statut de 1975, y compris, mais pas seulement, sur l'autorisation de construction des usines litigieuses.

136. L'Argentine soutient que l'Uruguay, par son comportement, a fait avorter les procédures prévues aux articles 7 à 9 du statut de 1975 et qu'il a, au cours de la période de négociation ouverte au sein du GTAN, poursuivi les travaux de construction de l'usine Orion (Botnia) et commencé la construction du terminal portuaire. Pendant le même temps, l'Argentine réitérait, au sein de la CARU, la nécessité pour l'Uruguay de s'acquitter des obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut, et de suspendre les travaux.

L'Argentine rejette enfin l'allégation de l'Uruguay selon laquelle les travaux sur les fondations de l'usine Orion (Botnia), la cheminée et le port n'auraient eu qu'un caractère préliminaire et ne pouvaient être considérés comme étant le commencement des travaux de construction au sens propre. Pour l'Argentine, une telle distinction n'a pas lieu d'être et ne peut être justifiée par la nature des travaux entrepris.

137. La Cour souligne tout d'abord qu'il n'y a pas lieu de distinguer, comme l'ont fait respectivement l'Uruguay et l'Argentine pour les besoins de leur cause, entre sa saisine sur la base de l'article 12 et sa saisine sur la base de l'article 60 du statut de 1975. Certes, l'article 12 prévoit le recours à la procédure prévue au chapitre XV au cas où les négociations n'aboutissent pas dans le délai de cent quatre-vingts jours, mais sa fonction s'arrête là. L'article 60 prend ensuite le relais, en particulier son premier alinéa, qui permet à l'une ou l'autre Partie de soumettre à la Cour tout différend concernant l'interprétation ou l'application du statut qui ne pourrait être réglé par la négociation directe. Cette formulation couvre aussi bien un différend portant sur l'application et l'interprétation de l'article 12 que sur toute autre disposition du statut de 1975.

138. La Cour note que le communiqué de presse du 31 mai 2005 est l'expression d'un accord entre les deux Etats pour créer un cadre de négociation, le GTAN, afin d'étudier, analyser et échanger les informations sur les effets que le fonctionnement des usines de pâte à papier que l'on construisait dans la République orientale de l'Uruguay pouvait avoir sur l'écosystème du fleuve partagé, «le groupe [devant] produire un premier rapport dans un délai de 180 jours».

139. La Cour admet que le GTAN a été créé dans le but de permettre aux négociations prévues, également pour une durée de cent quatre-vingts jours, à l'article 12 du statut de 1975 d'avoir lieu. Ces négociations entre les parties, pour parvenir à un accord, interviennent une fois que la partie destinataire de la notification a adressé, conformément à l'article 11, une communication à l'autre partie, par l'intermédiaire de la commission, précisant

> «quels sont les aspects de l'ouvrage ou du programme d'opérations qui peuvent causer un préjudice sensible à la navigation, au régime

sees it as for the Court to pronounce on all the breaches of the 1975 Statute, including and not limited to the authorization for the construction of the disputed mills.

136. Argentina submits that Uruguay, by its conduct, frustrated the procedures laid down in Articles 7 to 9 of the 1975 Statute and that, during the period of negotiation within the GTAN, Uruguay continued the construction work on the Orion (Botnia) mill and began building the port terminal. During that same period, Argentina reiterated, within CARU, the need for Uruguay to comply with its procedural obligations under Articles 7 to 12 of the 1975 Statute and to suspend the works.

Lastly, Argentina rejects Uruguay's claim that the work on the foundations of the Orion (Botnia) mill, its chimney and the port was merely preliminary in nature and cannot be regarded as the beginning of construction work as such. For Argentina, such a distinction is groundless and cannot be justified by the nature of the work carried out.

137. The Court first points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay River, with "the group [having] to produce an initial report within a period of 180 days".

139. The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality

du fleuve ou à la qualité de ses eaux, les raisons techniques qui permettent d'arriver à cette conclusion et les modifications qu'elle suggère d'apporter au projet ou au programme d'opérations».

La Cour est consciente de ce que la négociation prévue à l'article 12 du statut de 1975 s'intègre dans l'ensemble de la procédure prévue aux articles 7 à 12, qui est articulée de telle manière que les parties, en relation avec la CARU, soient en mesure, au terme du processus, de s'acquitter de leur obligation de prévenir tout préjudice sensible transfrontière susceptible d'être généré par des activités potentiellement nocives projetées par l'une d'elles.

140. La Cour considère, en conséquence, que l'accord créant le GTAN, s'il établit effectivement une instance de négociation à même de permettre aux Parties de poursuivre le même objectif que celui prévu à l'article 12 du statut de 1975, ne peut être interprété comme exprimant l'accord des Parties pour déroger à d'autres obligations de nature procédurale prévues par le statut.

141. Dès lors, selon la Cour, l'Argentine, en acceptant la création du GTAN, n'a pas renoncé, comme le prétend l'Uruguay, aux autres droits de nature procédurale que lui reconnaît le statut de 1975, ni à invoquer la responsabilité de l'Uruguay du fait de leur violation éventuelle. En effet, l'Argentine n'a pas renoncé, dans l'accord créant le GTAN, aux droits qu'elle tient du statut, «de manière claire et non équivoque» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 247, par. 13). Elle n'a pas non plus consenti à suspendre l'application des dispositions procédurales du statut. En effet, selon l'article 57 de la convention de Vienne du 23 mai 1969 sur le droit des traités, relatif à la «suspension de l'application d'un traité», y compris, selon le commentaire de la Commission du droit international, «la suspension de l'application de certaines de ses dispositions» (*Annuaire de la Commission du droit international*, 1966, vol. II, p. 274), la suspension n'est possible que «conformément à une disposition du traité» ou «par consentement des parties».

142. La Cour observe, d'autre part, que l'accord créant le GTAN, en se référant aux «usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay», constate un simple fait et ne peut être interprété, ainsi que le prétend l'Uruguay, comme une acceptation de cette construction par l'Argentine.

143. La Cour considère que l'Uruguay n'avait le droit, pendant toute la période de consultation et de négociation prévue aux articles 7 à 12 du statut de 1975, ni d'autoriser la construction ni de construire les usines projetées et le terminal portuaire. En effet, il serait contraire à l'objet et au but du statut de 1975 de procéder aux activités litigieuses avant d'avoir appliqué les procédures prévues par les «mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve» (article premier). L'article 9 prévoit cependant que, «[s]i la partie notifiée ne formule pas d'objections ou ne répond pas dans le délai prévu à l'article 8

of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

140. The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

141. Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the 1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Argentina did not, in the agreement to set up the GTAN, "effect a clear and unequivocal waiver" of its rights under the 1975 Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para. 13). Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 251), suspension is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

142. The Court further observes that the agreement to set up the GTAN, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is stating a simple fact and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina.

143. The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Arti-

[cent quatre-vingts jours], l'autre partie peut construire ou autoriser la construction de l'ouvrage projeté».

144. Il en découle, selon la Cour, que, tant que se déroule le mécanisme de coopération entre les parties pour prévenir un préjudice sensible au détriment de l'une d'elles, l'Etat d'origine de l'activité projetée est tenu de ne pas autoriser sa construction et *a fortiori* de ne pas y procéder.

145. La Cour relève, en outre, que le statut de 1975 s'inscrit parfaitement dans le cadre des exigences du droit international en la matière, dès lors que le mécanisme de coopération entre Etats est régi par le principe de la bonne foi. En effet, selon le droit international coutumier, reflété à l'article 26 de la convention de Vienne de 1969 sur le droit des traités, «[t]out traité en vigueur lie les parties et doit être exécuté par elles de bonne foi». Cela s'applique à toutes les obligations établies par un traité, y compris les obligations de nature procédurale, essentielles à la coopération entre Etats. La Cour a rappelé, dans les affaires des *Essais nucléaires (Australie c. France) (Nouvelle-Zélande c. France)*, ce qui suit:

> «L'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale...» (*Arrêts, C.I.J. Recueil 1974*, p. 268, par. 46, et p. 473, par. 49; voir également *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 105, par. 94.)

146. La Cour a par ailleurs eu l'occasion de mettre l'accent sur les caractéristiques de l'obligation de négocier et sur le comportement qu'elle prescrit aux Etats concernés: «les parties ont l'obligation de se comporter de telle manière que la négociation ait un sens» (*Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark; République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 47, par. 85).

147. Le mécanisme de coopération prévu par les articles 7 à 12 du statut de 1975 n'aurait pas de sens, de l'avis de la Cour, si la partie d'origine de l'activité projetée autorisait celle-ci ou la mettait en œuvre sans attendre que ce mécanisme soit mené à son terme. En effet, si tel était le cas, les négociations entre les parties n'auraient plus d'objet.

148. A cet égard, les travaux préliminaires des usines de pâte à papier sur des sites approuvés uniquement par l'Uruguay ne font pas exception, contrairement à ce que prétend cet Etat. Ces travaux font en effet partie intégrante de la construction des usines projetées (voir paragraphes 39 et 42 ci-dessus).

149. La Cour conclut de ce qui précède que l'accord créant le GTAN n'a pas permis à l'Uruguay de déroger à ses obligations d'informer et de notifier, conformément à l'article 7 du statut de 1975, et que, en autorisant la construction des usines ainsi que du terminal portuaire de

cle 8 [180 days], the other party may carry out or authorize the work planned".

144. Consequently, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out.

145. The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation . . ." (*Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.)

146. The Court has also had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85).

147. In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

148. In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

149. The Court concludes from the above that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at

Fray Bentos avant la fin de la période de négociation, l'Uruguay n'a pas respecté l'obligation de négocier prévue à l'article 12 du statut. Il en résulte que l'Uruguay a méconnu l'ensemble du mécanisme de coopération prévu par les articles 7 à 12 du statut de 1975.

150. Etant donné que «l'engagement de négocier n'implique pas celui de s'entendre» (*Trafic ferroviaire entre la Lithuanie et la Pologne, avis consultatif, 1931, C.P.J.I. série A/B n° 42*, p. 116), il reste à la Cour à examiner si l'Etat d'origine du projet est tenu à certaines obligations après l'expiration de la période de négociation prévue à l'article 12.

### *D. Les obligations de l'Uruguay après l'expiration de la période de négociation*

151. L'article 12 renvoie les Parties, dans l'hypothèse où elles n'aboutissent pas à un accord dans un délai de cent quatre-vingts jours, à l'application de la procédure indiquée au chapitre XV.

Le chapitre XV comporte un article unique, l'article 60, selon lequel:

> «Tout différend concernant l'interprétation ou l'application du traité et du statut qui ne pourrait être réglé par négociation directe peut être soumis par l'une ou l'autre des parties à la Cour internationale de Justice.
>
> Dans les cas visés aux articles 58 et 59, l'une ou l'autre des parties peut soumettre tout différend sur l'interprétation ou l'application du traité et du statut à la Cour internationale de Justice lorsque ledit différend n'a pas pu être réglé dans un délai de 180 jours à compter de la notification prévue à l'article 59.»

152. Le statut de 1975, selon l'Uruguay, ne reconnaît pas à l'une des parties un «droit de veto» sur les projets initiés par l'autre. L'Uruguay estime qu'il n'existe aucune «obligation de non-construction» qui pèserait sur l'Etat d'origine des projets jusqu'à ce que la Cour, une fois saisie, se soit prononcée. L'existence d'une telle obligation, souligne l'Uruguay, permettrait à une partie de bloquer un projet vital pour le développement durable de l'autre partie, ce qui serait incompatible avec «l'utilisation rationnelle et optimale du fleuve». Au contraire, pour l'Uruguay, en l'absence de disposition particulière dans le statut, il convient d'en revenir au droit international général, que refléterait le projet d'articles de la Commission du droit international de 2001 sur la prévention des dommages transfrontières résultant d'activités dangereuses (*Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie), en particulier l'alinéa 3 de l'article 9 de ce projet, relatif aux «consultations sur les mesures préventives», selon lequel «si les consultations ... ne permettent pas d'aboutir à une solution concertée, l'Etat d'origine tient néanmoins compte des intérêts de l'Etat susceptible d'être affecté s'il décide d'autoriser la poursuite de l'activité...».

Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

150. Given that "an obligation to negotiate does not imply an obligation to reach an agreement" (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116), it remains for the Court to examine whether the State initiating the plan is under certain obligations following the end of the negotiation period provided for in Article 12.

### *D. Uruguay's Obligations Following the End of the Negotiation Period*

151. Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

152. According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations . . . fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued . . .".

153. L'Argentine, au contraire, soutient que l'article 12 du statut de 1975 fait de la Cour le décideur final lorsque les parties n'aboutissent pas à un accord dans le délai de cent quatre-vingts jours à compter de la communication visée à l'article 11. Il résulterait de l'article 9 du statut, interprété à la lumière des articles 11 et 12, et compte tenu de son objet et de son but, que, si la partie à laquelle la notification est adressée formule une objection, l'autre partie ne pourrait ni construire l'ouvrage en question ni autoriser sa construction, aussi longtemps que la procédure prévue aux articles 7 à 12 n'aurait pas été achevée et que la Cour ne se serait pas prononcée sur le projet. L'Argentine considère ainsi que, pendant la procédure de règlement du différend devant la Cour, l'Etat qui projette de construire l'ouvrage ne peut mettre l'autre Partie devant le fait accompli de sa construction.

En ce qui concerne la question du «veto», elle serait, selon l'Argentine, mal posée par l'Uruguay, car ni l'une ni l'autre des parties ne pourrait imposer sa position sur la construction et il reviendrait en définitive à la Cour de trancher, en cas de désaccord, par une décision revêtue de l'autorité de la chose jugée. En quelque sorte, l'Uruguay n'aurait d'autre choix, selon l'Argentine, que de parvenir à un accord avec elle ou d'attendre le règlement du différend. En poursuivant la construction et la mise en service de l'usine et du port d'Orion (Botnia), l'Uruguay commet, selon l'Argentine, une violation continue des obligations de nature procédurale résultant du chapitre II du statut de 1975.

154. La Cour observe que la prétendue «obligation de non-construction», qui pèserait sur l'Uruguay entre la fin de la période de négociation et la décision de la Cour, ne figure pas expressément dans le statut de 1975 et ne découle pas davantage de ses dispositions. L'article 9 ne prévoit une telle obligation que pendant la mise en œuvre de la procédure prévue aux articles 7 à 12 du statut.

En outre, le statut ne prévoit pas que, en cas de désaccord persistant entre les parties sur l'activité projetée au terme de la période de négociation, il reviendrait à la Cour, saisie par l'Etat concerné, comme le prétend l'Argentine, d'autoriser ou non l'activité en question. La Cour souligne que, si le statut de 1975 lui confère compétence pour le règlement de tout différend relatif à son application et à son interprétation, il ne l'investit pas pour autant de la fonction d'autoriser ou non en dernier ressort les activités projetées. Par conséquent, l'Etat d'origine du projet peut, à la fin de la période de négociation, procéder à la construction à ses propres risques.

La Cour ne peut retenir l'interprétation de l'article 9 selon laquelle toute construction serait interdite jusqu'à ce qu'elle se soit prononcée en vertu des articles 12 et 60.

155. L'article 12 ne met pas à la charge des parties une obligation de saisir la Cour mais leur donne plutôt la possibilité de le faire, après l'expiration de la période de négociation. Ainsi, l'article 12 n'est pas susceptible de modifier les droits et obligations de la partie intéressée, tant que la Cour n'a pas statué définitivement à leur sujet. Selon la Cour, parmi ces

153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the "veto" raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of *res judicata*. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that

droits figure celui de mettre en œuvre le projet, sous la seule responsabilité de cette partie, dans la mesure où la période de négociation a expiré.

156. La Cour avait considéré, dans son ordonnance du 13 juillet 2006, que «la construction des usines sur le site actuel ne p[ouvait] être réputée constituer un fait accompli» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 78). Ainsi, en statuant au fond sur le différend qui oppose les deux Parties, la Cour est l'ultime garant du respect par celles-ci du statut de 1975.

157. La Cour conclut de ce qui précède qu'aucune «obligation de non-construction» ne pesait sur l'Uruguay après que la période de négociation prévue par l'article 12 a expiré, soit le 3 février 2006, les Parties ayant constaté à cette date l'échec des négociations entreprises dans le cadre du GTAN (voir paragraphe 40). En conséquence, le comportement illicite de l'Uruguay (constaté au paragraphe 149 ci-dessus) ne pouvait s'étendre au-delà de cette date.

158. La Cour ayant établi que l'Uruguay a violé ses obligations de nature procédurale d'informer, de notifier et de négocier dans la mesure et pour les raisons exposées ci-dessus, elle se penchera à présent sur la question du respect par cet Etat des obligations de fond prescrites par le statut de 1975.

* *

## IV. Les obligations de fond

159. Avant d'examiner les violations alléguées des obligations de fond découlant du statut de 1975, la Cour traitera de deux questions préliminaires, à savoir la charge de la preuve et la preuve par expertise.

### *A. La charge de la preuve et la preuve par expertise*

160. L'Argentine soutient que l'approche de précaution adoptée dans le statut de 1975 a pour effet de «transfér[er] la charge de la preuve à l'Uruguay, [de telle sorte que ce serait à lui de démontrer] que l'usine de pâte à papier Orion (Botnia) ne cause pas de dommages significatifs à l'environnement». Elle affirme également que la charge de la preuve ne devrait pas peser sur elle seule, en tant qu'Etat demandeur, car, selon elle, le statut de 1975 impose aux deux Parties une obligation égale de convaincre — l'une, de l'innocuité du projet, l'autre, de sa nocivité.

161. L'Uruguay estime au contraire que, conformément à la jurisprudence bien établie de la Cour, c'est à l'Argentine, Etat demandeur, qu'incombe la charge de la preuve, mais que, quand bien même la position argentine relative au transfert de la charge de la preuve serait fondée en droit, cela ne changerait rien, étant donné la faiblesse manifeste de

those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

158. Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court will now turn to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

* *

## IV. Substantive Obligations

159. Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court will address two preliminary issues, namely, the burden of proof and expert evidence.

### *A. Burden of Proof and Expert Evidence*

160. Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby "the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment". It also argues that the burden of proof should not be placed on Argentina alone as the Applicant, because, in its view, the 1975 Statute imposes an equal onus to persuade — for the one that the plant is innocuous and for the other that it is harmful.

161. Uruguay, on the other hand, asserts that the burden of proof is on Argentina, as the Applicant, in accordance with the Court's long-standing case law, although it considers that, even if the Argentine position about transferring the burden of proof to Uruguay were correct, it would make no difference given the manifest weakness of Argentina's

l'argumentation de l'Argentine sur le fond et le nombre d'éléments de preuve émanant de sources indépendantes que l'Uruguay a soumis à la Cour. Il conteste également avec force l'argument de l'Argentine selon lequel l'approche de précaution adoptée dans le statut de 1975 aurait pour effet de transférer la charge de la preuve, invoquant l'absence de toute disposition conventionnelle expresse en ce sens, et rejette de même l'idée avancée par l'Argentine selon laquelle le statut ferait peser la charge de la preuve à égalité sur les deux Parties.

162. Tout d'abord, la Cour considère que, selon le principe bien établi *onus probandi incumbit actori*, c'est à la partie qui avance certains faits d'en démontrer l'existence. Ce principe, confirmé par la Cour à maintes reprises (*Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 86, par. 68; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 31, par. 45; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 128, par. 204; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 437, par. 101), s'applique aux faits avancés aussi bien par le demandeur que par le défendeur.

163. Le demandeur doit naturellement commencer par soumettre les éléments de preuve pertinents pour étayer sa thèse. Cela ne signifie pas pour autant que le défendeur ne devrait pas coopérer en produisant tout élément de preuve en sa possession susceptible d'aider la Cour à régler le différend dont elle est saisie.

164. Quant aux arguments avancés par l'Argentine concernant le renversement de la charge de la preuve et l'existence, à l'égard de chaque Partie, d'une obligation égale de convaincre au titre du statut de 1975, la Cour considère qu'une approche de précaution, si elle peut se révéler pertinente pour interpréter et appliquer les dispositions du statut, n'a toutefois pas pour effet d'opérer un renversement de la charge de la preuve; elle considère également que rien dans le statut de 1975 lui-même ne permet de conclure que celui-ci ferait peser la charge de la preuve de façon égale sur les deux Parties.

*

165. La Cour examinera à présent la question de la preuve par expertise. L'Argentine et l'Uruguay ont tous deux soumis à la Cour une grande quantité d'informations factuelles et scientifiques à l'appui de leurs prétentions respectives. Ils ont également produit des rapports et des études établis par les experts et les consultants qu'ils ont engagés, ainsi que par ceux engagés par la Société financière internationale en sa qualité de bailleur de fonds du projet. Certains de ces experts se sont également pré-

case and the extensive independent evidence put before the Court by Uruguay. Uruguay also strongly contests Argentina's argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it as well as Argentina's proposition that the Statute places the burden of proof equally on both Parties.

162. To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101) applies to the assertions of fact both by the Applicant and the Respondent.

163. It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

164. Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

*

165. The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared

sentés devant la Cour comme conseils de l'une ou l'autre Partie pour fournir des éléments de preuve.

166. Les Parties sont néanmoins divisées sur l'autorité et la fiabilité des études et rapports versés au dossier, qui ont été établis par leurs experts et consultants respectifs, d'une part, et par ceux de la SFI, d'autre part, et qui contiennent bien souvent des affirmations et des conclusions contradictoires. Répondant à une question posée par un juge, l'Argentine a affirmé que le poids à leur accorder devait être déterminé en fonction non seulement de l'«indépendance» de l'auteur, qui devait n'avoir aucun intérêt personnel à ce que l'affaire fût tranchée dans un sens ou un autre et ne devait pas être fonctionnaire du gouvernement, mais aussi des caractéristiques du document lui-même, en particulier du soin avec lequel l'analyse avait été réalisée, de son exhaustivité, de l'exactitude des données utilisées, et de la clarté et de la cohérence des conclusions tirées de celles-ci. Dans sa réponse à la même question, l'Uruguay a soutenu que les rapports élaborés par des experts engagés aux fins de l'instance et versés au dossier ne devaient pas être considérés comme établis de façon indépendante et devaient être traités avec circonspection, contrairement aux déclarations et analyses d'experts publiées par une organisation internationale compétente telle la SFI ou celles publiées par les consultants engagés par ladite organisation, qui, elles, devaient être considérées comme émanant d'une source indépendante et se voir accorder un «poids spécial».

167. La Cour a prêté la plus grande attention aux éléments qui lui ont été soumis par les Parties, ainsi qu'il ressortira de son examen des éléments de preuve ci-après relatifs aux violations alléguées des obligations de fond. S'agissant des experts qui sont intervenus à l'audience en qualité de conseils, la Cour aurait trouvé plus utile que les Parties, au lieu de les inclure à ce titre dans leurs délégations respectives, les présentent en tant que témoins-experts en vertu des articles 57 et 64 du Règlement de la Cour. Elle considère en effet que les personnes déposant devant elle sur la base de leurs connaissances scientifiques ou techniques et de leur expérience personnelle devraient le faire en qualité d'experts ou de témoins, voire, dans certains cas, à ces deux titres à la fois, mais non comme conseils, afin de pouvoir répondre aux questions de la partie adverse ainsi qu'à celles de la Cour elle-même.

168. Quant à l'indépendance de ces experts, la Cour n'estime pas nécessaire, pour statuer en l'espèce, de s'engager dans un débat général sur la valeur, la fiabilité et l'autorité relatives des documents et études élaborés par les experts et les consultants des Parties. Elle doit seulement garder à l'esprit que, si volumineuses et complexes que soient les informations factuelles qui lui ont été soumises, il lui incombe, au terme d'un examen attentif de l'ensemble des éléments soumis par les Parties, de déterminer quels faits sont à prendre en considération, d'en apprécier la force probante et d'en tirer les conclusions appropriées. Ainsi, fidèle à sa pratique, la Cour se prononcera sur les faits, en se fondant sur les éléments de preuve qui lui ont été pré-

before the Court as counsel for one or the other of the Parties to provide evidence.

166. The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the "independence" of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data. In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given "special weight".

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence

sentés, puis appliquera les règles pertinentes du droit international à ceux qu'elle aura jugés avérés.

### *B. Les violations alléguées des obligations de fond*

169. La Cour examinera maintenant les violations alléguées des obligations de fond découlant du statut de 1975 commises par l'Uruguay en autorisant la construction et la mise en service de l'usine Orion (Botnia). En particulier, l'Argentine affirme que l'Uruguay a violé les obligations que lui imposent les articles premier, 27, 35, 36 et 41, alinéa *a)*, du statut de 1975 ainsi que d'«autres obligations découlant du droit international général, conventionnel et coutumier, ... nécessaires à l'application [de ce] statut...». L'Uruguay rejette ces allégations. Il considère par ailleurs que l'article 27 du statut de 1975 autorise les parties à utiliser les eaux du fleuve à des fins ménagères, sanitaires, industrielles et agricoles.

#### *1. L'obligation de contribuer à l'utilisation rationnelle et optimale du fleuve (article premier)*

170. Selon l'Argentine, l'Uruguay a violé son obligation de contribuer à l'«utilisation rationnelle et optimale du fleuve» en manquant de la consulter sur les actions propres à éviter une modification de l'équilibre écologique, et de prendre les mesures nécessaires pour empêcher une pollution. L'Argentine fait également valoir que, pour interpréter le statut de 1975 (en particulier ses articles 27, 35 et 36) selon le principe de l'utilisation équitable et raisonnable, il faut tenir compte de toutes les utilisations préalables et légitimes du fleuve, y compris son utilisation à des fins récréatives et touristiques.

171. Pour l'Uruguay, l'objet et le but du statut de 1975 sont d'organiser la coopération entre les Parties par l'intermédiaire de la CARU au service de leur objectif commun, celui d'assurer une utilisation équitable et durable des eaux et des ressources biologiques du fleuve. L'Uruguay estime, d'une part, n'avoir contrevenu en rien au principe de l'utilisation équitable et raisonnable du fleuve et, d'autre part, que ce principe ne peut être invoqué pour privilégier des utilisations préalables du fleuve, liées par exemple au tourisme ou à la pêche, par rapport à de nouvelles utilisations.

172. Les Parties sont également en désaccord sur la portée et les implications de l'article 27 du statut de 1975 concernant le droit de chacune d'elles d'utiliser les eaux du fleuve, à l'intérieur de sa juridiction, à des fins ménagères, sanitaires, industrielles et agricoles.

173. La Cour fait observer que, comme l'indique le titre de son chapitre I, le statut de 1975 expose, en son article premier, le but de cet instrument. En tant que tel, l'article premier éclaire l'interprétation des obligations de fond mais ne confère pas, en lui-même, de droits ou d'obligations spécifiques aux parties. Celles-ci sont tenues de garantir l'utilisation rationnelle et optimale du fleuve Uruguay en se conformant aux obliga-

presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

### *B. Alleged Violations of Substantive Obligations*

169. The Court now turns to the examination of the alleged violations by Uruguay of its substantive obligations under the 1975 Statute by authorizing the construction and operation of the Orion (Botnia) mill. In particular, Argentina contends that Uruguay has breached its obligations under Articles 1, 27, 35, 36 and 41 *(a)* of the 1975 Statute and "other obligations deriving from . . . general, conventional and customary international law which are necessary for the application of the 1975 Statute". Uruguay rejects these allegations. Uruguay considers furthermore that Article 27 of the 1975 Statute allows the parties to use the waters of the river for domestic, sanitary, industrial and agricultural purposes.

#### *1. The obligation to contribute to the optimum and rational utilization of the river (Article 1)*

170. According to Argentina, Uruguay has breached its obligation to contribute to the "optimum and rational utilization of the river" by failing to co-ordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution. Argentina also maintains that, in interpreting the 1975 Statute (in particular Articles 27, 35, and 36 thereof) according to the principle of equitable and reasonable use, account must be taken of all pre-existing legitimate uses of the river, including in particular its use for recreational and tourist purposes.

171. For Uruguay, the object and purpose of the 1975 Statute is to establish a structure for co-operation between the Parties through CARU in pursuit of the shared goal of equitable and sustainable use of the water and biological resources of the river. Uruguay contends that it has in no way breached the principle of equitable and reasonable use of the river and that this principle provides no basis for favouring pre-existing uses of the river, such as tourism or fishing, over other, new uses.

172. The Parties also disagree on the scope and implications of Article 27 of the 1975 Statute on the right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes.

173. The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the envi-

tions prescrites par le statut aux fins de la protection de l'environnement et de la gestion conjointe de cette ressource partagée. Cet objectif doit aussi être poursuivi par le biais de la CARU, qui constitue le «mécanisme commun» nécessaire à sa réalisation, ainsi que par le biais des règles adoptées par cette commission et des normes et mesures adoptées par les Parties.

174. La Cour rappellera que les Parties ont conclu le traité contenant le statut de 1975 en application de l'article 7 du traité de 1961, qui leur faisait obligation d'établir conjointement un code de l'utilisation du fleuve comprenant, entre autres, des dispositions visant à prévenir la pollution et à protéger et préserver le milieu aquatique. Ainsi, l'utilisation rationnelle et optimale des eaux du fleuve peut être considérée comme la pierre angulaire du système de coopération institué par le statut de 1975 et du mécanisme commun destiné à assurer cette coopération.

175. La Cour considère que, pour parvenir à une utilisation rationnelle et optimale, un équilibre doit être trouvé entre, d'une part, les droits et les besoins des Parties concernant l'utilisation du fleuve à des fins économiques et commerciales et, d'autre part, l'obligation de protéger celui-ci de tout dommage à l'environnement susceptible d'être causé par de telles activités. Cette nécessité d'assurer un tel équilibre ressort de plusieurs dispositions du statut de 1975 établissant les droits et obligations des Parties, telles que les articles 27, 36 et 41. La Cour appréciera donc le comportement de l'Uruguay en ce qui concerne l'autorisation de la construction et de la mise en service de l'usine Orion (Botnia) à la lumière de ces dispositions du statut, et des droits et obligations énoncés dans celles-ci.

176. La Cour a déjà examiné aux paragraphes 84 à 93 ci-dessus le rôle de la CARU par rapport aux obligations de nature procédurale établies dans le statut de 1975. En plus de son rôle à cet égard, les fonctions de la CARU concernent presque tous les aspects de la mise en œuvre des dispositions de fond du statut de 1975. Les fonctions de réglementation de la commission dans le domaine de la conservation et de la préservation des ressources biologiques, de la prévention et de la surveillance de la pollution, ainsi que celles qui concernent la coordination des mesures prises par les Parties, revêtent une importance particulière dans la présente affaire. La Cour les examinera au stade de son analyse des positions des Parties sur l'interprétation et l'application des articles 36 et 41 du statut de 1975.

177. Quant à l'article 27, la Cour considère que son libellé reflète non seulement la nécessité de concilier les intérêts variés des Etats riverains dans un contexte transfrontière et, en particulier, dans l'utilisation d'une ressource naturelle partagée, mais aussi celle de trouver un équilibre entre l'utilisation et la protection des eaux du fleuve qui soit conforme à l'objectif de développement durable. La Cour a déjà examiné les obligations découlant des articles 7 à 12 du statut de 1975 qui, selon l'article 27, doivent être respectées par toute partie souhaitant exercer son droit d'utiliser les eaux du fleuve pour l'une quelconque des fins y énoncées dès lors que le régime du fleuve ou la qualité de ses eaux risque de pâtir de cette

ronment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

174. The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, *inter alia*, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

176. The Court has already addressed in paragraphs 84 to 93 above the role of CARU with respect to the procedural obligations laid down in the 1975 Statute. In addition to its role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute. Of particular relevance in the present case are its functions relating to rule-making in respect of conservation and preservation of living resources, the prevention of pollution and its monitoring, and the co-ordination of actions of the Parties. These functions will be examined by the Court in its analysis of the positions of the Parties with respect to the interpretation and application of Articles 36 and 41 of the 1975 Statute.

177. Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river

utilisation. La Cour tient à ajouter que l'utilisation en question ne pourrait être jugée équitable et raisonnable s'il n'était pas tenu compte des intérêts de l'autre Etat riverain à l'égard de la ressource partagée et de la protection environnementale de cette dernière. Aussi la Cour est-elle d'avis que l'article 27 traduit ce lien étroit entre l'utilisation équitable et raisonnable d'une ressource partagée et la nécessité de concilier le développement économique et la protection de l'environnement qui est au cœur du développement durable.

*2. L'obligation de veiller à ce que la gestion du sol et des forêts ne cause pas un préjudice au régime du fleuve ou à la qualité de ses eaux (article 35)*

178. A l'article 35 du statut de 1975, les parties:

> «s'obligent à adopter les mesures nécessaires pour que la gestion du sol et des forêts, l'utilisation des eaux souterraines et celle des affluents du fleuve n'entraînent pas de modification causant un préjudice sensible au régime de ce dernier ou à la qualité de ses eaux».

179. L'Argentine soutient que la décision de l'Uruguay de procéder à d'importantes plantations d'eucalyptus afin de fournir de la matière première à l'usine Orion (Botnia) a des incidences non seulement sur la gestion des sols et des forêts uruguayennes, mais aussi sur la qualité des eaux du fleuve. Pour sa part, l'Uruguay affirme que l'Argentine n'expose aucun argument fondé sur la manière dont il gère ses sols et ses forêts — et qu'elle «n'a pas non plus formulé d'allégations relatives aux eaux des affluents».

180. La Cour fait observer que l'Argentine n'a apporté aucune preuve à l'appui de ce qu'elle avance. En outre, l'article 35 concerne la gestion des sols et des forêts ainsi que l'utilisation des eaux souterraines et des affluents, et rien dans les éléments de preuve produits par l'Argentine ne permet de relier directement la façon dont l'Uruguay gère ses sols et ses forêts, ou utilise les eaux souterraines et les affluents, aux modifications alléguées de la qualité des eaux du fleuve Uruguay que l'Argentine attribue à l'usine de pâte à papier Orion (Botnia). De fait, si elle a développé une longue argumentation quant aux effets des rejets de l'usine de pâte à papier sur la qualité des eaux du fleuve, l'Argentine a en revanche été nettement moins diserte quant à l'effet délétère qu'auraient eu sur la qualité de ces eaux les opérations de plantation d'eucalyptus effectuées par l'Uruguay. La Cour en conclut que l'Argentine n'a pas établi le bien-fondé de ses allégations sur ce point.

*3. L'obligation de coordonner les mesures propres à éviter une modification de l'équilibre écologique (article 36)*

181. L'Argentine soutient que l'Uruguay a violé l'article 36 du statut

or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

*2. The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35)*

178. Article 35 of the 1975 Statute provides that the parties:

> "undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of its waters".

179. Argentina contends that Uruguay's decision to carry out major eucalyptus planting operations to supply the raw material for the Orion (Botnia) mill has an impact on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river. For its part, Uruguay states that Argentina does not make any arguments that are based on Uruguay's management of soil or woodland — "nor has it made any allegations concerning the waters of tributaries".

180. The Court observes that Argentina has not provided any evidence to support its contention. Moreover, Article 35 concerns the management of the soil and woodland as well as the use of groundwater and the water of tributaries, and there is nothing to suggest, in the evidentiary material submitted by Argentina, a direct relationship between Uruguay's management of the soil and woodland, or its use of ground water and water of tributaries and the alleged changes in the quality of the waters of the River Uruguay which had been attributed by Argentina to the Orion (Botnia) mill. Indeed, while Argentina made lengthy arguments about the effects of the pulp mill discharges on the quality of the waters of the river, no similar arguments have been presented to the Court regarding a deleterious relationship between the quality of the waters of the river and the eucalyptus-planting operations by Uruguay. The Court concludes that Argentina has not established its contention on this matter.

*3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36)*

181. Argentina contends that Uruguay has breached Article 36 of the

de 1975, qui fait obligation aux Parties de coordonner, par l'intermédiaire de la CARU, les mesures propres à éviter une modification de l'équilibre écologique du fleuve. Elle indique que les rejets de l'usine Orion (Botnia) ont modifié cet équilibre, et cite à titre d'exemples la prolifération d'algues du 4 février 2009, qui constitue selon elle une preuve flagrante d'une telle modification, et les rejets de toxines qui seraient à l'origine des malformations observées chez les rotifères dont des photographies ont été présentées à la Cour.

182. L'Uruguay considère que toute appréciation du comportement des Parties en ce qui concerne l'article 36 du statut de 1975 doit tenir compte des règles adoptées par la CARU, car cet article, qui crée une obligation de coopération, fait référence à ces règles et n'interdit pas en soi tel ou tel comportement. L'Uruguay estime que l'usine satisfait pleinement aux exigences de la CARU concernant l'équilibre écologique du fleuve, et conclut qu'il n'a pas agi de manière contraire à l'article 36 du statut de 1975.

183. Il est rappelé que, aux termes de l'article 36, «[l]es parties coordonnent, par l'intermédiaire de la commission, les mesures propres à éviter une modification de l'équilibre écologique et à contenir les fléaux et autres facteurs nocifs sur le fleuve et dans ses zones d'influence».

184. La Cour est d'avis que les Parties ne sauraient satisfaire à cette obligation isolément, par des actes individuels. Le respect de cette obligation exige une action concertée, par l'intermédiaire de la commission. Cette obligation est l'expression de la recherche par le statut de 1975 de l'intérêt collectif, et reflète l'un des objectifs ayant présidé à la mise en place de mécanismes communs, à savoir celui d'assurer une coordination entre les initiatives et mesures prises par les Parties aux fins de la gestion durable et de la protection environnementale du fleuve. Les Parties ont effectivement coordonné leur action en promulguant, dans le cadre de la commission, des normes qui figurent aux points E3 et E4 du digeste de la CARU. L'un des objectifs énoncés au point E3 consiste à «[p]rotéger et préserver le milieu aquatique et son équilibre écologique». De même, il est indiqué au point E4 que celui-ci a été élaboré «suivant ce qui [était] ... établi dans le[s] ... [a]rticles 36, 37, 38 et 39».

185. Selon la Cour, l'article 36 du statut de 1975 vise à empêcher toute pollution transfrontière susceptible de modifier l'équilibre écologique du fleuve, en coordonnant l'adoption des mesures nécessaires à cette fin, par l'intermédiaire de la CARU. Il oblige donc les deux Etats à prendre des mesures concrètes pour éviter toute modification de l'équilibre écologique. Ces mesures ne se limitent pas à l'adoption d'un cadre réglementaire — ce qu'ont fait les Parties par l'intermédiaire de la CARU; les deux Parties sont également tenues de respecter et de mettre en œuvre les mesures ainsi adoptées. Comme la Cour l'a souligné dans l'affaire relative au *Projet Gabčíkovo-Nagymaros*:

> «dans le domaine de la protection de l'environnement, la vigilance et la prévention s'imposent en raison du caractère souvent irréversible

1975 Statute, which places the Parties under an obligation to co-ordinate through CARU the necessary measures to avoid changing the ecological balance of the river. Argentina asserts that the discharges from the Orion (Botnia) mill altered the ecological balance of the river, and cites as examples the 4 February 2009 algal bloom, which, according to it, provides graphic evidence of a change in the ecological balance, as well as the discharge of toxins, which gave rise, in its view, to the malformed rotifers whose pictures were shown to the Court.

182. Uruguay considers that any assessment of the Parties' conduct in relation to Article 36 of the 1975 Statute must take account of the rules adopted by CARU, because this Article, creating an obligation of co-operation, refers to such rules and does not by itself prohibit any specific conduct. Uruguay takes the position that the mill fully meets CARU requirements concerning the ecological balance of the river, and concludes that it has not acted in breach of Article 36 of the 1975 Statute.

183. It is recalled that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

184. It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

185. In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabčíkovo-Nagymaros* case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage

des dommages causés à l'environnement et des limites inhérentes au mécanisme même de réparation de ce type de dommages» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140).

186. Les Parties divergent encore quant à la nature de l'obligation énoncée à l'article 36; elles s'opposent en particulier sur la question de savoir s'il s'agit d'une obligation de comportement ou de résultat. L'Argentine soutient que, suivant leur sens ordinaire, les articles 36 et 41 du statut de 1975 établissent l'un et l'autre une obligation de résultat.

187. La Cour considère que l'obligation formulée à l'article 36 incombe aux deux Parties et leur impose d'adopter un comportement spécifique consistant à prendre les mesures nécessaires de façon coordonnée, par l'intermédiaire de la commission, pour éviter toute modification de l'équilibre écologique. L'obligation d'adopter des mesures réglementaires ou administratives, que ce soit de manière individuelle ou conjointe, et de les mettre en œuvre constitue une obligation de comportement. Les deux Parties doivent donc, en application de l'article 36, faire preuve de la diligence requise («due diligence») en agissant dans le cadre de la commission pour prendre les mesures nécessaires à la préservation de l'équilibre écologique du fleuve.

188. Cette vigilance et cette prévention sont particulièrement importantes lorsqu'il s'agit de préserver l'équilibre écologique puisque les effets négatifs des activités humaines sur les eaux du fleuve risquent de toucher d'autres composantes de l'écosystème du cours d'eau, telles que sa flore, sa faune et son lit. L'obligation de coordonner, par l'intermédiaire de la commission, l'adoption des mesures nécessaires, ainsi que la mise en application et le respect de ces mesures, jouent dans ce contexte un rôle central dans le système global de protection du fleuve Uruguay établi par le statut de 1975. Il est dès lors d'une importance cruciale que les Parties respectent cette obligation.

189. La Cour conclut des développements qui précèdent que l'Argentine n'a pas démontré de manière convaincante que l'Uruguay a refusé de prendre part aux efforts de coordination prévus par l'article 36, en violation de celui-ci.

*4. L'obligation d'empêcher la pollution et de préserver le milieu aquatique (article 41)*

190. L'article 41 est ainsi libellé:

«Sans préjudice des fonctions assignées à la commission en la matière, les parties s'obligent:

*a)* à protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution en établissant des normes et en adoptant les mesures appropriées, conformément aux accords internationaux applicables et, le cas échéant, en harmonie avec les

to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

*4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)*

190. Article 41 provides that:

"Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

*(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where rele-

directives et les recommandations des organismes techniques internationaux;

*b)* à ne pas abaisser, dans leurs systèmes juridiques respectifs:

1) les normes techniques en vigueur pour prévenir la pollution des eaux, et
2) les pénalités établies pour les infractions;

*c)* à s'informer mutuellement des normes qu'elles se proposent d'établir en matière de pollution des eaux, en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.»

191. Selon l'Argentine, en autorisant le rejet de nutriments supplémentaires dans un fleuve qui connaît des phénomènes d'eutrophisation, d'inversion de courant et de stagnation, l'Uruguay a violé l'obligation qui lui incombe d'empêcher la pollution, faute d'avoir prescrit des mesures appropriées en ce qui concerne l'usine Orion (Botnia) et respecté les accords internationaux en matière d'environnement applicables, notamment la convention sur la diversité biologique et la convention de Ramsar. Elle soutient que le statut de 1975 interdit toute pollution portant atteinte à la protection et à la préservation du milieu aquatique ou modifiant l'équilibre écologique du fleuve. L'Argentine affirme en outre que l'obligation d'empêcher la pollution du fleuve est une obligation de résultat et qu'elle ne porte pas seulement sur la protection du milieu aquatique proprement dit, mais s'étend également à toute utilisation raisonnable et légitime du fleuve, y compris au tourisme et aux autres usages récréatifs.

192. L'Uruguay soutient que l'obligation d'«empêcher la pollution» énoncée à l'alinéa *a)* de l'article 41 du statut de 1975 n'emporte pas l'interdiction de tout déversement dans le fleuve. Seuls les rejets supérieurs aux limites fixées conjointement par les Parties au sein de la CARU, conformément à leurs obligations internationales, et qui ont pour cette raison des effets préjudiciables, sont susceptibles d'être qualifiés de «pollution» au sens de l'article 40 du statut de 1975. De surcroît, l'Uruguay estime que l'article 41 crée une obligation de comportement, et non de résultat, mais que, de fait, cela importe peu puisqu'il s'est acquitté de son devoir d'empêcher la pollution en exigeant de l'usine qu'elle réponde aux normes relatives aux meilleures techniques disponibles.

193. Avant d'en venir à l'analyse de l'article 41, la Cour rappelle ce qui suit:

> «L'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale fait maintenant partie du corps de règles du droit international de l'environnement.» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29.)

194. Dans le cadre de l'affaire relative au *Projet Gabčíkovo-Nagymaros*, la Cour a par ailleurs eu l'occasion de souligner que «les

vant, with the guidelines and recommendations of international technical bodies;

*(b)* not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

*(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to protecting the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 *(a)* of the 1975 Statute to "prevent . . . pollution" does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as "pollution" under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology ("BAT") standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the *Gabčíkovo-Nagymaros Project* case, that "the Parties together should look afresh at

Parties devraient, ensemble, examiner à nouveau les effets sur l'environnement de l'exploitation de la centrale de Gabčíkovo» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140). C'est en gardant à l'esprit ces déclarations que la Cour analysera maintenant l'article 41 du statut de 1975.

195. Compte tenu du rôle central de cette disposition dans le différend qui oppose les Parties à la présente affaire, ainsi que des profondes divergences entre celles-ci en ce qui concerne l'interprétation et l'application de cette disposition, la Cour souhaiterait faire quelques observations d'ordre général sur le contenu normatif de l'article 41 avant de se pencher sur les arguments spécifiques des Parties. Premièrement, selon la Cour, l'article 41 établit une distinction claire entre les fonctions réglementaires confiées à la CARU en vertu du statut de 1975 — qui font l'objet de l'article 56 — et l'obligation que ledit article impose aux Parties d'adopter individuellement des normes et des mesures destinées à «protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution». Ainsi, l'obligation que les Parties s'engagent à respecter en vertu de l'article 41, qui est distincte de celles prévues aux articles 36 et 56 du statut de 1975, consiste à adopter les normes et mesures appropriées au sein de leurs systèmes juridiques nationaux respectifs afin de protéger et de préserver le milieu aquatique et d'en empêcher la pollution. Cette conclusion est confortée par le libellé des alinéas *b)* et *c)* de l'article 41, qui mentionnent la nécessité pour les Parties de n'abaisser ni les normes techniques ni les pénalités en vigueur dans leurs législations respectives et de s'informer mutuellement des normes qu'elles se proposent d'édicter en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.

196. Deuxièmement, selon la Cour, une simple lecture du texte de l'article 41 montre que ce sont les normes et mesures que les Parties sont tenues d'établir dans leurs systèmes juridiques respectifs qui doivent être «conform[es] aux accords internationaux applicables» et, «le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux».

197. Troisièmement, l'obligation de «préserver le milieu aquatique et, en particulier, [d']en empêcher la pollution en établissant des normes et en adoptant les mesures appropriées» impose d'exercer la diligence requise («due diligence») vis-à-vis de toutes les activités qui se déroulent sous la juridiction et le contrôle de chacune des parties. Cette obligation implique la nécessité non seulement d'adopter les normes et mesures appropriées, mais encore d'exercer un certain degré de vigilance dans leur mise en œuvre ainsi que dans le contrôle administratif des opérateurs publics et privés, par exemple en assurant la surveillance des activités entreprises par ces opérateurs, et ce, afin de préserver les droits de l'autre partie. Par conséquent, la responsabilité d'une partie au statut de 1975 serait engagée s'il était démontré qu'elle n'avait pas agi avec la diligence requise, faute d'avoir pris toutes les mesures appropriées pour assurer l'application de la réglementation pertinente à un opérateur public ou privé relevant de sa

the effects on the environment of the operation of the Gabčíkovo power plant" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs *(b)* and *(c)* of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

196. Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

197. Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 *(a)* in the adoption and enforcement of appropriate

juridiction. L'obligation de diligence requise qu'impose l'alinéa *a)* de l'article 41 en ce qui concerne l'adoption et la mise en œuvre des normes et mesures appropriées est encore renforcée par la double exigence que ces normes et mesures soient «conform[es] aux accords internationaux applicables» et, «le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux». Cette exigence présente l'avantage de garantir que les normes et mesures adoptées par les parties soient conformes aux accords internationaux applicables et prennent en même temps en compte les normes techniques convenues au niveau international.

198. Enfin, la portée de l'obligation d'empêcher la pollution doit être déterminée à la lumière de la définition de la pollution donnée à l'article 40 du statut de 1975. Celui-ci se lit ainsi: «Aux fins du présent statut, le terme «pollution» désigne l'introduction directe ou indirecte par l'homme de substances ou d'énergie nocives dans le milieu aquatique», le concept d'«effets nocifs» étant pour sa part défini comme suit dans le digeste de la CARU:

> «tout changement de la qualité des eaux qui empêche ou entrave leur utilisation légitime, produisant des effets délétères ou portant atteinte aux ressources vivantes, un risque à la santé humaine, une menace aux activités aquatiques y compris la pêche, ou la réduction des activités de récréation» (titre I, chapitre 1, section 2, article 1, alinéa *c)*, du digeste de la CARU (E3)).

199. Le digeste reflète la volonté des Parties et leur interprétation des dispositions du statut de 1975. Tout comme de nombreuses autres dispositions du statut, l'article 41 énonce les obligations d'ordre général, dont les Parties sont convenues, de réglementer et de limiter l'utilisation du fleuve et de protéger son environnement; c'est par le biais de l'activité réglementaire coordonnée de la CARU, telle que définie à l'article 56 du statut, de l'activité réglementaire de chacune des parties, ou par ces deux moyens, qu'un contenu plus précis est donné à ces obligations d'ordre général. Les deux types d'activités réglementaires sont conçus pour être complémentaires. Ainsi qu'expliqué plus bas (voir paragraphes 201 à 202, et 214), les normes établies par la CARU concernent principalement la qualité de l'eau. Le digeste de la CARU établit seulement des limites générales pour certains rejets ou effluents provenant d'installations industrielles, tels que les «hydrocarbures», les «solides sédimentables» et les «huiles et graisses», mais prévoit explicitement que la réglementation de ces questions est du ressort de chacune des parties. Il dispose également que, en ce qui concerne les effluents relevant de leur juridiction, chacune des parties doit prendre les «mesures correctives» nécessaires pour assurer la conformité aux normes relatives à la qualité de l'eau (digeste de la CARU, point E3: pollution, titre 2, chapitre 5, section 1, article 3). En Uruguay, ces mesures ont pris la forme d'un règlement sur la qualité des eaux (décret nº 253/79) et, en ce qui concerne l'usine Orion (Botnia), des conditions imposées dans le cadre de l'autorisation délivrée par le

rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

198. Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU Digest as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter 1, Section 2, Article 1 *(c)* of the Digest (E3)).

199. The Digest expresses the will of the Parties and their interpretation of the provisions of the 1975 Statute. Article 41, not unlike many other provisions of the 1975 Statute, lays down broad obligations agreed to by the Parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU as established under Article 56 of the 1975 Statute or through the regulatory action of each of the parties, or by both means. The two regulatory actions are meant to complement each other. As discussed below (see paragraphs 201 to 202, and 214), CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: "hydrocarbons", "sedimentable solids", and "oils and greases". As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate "corrective measures" in order to assure compliance with water quality standards (CARU Digest, Sec. E3: Pollution, Title 2, Chapter 5, Section 1, Article 3). Uruguay has taken that action in its Regulation on Water Quality (Decree No. 253/79) and in relation to the Orion (Botnia) mill in the conditions stipulated in the authorization issued by MVOTMA. In Argentina, the Entre Ríos Province, which borders the river opposite the plant, has regulated industrial discharges in a decree that also recognizes the binding effect of the

MVOTMA. En Argentine, la province d'Entre Ríos, qui jouxte le fleuve sur la rive opposée au site de l'usine, a réglementé les rejets industriels par des décrets qui reconnaissent également le caractère contraignant du digeste de la CARU (décret réglementaire n° 5837, gouvernement d'Entre Ríos (26 décembre 1991), et décret réglementaire n° 5394, gouvernement d'Entre Ríos (7 avril 1997)).

200. La Cour estime qu'il convient de traiter à ce stade de la question des règles à l'aune desquelles doit s'apprécier toute allégation de violation et, plus précisément, l'existence d'«effets nocifs». La Cour considère qu'il convient de rechercher ces règles dans le statut de 1975, dans les mesures communes que les Parties ont adoptées de manière coordonnée par l'intermédiaire de la CARU (comme le prévoit le texte introductif des articles 41 et 56 du statut), et dans les dispositions réglementaires adoptées par chacune des Parties dans la mesure exigée par le statut de 1975 (comme le prévoient les alinéas *a), b)* et *c)* de l'article 41).

201. En vertu de l'alinéa *a)* de l'article 56, la CARU a notamment pour fonction d'établir le cadre réglementaire relatif à la prévention de la pollution ainsi qu'à la conservation et à la préservation des ressources biologiques. C'est dans l'exercice de ce pouvoir réglementaire que la commission a adopté en 1984 le digeste sur les utilisations des eaux du fleuve Uruguay, qu'elle a depuis modifié. En 1990, lorsqu'elles ont adopté le point E3 du digeste, les Parties ont indiqué l'avoir élaboré au titre de l'alinéa *f)* de l'article 7 du traité de 1961 ainsi que des articles 35, 36, 41 à 45 et 56, alinéa *a)*, point 4), du statut de 1975. Ainsi que mentionné dans le digeste, les «objectifs de base» du point E3 sont les suivants:

> «*a)* protéger et préserver le milieu aquatique et son équilibre écologique;
> *b)* assurer toute utilisation légitime des eaux, en tenant compte des besoins à long terme et particulièrement [de] ceux concernant la consommation humaine;
> *c)* prévenir toute nouvelle forme de pollution et essayer de la réduire, lorsque les valeurs de référence adoptées pour les différentes utilisations légitimes des eaux du fleuve sont dépassées;
> *d)* promouvoir la recherche scientifique en matière de pollution.» (Titre I, chapitre 2, section 1, article 1.)

202. Les normes établies dans le cadre du digeste ne sont toutefois pas exhaustives. Comme cela a été indiqué précédemment, il est prévu qu'elles soient complétées par les normes et mesures devant être adoptées par chacune des Parties dans le cadre de sa législation interne.

La Cour appliquera donc, outre le statut de 1975, ces deux ensembles de règles pour déterminer si les Parties ont violé les obligations qu'elles avaient contractées en ce qui concerne les rejets d'effluents de l'usine et l'impact de ces rejets sur la qualité des eaux, l'équilibre écologique et la diversité biologique du fleuve.

CARU Digest (Regulatory Decree No. 5837, Government of Entre Ríos, 26 December 1991, and Regulatory Decree No. 5394, Government of Entre Ríos, 7 April 1997).

200. The Court considers it appropriate to now address the question of the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined. It is the view of the Court that these rules are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs *(a)*, *(b)* and *(c)* of Article 41 contemplate).

201. The functions of CARU under Article 56 *(a)* include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 *(f)* of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 *(a)* (4) of the 1975 Statute. As stated in the Digest, the "basic purposes" of Section E3 of the Digest are to be as follows:

"*(a)* to protect and preserve the water and its ecological balance;

*(b)* to ensure any legitimate use of the water considering long term needs and particularly human consumption needs;

*(c)* to prevent all new forms of pollution and to achieve its reduction in case the standard values adopted for the different legitimate uses of the River's water are exceeded;

*(d)* to promote scientific research on pollution." (Title I, Chapter 2, Section 1, Article 1.)

202. The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

a) *Evaluation de l'impact sur l'environnement*

203. La Cour se penchera maintenant sur la relation entre la nécessité de réaliser une évaluation de l'impact sur l'environnement, lorsque l'activité projetée risque d'avoir un effet préjudiciable sur une ressource partagée et de causer un dommage transfrontière, et les obligations qui incombent aux Parties en vertu des alinéas *a)* et *b)* de l'article 41 du statut de 1975. Les Parties conviennent de la nécessité de procéder à une évaluation de l'impact sur l'environnement. L'Argentine soutient que, prises dans leur globalité, les obligations prévues par le statut imposaient l'obligation de procéder à une évaluation de l'impact sur l'environnement avant d'autoriser Botnia à construire l'usine, ce dont convient l'Uruguay. En revanche, les Parties sont en désaccord quant à la portée et au contenu de l'évaluation de l'impact sur l'environnement à laquelle aurait dû procéder l'Uruguay en ce qui concerne le projet d'usine Orion (Botnia). L'Argentine soutient en premier lieu que l'Uruguay a manqué de s'assurer que «des évaluations environnementales complètes [avaient été] préparées préalablement à ses décisions d'autoriser la construction…» et, en second lieu, que «[l]es décisions de l'Uruguay [ont été] ... basées sur des évaluations environnementales qui [n'étaient] pas satisfaisantes», essentiellement parce que l'Uruguay n'a pas pris en compte l'ensemble des impacts potentiels de l'usine, alors que le droit international et la pratique internationale l'exigeaient; elle mentionne à cet égard la convention de 1991 sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière de la Commission économique des Nations Unies pour l'Europe (ci-après la «convention d'Espoo») (*RTNU*, vol. 1989, p. 309) ainsi que les buts et principes de l'évaluation de l'impact sur l'environnement adoptés en 1987 par le Programme des Nations Unies pour l'environnement (ci-après les «buts et principes du PNUE») (*UNEP/WG.152/4 Annexe (1987)*, document adopté par le conseil d'administration du PNUE lors de sa 14e session (déc. 14/25 (1987)). L'Uruguay admet que, conformément à la pratique internationale, une évaluation de l'impact sur l'environnement de l'usine Orion (Botnia) était nécessaire, mais soutient que le droit international n'impose aucune condition quant au contenu d'une telle évaluation, sa réalisation relevant d'une procédure nationale, et non internationale, du moins lorsque le projet concerné n'est pas un projet commun à plusieurs Etats. L'Uruguay estime que, en vertu de la pratique des Etats et du projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses adopté en 2001 par la Commission du droit international, le droit international lui impose uniquement d'évaluer les éventuels effets nocifs transfrontières du projet sur les êtres humains, les biens et l'environnement des autres Etats, sans qu'il soit nécessaire d'évaluer les risques lointains ou purement théoriques.

204. La Cour considère que, pour s'acquitter comme il se doit des obligations qu'elles tiennent des alinéas *a)* et *b)* de l'article 41 du statut de 1975, les Parties sont tenues, aux fins de protéger et de préserver le

(a) *Environmental Impact Assessment*

203. The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the Parties under Article 41 *(a)* and *(b)* of the 1975 Statute. The Parties agree on the necessity of conducting an environmental impact assessment. Argentina maintains that the obligations under the 1975 Statute viewed together impose an obligation to conduct an environmental impact assessment prior to authorizing Botnia to construct the plant. Uruguay also accepts that it is under such an obligation. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project. Argentina maintains in the first place that Uruguay failed to ensure that "full environmental assessments [had been] produced, prior to its decision to authorize the construction . . ."; and in the second place that "Uruguay's decisions [were] . . . based on unsatisfactory environmental assessments", in particular because Uruguay failed to take account of all potential impacts from the mill, even though international law and practice require it, and refers in this context to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe (hereinafter the "Espoo Convention") (*UNTS*, Vol. 1989, p. 309), and the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter the "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987)*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)). Uruguay accepts that, in accordance with international practice, an environmental impact assessment of the Orion (Botnia) mill was necessary, but argues that international law does not impose any conditions upon the content of such an assessment, the preparation of which being a national, not international, procedure, at least where the project in question is not one common to several States. According to Uruguay, the only requirements international law imposes on it are that there must be assessments of the project's potential harmful transboundary effects on people, property and the environment of other States, as required by State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, without there being any need to assess remote or purely speculative risks.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the

milieu aquatique lorsqu'elles envisagent des activités pouvant éventuellement causer un dommage transfrontière, de procéder à une évaluation de l'impact sur l'environnement. Comme la Cour l'a relevé dans l'affaire du *Différend relatif à des droits de navigation et des droits connexes*,

> «il existe des cas où l'intention des parties au moment même de la conclusion du traité a été, ou peut être présumée avoir été, de conférer aux termes employés — ou à certains d'entre eux — un sens ou un contenu évolutif et non pas intangible, pour tenir compte notamment de l'évolution du droit international» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 242, par. 64).

Ainsi, l'obligation de protéger et de préserver, énoncée à l'alinéa *a)* de l'article 41 du statut, doit être interprétée conformément à une pratique acceptée si largement par les Etats ces dernières années que l'on peut désormais considérer qu'il existe, en droit international général, une obligation de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière, et en particulier sur une ressource partagée. De plus, on ne pourrait considérer qu'une partie s'est acquittée de son obligation de diligence, et du devoir de vigilance et de prévention que cette obligation implique, dès lors que, prévoyant de réaliser un ouvrage suffisamment important pour affecter le régime du fleuve ou la qualité de ses eaux, elle n'aurait pas procédé à une évaluation de l'impact sur l'environnement permettant d'apprécier les effets éventuels de son projet.

205. La Cour note que ni le statut de 1975 ni le droit international général ne précisent la portée et le contenu des évaluations de l'impact sur l'environnement. Elle relève par ailleurs que l'Argentine et l'Uruguay ne sont pas parties à la convention d'Espoo. Enfin, elle constate que l'autre instrument cité par l'Argentine à l'appui de son argument, à savoir les buts et principes du PNUE, ne lie pas les Parties, mais doit, en tant qu'il s'agit de directives établies par un organisme technique international, être pris en compte par chacune des Parties conformément à l'alinéa *a)* de l'article 41 lorsqu'elle adopte des mesures dans le cadre de sa réglementation interne. En outre, cet instrument dispose seulement que «[l]es effets sur l'environnement devraient être évalués, dans une [évaluation de l'impact sur l'environnement], à un niveau de détail correspondant à leur importance probable du point de vue de l'environnement» (principe 5), mais ne spécifie aucunement les éléments qu'une telle évaluation doit à tout le moins contenir. Dès lors, la Cour estime qu'il revient à chaque Etat de déterminer, dans le cadre de sa législation nationale ou du processus d'autorisation du projet, la teneur exacte de l'évaluation de l'impact sur l'environnement requise dans chaque cas en prenant en compte la nature et l'ampleur du projet en cause et son impact négatif probable sur l'environnement, ainsi que la nécessité d'exercer, lorsqu'il procède à une telle évaluation, toute la diligence requise. La Cour estime par ailleurs

aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once

qu'une évaluation de l'impact sur l'environnement doit être réalisée avant la mise en œuvre du projet. En outre, une fois les opérations commencées, une surveillance continue des effets dudit projet sur l'environnement sera mise en place, qui se poursuivra au besoin pendant toute la durée de vie du projet.

206. La Cour a déjà examiné la place qu'occupe l'évaluation de l'impact sur l'environnement dans le cadre des obligations de nature procédurale imposées aux Parties par le statut de 1975 (paragraphes 119 et 120). Elle se penchera à présent sur les points en litige concernant spécifiquement le rôle de ce type d'évaluation dans le respect des obligations de fond des Parties, c'est-à-dire sur les questions de savoir, d'une part, si cette évaluation aurait, sur le plan méthodologique, nécessairement dû envisager d'autres sites possibles, compte tenu de la capacité de réception du fleuve dans la zone où l'usine devait être construite, et, d'autre part, si les populations susceptibles d'être affectées, en l'occurrence les populations riveraines uruguayenne comme argentine, auraient dû être consultées, ou l'ont en fait été, dans le cadre d'une évaluation de l'impact sur l'environnement.

i) *Le choix du site de Fray Bentos pour l'usine Orion (Botnia)*

207. Selon l'Argentine, si l'évaluation de l'impact sur l'environnement réalisée par l'Uruguay est insuffisante, c'est notamment parce qu'elle ne prévoit pas d'autres emplacements possibles pour la construction de l'usine, comme l'exige le droit international (buts et principes du PNUE, convention d'Espoo, politique opérationnelle SFI 4.01). L'Argentine soutient que le site choisi est particulièrement sensible d'un point de vue écologique et qu'il n'est pas propice à la dispersion des polluants «eu égard à la nature des eaux qui recevront la pollution, à la propension du site à la sédimentation et à l'eutrophisation, au phénomène d'inversion de courant et à la proximité de l'agglomération la plus importante du fleuve Uruguay».

208. L'Uruguay répond que le site de Fray Bentos a été initialement retenu en raison du volume d'eau particulièrement important du fleuve à cet endroit, qui constituerait un facteur propice à la dilution des effluents. Il précise que le site est en outre aisément accessible par voie fluviale, ce qui facilite la livraison des matières premières, et qu'une main-d'œuvre locale y est disponible. L'Uruguay considère que, s'il existe une obligation d'envisager d'autres sites, les instruments invoqués en ce sens par l'Argentine ne font pas obligation de le faire dans le cadre d'une évaluation de l'impact sur l'environnement, à moins que les circonstances ne l'imposent. Enfin, l'Uruguay affirme qu'il a de toute façon étudié les autres sites possibles et que l'opportunité du choix du site de l'usine Orion (Botnia) a été évaluée de manière exhaustive.

209. La Cour examinera à présent la question de savoir si, d'une part, l'Uruguay a manqué d'exercer la diligence requise dans le cadre de son évaluation de l'impact sur l'environnement, en particulier en ce qui

operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

206. The Court has already considered the role of the environmental impact assessment in the context of the procedural obligations of the Parties under the 1975 Statute (paragraphs 119 and 120). It will now deal with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

(i) *The siting of the Orion (Botnia) mill at Fray Bentos*

207. According to Argentina, one reason why Uruguay's environmental impact assessment is inadequate is that it contains no analysis of alternatives for the choice of the mill site, whereas the study of alternative sites is required under international law (UNEP Goals and Principles, Espoo Convention, IFC Operational Policy 4.01). Argentina contends that the chosen site is particularly sensitive from an ecological point of view and unconducive to the dispersion of pollutants "[b]ecause of the nature of the waters which will receive the pollution, the propensity of the site to sedimentation and eutrophication, the phenomenon of reverse flow and the proximity of the largest settlement on the River Uruguay".

208. Uruguay counters that the Fray Bentos site was initially chosen because of the particularly large volume of water in the river at that location, which would serve to promote effluent dilution. Uruguay adds that the site is moreover easily accessible for river navigation, which facilitates delivery of raw materials, and local manpower is available there. Uruguay considers that, if there is an obligation to consider alternative sites, the instruments invoked for that purpose by Argentina do not require alternative locations to be considered as part of an environmental impact assessment unless it is necessary in the circumstances to do so. Finally, Uruguay affirms that in any case it did so and that the suitability of the Orion (Botnia) site was comprehensively assessed.

209. The Court will now consider, first, whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant

concerne le choix de l'emplacement de l'usine, et si, d'autre part, le site retenu, en l'occurrence Fray Bentos, était impropre à la construction d'une installation produisant des rejets industriels de cette nature et de cette ampleur ou pouvait avoir un impact préjudiciable sur le fleuve.

210. S'agissant du premier point, la Cour a déjà indiqué que la convention d'Espoo n'était pas applicable en l'espèce (voir paragraphe 205 ci-dessus); pour ce qui est des buts et principes du PNUE auxquels l'Argentine fait référence, et dont le caractère juridique a été explicité plus haut au paragraphe 205, la Cour rappelle que l'alinéa *c)* du principe 4 dispose simplement qu'une évaluation de l'impact sur l'environnement doit au minimum contenir «[une] description des autres solutions possibles, le cas échéant». Il convient par ailleurs de noter que l'Uruguay a précisé à plusieurs reprises que l'opportunité du choix de Fray Bentos avait été évaluée de manière exhaustive et que d'autres emplacements possibles avaient été envisagés. La Cour relèvera encore que l'étude d'impact cumulé (ci-après «CIS», selon l'acronyme anglais de «Cumulative Impact Study») finale réalisée par la SFI en septembre 2006 montre que Botnia a évalué au total quatre sites en 2003 — La Paloma, Paso de los Toros, Nueva Palmira et Fray Bentos —, avant de retenir celui de Fray Bentos. Ces évaluations concluaient que le site de La Paloma ne convenait pas parce que les quantités d'eau douce y étaient limitées et qu'il abritait d'importantes populations d'oiseaux, que celui de Nueva Palmira devait être écarté en raison de la présence de zones résidentielles, récréatives et culturellement importantes à proximité, et que celui de Paso de los Toros était à exclure en raison d'un trop faible débit pendant la saison sèche, d'un conflit potentiel avec d'autres utilisations de l'eau et d'un manque d'infrastructures. Dès lors, la Cour n'est pas convaincue par l'argument de l'Argentine selon lequel une évaluation des différents sites possibles n'a pas eu lieu avant le choix de l'emplacement définitif.

211. S'agissant du second point, la Cour ne peut manquer d'observer que le choix de l'emplacement effectif d'une usine telle que celle construite le long du fleuve Uruguay devrait tenir compte de la capacité des eaux du fleuve à recevoir, diluer et disperser des rejets d'effluents d'une installation de cette nature et de cette ampleur.

212. La Cour relève que, sur la question de la capacité de réception des eaux du fleuve à l'emplacement de l'usine, les Parties sont en désaccord sur les caractéristiques géomorphologiques et hydrodynamiques du fleuve dans la zone en question, notamment en ce qui concerne son débit et la manière dont le courant, y compris son sens et sa vitesse, agit à son tour sur la dispersion et la dilution des polluants. Les différentes interprétations avancées par les Parties quant au débit du fleuve résultent peut-être des différents modèles utilisés par celles-ci pour analyser les caractéristiques hydrodynamiques du fleuve Uruguay à Fray Bentos. L'Argentine a eu recours à un modèle tridimensionnel s'appuyant sur des mesures de la vitesse et du sens du courant à dix profondeurs différentes, et s'est servie d'un sonar — un profileur de courant à effet Doppler (ci-après «sonar

and, secondly, whether the particular location chosen for the siting of the plant, in this case Fray Bentos, was unsuitable for the construction of a plant discharging industrial effluent of this nature and on this scale, or could have a harmful impact on the river.

210. Regarding the first point, the Court has already indicated that the Espoo Convention is not applicable to the present case (see paragraph 205 above); while with respect to the UNEP Goals and Principles to which Argentina has referred, whose legal character has been described in paragraph 205 above, the Court recalls that Principle 4 *(c)* simply provides that an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

211. Regarding the second point, the Court cannot fail to note that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

212. The Court notes, with regard to the receiving capacity of the river at the location of the mill, that the Parties disagree on the geomorphological and hydrodynamic characteristics of the river in the relevant area, particularly as they relate to river flow, and how the flow of the river, including its direction and its velocity, in turn determines the dispersal and dilution of pollutants. The differing views put forward by the Parties with regard to the river flow may be due to the different modelling systems which each has employed to analyse the hydrodynamic features of the River Uruguay at the Fray Bentos location. Argentina implemented a three-dimensional modelling that measured speed and direction at ten different depths of the river and used a sonar — an Acoustic Doppler Current Profiler (hereafter

ADCP») — pour enregistrer, pendant environ un an, la vitesse du courant à différentes profondeurs. Le système tridimensionnel a produit un grand nombre de données, intégrées ensuite dans un modèle hydrodynamique numérique. En revanche, Botnia a fondé son évaluation de l'impact sur l'environnement sur un modèle bidimensionnel — le RMA2. L'étude d'impact cumulé d'EcoMetrix, quant à elle, se fondait à la fois sur un modèle tridimensionnel et sur un modèle bidimensionnel, mais n'indiquait pas si un sonar ADCP avait été utilisé à différentes profondeurs.

213. La Cour n'estime pas nécessaire d'examiner en détail la validité scientifique et technique des différents types de modélisation, de calibrage et de validation mis en œuvre par les Parties pour déterminer le débit du fleuve et le sens de son courant dans la zone concernée. La Cour observe cependant que, si les deux Parties conviennent que des inversions de courant se produisent fréquemment et que des périodes de bas débit et de stagnation peuvent être observées dans la zone concernée, elles sont en désaccord sur les conséquences de ces phénomènes pour les rejets de l'usine Orion (Botnia) dans ce tronçon du fleuve.

214. La Cour est d'avis que, en élaborant ses normes relatives à la qualité de l'eau conformément aux articles 36 et 56 du statut de 1975, la CARU a certainement tenu compte de la capacité de réception et de la sensibilité des eaux du fleuve, y compris dans les zones fluviales qui bordent Fray Bentos. Dès lors, s'il n'est pas établi que les rejets d'effluents de l'usine Orion (Botnia) ont, du fait de leur taux de concentration, excédé les limites fixées par ces normes, la Cour ne saurait conclure que l'Uruguay a violé les obligations lui incombant en vertu du statut de 1975. Qui plus est, aucune des Parties n'a soutenu devant la Cour que, en élaborant ses normes relatives à la qualité de l'eau, la CARU n'avait pas dûment tenu compte des caractéristiques géomorphologiques et hydrologiques du fleuve et de la capacité de ses eaux à disperser et diluer différents types de rejets. La Cour estime que, si pareille insuffisance était avérée, notamment en ce qui concerne certaines portions du fleuve, telles que le tronçon qui borde Fray Bentos, les Parties devraient entamer une révision des normes relatives à la qualité de l'eau établies par la CARU pour s'assurer qu'elles tiennent bien compte des caractéristiques du fleuve et permettent d'en protéger les eaux et l'écosystème.

ii) *Consultation des populations concernées*

215. Les Parties sont en désaccord sur la mesure dans laquelle les populations susceptibles d'être affectées par la construction de l'usine Orion (Botnia), notamment les riverains en Argentine, ont été consultées au cours de la réalisation de l'évaluation de l'impact sur l'environnement. Les deux Parties conviennent que la consultation des populations concernées doit faire partie de l'évaluation de l'impact sur l'environnement, mais l'Argentine affirme que le droit international impose aux Etats des obligations spécifiques à cet égard. A l'appui de cet argument, elle cite les

"ADCP") — to record water flow velocities for a range of depths for about a year. The three-dimensional system generated a large number of data later introduced in a numerical hydrodynamic model. On the other hand, Botnia based its environmental impact assessment on a bi-dimensional modelling — the RMA2. The EcoMetrix CIS implemented both three-dimensional and bi-dimensional models. However, it is not mentioned whether an ADCP sonar was used at different depths.

213. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

214. The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute. Moreover, neither of the Parties has argued before the Court that the water quality standards established by CARU have not adequately taken into consideration the geomorphological and hydrological characteristics of the river and the capacity of its waters to disperse and dilute different types of discharges. The Court is of the opinion that, should such inadequacy be detected, particularly with respect to certain areas of the river such as at Fray Bentos, the Parties should initiate a review of the water quality standards set by CARU and ensure that such standards clearly reflect the characteristics of the river and are capable of protecting its waters and its ecosystem.

(ii) *Consultation of the affected populations*

215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of

articles 2.6 et 3.8 de la convention d'Espoo, l'article 13 du projet d'articles de la Commission du droit international de 2001 sur la prévention des dommages transfrontières résultant d'activités dangereuses et les principes 7 et 8 des buts et principes du PNUE. L'Uruguay estime que les dispositions invoquées par l'Argentine ne peuvent servir de fondement juridique à une obligation de consulter les populations concernées et ajoute qu'en tout état de cause ces populations ont bien été consultées.

216. La Cour estime qu'aucune obligation juridique de consulter les populations concernées ne découle pour les Parties des instruments invoqués par l'Argentine.

217. En ce qui concerne les faits de l'espèce, la Cour note que, tant avant qu'après l'octroi de l'autorisation environnementale préalable, l'Uruguay a entrepris des activités visant à consulter les populations concernées, à la fois sur la rive argentine et sur la rive uruguayenne du fleuve. Ainsi, des réunions ont eu lieu le 2 décembre 2003 à Río Negro et le 26 mai 2004 à Fray Bentos, avec la participation d'organisations non gouvernementales argentines. En outre, le 21 décembre 2004, une séance publique de discussion a eu lieu à Fray Bentos, qui, selon l'Uruguay, a porté entre autres sujets sur la

> «manipulation de produits chimiques dans l'usine et dans le port, l'apparition de pluies acides, de dioxines, de furanes et d'autres composés polychlorés hautement toxiques pouvant avoir des effets dommageables sur l'environnement, la conformité à la convention de Stockholm, les rejets atmosphériques de l'usine, les émissions électromagnétiques et électrostatiques [et] les rejets liquides dans le fleuve».

Des habitants de Fray Bentos et des régions voisines d'Uruguay et d'Argentine ont participé à la réunion et présenté 138 documents, dans lesquels sont exposées leurs questions ou préoccupations.

218. De plus, la Cour note que, entre juin et novembre 2005, plus de quatre-vingts entretiens ont été menés par le Consensus Building Institute, organisation sans but lucratif spécialisée dans la facilitation du dialogue, la médiation et la négociation, que la SFI avait chargée de ce travail. Ces entretiens se sont déroulés entre autres à Fray Bentos, Gualeguaychú, Montevideo et Buenos Aires; y ont notamment participé des groupes de la société civile, des organisations non gouvernementales, des associations professionnelles, des représentants officiels, des agences de tourisme, des chefs d'entreprise locaux, des pêcheurs, des agriculteurs et des propriétaires de plantations des deux rives du fleuve. En décembre 2005, le projet d'étude d'impact cumulé et le rapport du Consensus Building Institute ont été publiés, et la SFI a ouvert une période de consultation afin de recevoir de nouveaux commentaires des parties prenantes en Argentine et en Uruguay.

219. Compte tenu de ce qui précède, la Cour constate qu'une consultation par l'Uruguay des populations concernées a bien eu lieu.

the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.

216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.

217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river. These activities included meetings on 2 December 2003 in Río Negro, and on 26 May 2004 in Fray Bentos, with participation of Argentine non-governmental organizations. In addition, on 21 December 2004, a public hearing was convened in Fray Bentos which, according to Uruguay, addressed among other subjects, the

> "handling of chemical products in the plant and in the port; the appearance of acid rain, dioxins, furans and other polychlorates of high toxicity that could affect the environment; compliance with the Stockholm Convention; atmospheric emissions of the plant; electromagnetic and electrostatic emissions; [and] liquid discharges into the river".

Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated in the meeting and submitted 138 documents containing questions or concerns.

218. Further, the Court notes that between June and November 2005 more than 80 interviews were conducted by the Consensus Building Institute, a non-profit organization specializing in facilitated dialogues, mediation, and negotiation, contracted by the IFC. Such interviews were conducted *inter alia* in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires, with interviewees including civil society groups, non-governmental organizations, business associations, public officials, tourism operators, local business owners, fishermen, farmers and plantation owners on both sides of the river. In December 2005, the draft CIS and the report prepared by the Consensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay.

219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

b) *La question des techniques de production utilisées à l'usine Orion (Botnia)*

220. L'Argentine soutient que l'Uruguay n'a pas pris toutes les mesures propres à empêcher la pollution en n'exigeant pas de l'usine qu'elle utilise les «meilleures techniques disponibles», alors que cette exigence résulterait de l'alinéa *d)* de l'article 5 de la convention POP, dont les dispositions seraient incorporées, par l'effet de la «clause de renvoi», dans l'alinéa *a)* de l'article 41 du statut de 1975. Selon l'Argentine, les rapports d'experts qu'elle cite établissent que l'usine n'utilise pas les meilleures techniques disponibles et que ses performances sont en deçà des normes internationales, si l'on considère les diverses techniques de production de pâte à papier disponibles. L'Uruguay conteste ces affirmations. S'appuyant sur l'étude d'impact cumulé finale, le deuxième rapport Hatfield et l'audit réalisé à la demande de la SFI par l'AMEC, l'Uruguay affirme que, par la technologie qu'elle emploie, l'usine Orion (Botnia) est une des usines de pâte à papier les plus performantes au monde, mettant en œuvre les meilleures techniques disponibles et se conformant notamment aux normes fixées par l'Union européenne dans ce domaine.

221. L'Argentine, cependant, dénonce en particulier l'absence de tout «traitement tertiaire des effluents» (c'est-à-dire un troisième traitement des résidus de production avant leur rejet dans la nature), qui serait nécessaire pour réduire le volume des nutriments, dont le phosphore, dès lors que les rejets sont déversés dans un environnement très sensible. L'usine de pâte à papier est, selon l'Argentine, également dépourvue d'un bassin d'urgence vide, censé contenir les déversements soudains d'effluents. Répondant à une question posée par un juge, l'Argentine estime qu'il serait possible d'ajouter un système de traitement tertiaire, mais que l'Uruguay n'a pas évalué comme il se devait les possibilités s'offrant en la matière à l'usine Orion (Botnia).

222. L'Uruguay fait observer que «les experts n'ont pas jugé nécessaire de prévoir, pour l'usine, une phase de traitement tertiaire». En réponse à cette même question, l'Uruguay a fait valoir que, bien que possible, l'ajout d'une installation de traitement tertiaire ne serait pas globalement bénéfique pour l'environnement, puisqu'il entraînerait une hausse importante de la consommation d'énergie, des émissions de carbone de l'usine, de la production de boues et de l'utilisation de produits chimiques. L'Uruguay a invariablement soutenu que la technique de blanchiment utilisée était adéquate, que les bassins d'urgence installés étaient suffisants, que la production de composés chimiques synthétiques de l'usine répondait aux exigences technologiques et que le risque potentiel de cette production avait bien été évalué.

223. Tout d'abord, la Cour fera observer que l'obligation d'empêcher la pollution et de protéger ainsi que de préserver le milieu aquatique du fleuve Uruguay énoncée à l'alinéa *a)* de l'article 41, et l'exercice de la diligence requise («due diligence») qu'elle implique, entraîne la nécessité

(b) *Question of the production technology used in the Orion (Botnia) mill*

220. Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques", even though this is required under Article 5 *(d)* of the POPs Convention, the provisions of which are incorporated by virtue of the "referral clause" in Article 41 *(a)* of the 1975 Statute. According to Argentina, the experts' reports it cites establish that the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp. Uruguay contests these claims. Relying on the CIS, the second Hatfield report and the audit conducted by AMEC at the IFC's request, Uruguay asserts that the Orion (Botnia) mill is, by virtue of the technology employed there, one of the best pulp mills in the world, applying best available techniques and complying with European Union standards, among others, in the area.

221. Argentina, however, specifically criticizes the absence of any "tertiary treatment of effluent" (i.e., a third round of processing production waste before discharge into the natural environment), which is necessary to reduce the quantity of nutrients, including phosphorus, since the effluent is discharged into a highly sensitive environment. The mill also lacks, according to Argentina, an empty emergency basin, designed to contain effluent spills. Answering a question asked by a judge, Argentina considers that a tertiary treatment would be possible, but that Uruguay failed to conduct an adequate assessment of tertiary treatment options for the Orion (Botnia) mill.

222. Uruguay observes that "the experts did not consider it necessary to equip the mill with a tertiary treatment phase". Answering the same question, Uruguay argued that, though feasible, the addition of a tertiary treatment facility would not be environmentally advantageous overall, as it would significantly increase the energy consumption of the plant, its carbon emissions, together with sludge generation and chemical use. Uruguay has consistently maintained that the bleaching technology used is acceptable, that the emergency basins in place are adequate, that the mill's production of synthetic chemical compounds meets technological requirements and that the potential risk from this production was indeed assessed.

223. To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 *(a)*, and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used

d'examiner avec soin la technologie à laquelle l'installation industrielle a recours, en particulier dans un secteur tel que celui de la fabrication de pâte à papier, où sont souvent employées ou produites des substances ayant un impact sur l'environnement. Ce point est d'autant plus important que, aux termes de l'alinéa *a)* de l'article 41, le cadre réglementaire qu'il incombe aux Parties d'adopter doit être en harmonie avec les directives et les recommandations des organismes techniques internationaux.

224. La Cour note que l'usine Orion (Botnia) utilise le procédé Kraft de fabrication de pâte blanchie. D'après le document de référence de décembre 2001 sur les meilleures techniques disponibles en matière de prévention et de réduction intégrées de la pollution dans l'industrie de la pâte à papier (ci-après «IPPC-BAT») de la Commission européenne, que les Parties ont qualifié de texte de référence pour ce secteur, le procédé Kraft, déjà utilisé à l'époque dans environ 80 % de la production mondiale de pâte à papier, constitue donc le procédé de production chimique de pâte à papier le plus répandu. L'usine utilise un procédé de blanchiment exempt de chlore élémentaire dit «léger» («ECF light»), ainsi que des systèmes de traitement des eaux usées primaire et secondaire faisant intervenir un procédé de traitement par boues activées.

225. La Cour estime que, s'agissant de la technologie employée, et sur la base des documents que lui ont soumis les Parties, en particulier du document IPPC-BAT, aucun élément de preuve ne vient à l'appui de la prétention de l'Argentine selon laquelle l'usine Orion (Botnia) n'appliquerait pas les meilleures techniques disponibles en matière de rejets d'effluents par tonne de pâte à papier produite. Cette conclusion est étayée par le fait que, comme démontré ci-dessous, l'Argentine n'a pas présenté d'éléments de preuve établissant clairement que l'usine Orion (Botnia) ne respecte pas les prescriptions du statut de 1975, du digeste de la CARU ou des règlements applicables des Parties en ce qui concerne la concentration d'effluents par litre d'eaux usées déversés par l'usine et la quantité absolue d'effluents pouvant être rejetée en une journée.

226. La Cour rappelle que l'Uruguay a soumis de très nombreuses informations relatives à la surveillance des effluents de l'usine Orion (Botnia), qui figurent dans les multiples rapports établis par EcoMetrix et la DINAMA (évaluation indépendante de la performance environnementale, réalisée par EcoMetrix à la demande de la SFI (phase 2 : examen de la performance environnementale à six mois), juillet 2008 ; évaluation indépendante de la performance environnementale, réalisée par EcoMetrix à la demande de la SFI (phase 3 : examen de la performance environnementale de l'année 2008) (ci-après le «troisième rapport de suivi d'EcoMetrix»), mars 2009 ; DINAMA, rapport d'évaluation de la performance dans la première année d'opération de l'usine Orion (Botnia) et de la qualité de l'environnement dans la zone d'influence, mai 2009 ; DINAMA, rapport semestriel des résultats du plan de contrôle des émissions et de la performance environnementale), et que l'Argentine a avancé, à cet égard, que l'Uruguay bénéficiait, sur cette question, sinon de l'exclusivité des éléments de preuve factuels, du moins d'un accès très privilégié

by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 *(a)* provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

224. The Court notes that the Orion (Botnia) mill uses the bleached Kraft pulping process. According to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), which the Parties referred to as the industry standard in this sector, the Kraft process already accounted at that time for about 80 per cent of the world's pulp production and is therefore the most applied production method of chemical pulping processes. The plant employs an ECF-light (Elemental chlorine-free) bleaching process and a primary and secondary wastewater treatment involving activated sludge treatment.

225. The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the IPPC-BAT, there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

226. The Court recalls that Uruguay has submitted extensive data regarding the monitoring of effluent from the Orion (Botnia) mill, as contained in the various reports by EcoMetrix and DINAMA (EcoMetrix, Independent Performance Monitoring as required by the IFC Phase 2: Six Month Environmental Performance Review (July 2008); EcoMetrix, Independent Performance Monitoring as required by the IFC, Phase 3: Environmental Performance Review (2008 Monitoring Year) (hereinafter "EcoMetrix Third Monitoring Report"); DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009; DINAMA, Six Month Report on the Botnia Emission Control and Environmental Performance Plan), and that Argentina expressed the view, in this regard, that Uruguay had on this matter, much greater, if not exclusive, access to the factual evidence. However, the Court notes that Argentina has itself generated much factual information and that the materials which Uruguay produced have

à ceux-ci. La Cour note cependant que l'Argentine a elle-même produit un grand nombre d'informations factuelles, et que les éléments soumis par l'Uruguay ou bien lui ont été accessibles à différents stades de la procédure ou bien figurent dans le domaine public. Aussi n'estime-t-elle pas que l'Argentine ait été désavantagée en ce qui concerne la production d'éléments de preuve relatifs aux déversements d'effluents provenant de l'usine de pâte à papier.

227. Afin de déterminer si les concentrations des polluants déversés par l'usine Orion (Botnia) respectent les limites réglementaires, la Cour devra les évaluer à l'aune des limites autorisées en matière de rejet d'effluents — tant en ce qui concerne la concentration d'effluents par litre d'eaux usées déversés qu'en ce qui concerne la quantité absolue d'effluents pouvant être rejetée en une journée — figurant dans les textes de réglementation applicables des Parties, tels que qualifiés plus haut par la Cour au paragraphe 200, et dans les autorisations relatives à l'usine accordées par les autorités uruguayennes. Le digeste, en effet, ne fixe que des limites générales pour les «hydrocarbures», les «solides sédimentables» et les «huiles et graisses», et n'en prévoit pas de spécifiques en ce qui concerne les substances à propos desquelles les Parties sont en désaccord. L'Argentine n'a pas allégué que l'usine Orion (Botnia) n'avait pas respecté les normes de la CARU relatives aux effluents (digeste de la CARU, point E3 (1984, tel que modifié)).

228. De l'examen des données réunies après sa mise en service, telles qu'elles figurent dans les différents rapports de la DINAMA et d'EcoMetrix, il ne ressort pas que les rejets de l'usine Orion (Botnia) ont excédé les limites fixées par les normes relatives aux effluents énoncées dans la réglementation applicable de l'Uruguay telle que qualifiée plus haut par la Cour au paragraphe 200 ou dans l'autorisation environnementale préalable accordée par le MVOTMA (autorisation environnementale préalable accordée pour l'usine Orion (Botnia) par le MVOTMA (14 février 2005)), si ce n'est dans quelques cas où les concentrations ont dépassé les limites autorisées. Des valeurs excédant les limites prescrites dans le décret n° 253/79 ou dans l'autorisation environnementale préalable du MVOTMA n'ont été mesurées qu'en ce qui concerne les paramètres suivants: l'azote, les nitrates et les AOX (composés organo-halogénés adsorbables). Dans ces cas, les mesures enregistrées pour un jour donné dépassaient le maximum autorisé. Toutefois, l'autorisation environnementale préalable du 14 février 2005 prévoit expressément la possibilité de calculer pour ces paramètres une moyenne annuelle. Le dépassement le plus notable est celui enregistré pour les AOX, paramètre utilisé sur le plan international pour surveiller les effluents rejetés par les usines de pâte à papier, comprenant parfois des polluants organiques persistants (POP). Selon le document de référence sur les IPPC-BAT, soumis par les Parties et considéré par elles comme le texte de référence pour ce secteur, «les autorités chargées de la protection de l'environnement de nombreux pays ont imposé des restrictions sévères aux rejets de substances organiques chlorées, mesurées en AOX, dans le milieu aquatique». Après la

been available to Argentina at various stages of the proceedings or have been available in the public domain. Therefore the Court does not consider that Argentina has been at a disadvantage with regard to the production of evidence relating to the discharges of effluent of the mill.

227. To determine whether the concentrations of pollutants discharged by the Orion (Botnia) mill are within the regulatory limits, the Court will have to assess them against the effluent discharge limits — both in terms of the concentration of effluents in each litre of wastewater discharged and the absolute amount of effluents that can be discharged in a day — prescribed by the applicable regulatory standards of the Parties, as characterized by the Court in paragraph 200 above, and the permits issued for the plant by the Uruguayan authorities, since the Digest only sets general limits on "hydrocarbons", "sedimentable solids", and "oils and greases", but does not establish specific ones for the substances in contention between the Parties. Argentina did not allege any non-compliance of the Orion (Botnia) mill with CARU's effluent standards (CARU Digest, Sec. E3 (1984, as amended)).

228. Taking into account the data collected after the start-up of the mill as contained in the various reports by DINAMA and EcoMetrix, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation as characterized by the Court in paragraph 200 above, or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT reference document submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environ-

mise en service de l'usine de pâte à papier, les concentrations d'AOX ont pu atteindre en une occasion, le 9 janvier 2008, 13 mg/l, alors que la limite maximale utilisée dans l'évaluation de l'impact sur l'environnement et prescrite ultérieurement par le MVOTMA était de 6 mg/l. Toutefois, en l'absence d'éléments de preuve établissant de manière convaincante qu'il ne s'agissait pas là d'un épisode isolé mais bien d'un problème plus durable, la Cour n'est pas à même de conclure que l'Uruguay a violé les dispositions du statut de 1975.

c) *L'impact des rejets sur la qualité des eaux du fleuve*

229. Comme indiqué ci-dessus (paragraphe 165), les Parties ont, au cours des trois dernières années, soumis à la Cour quantité de documents contenant des données et analyses d'ordre factuel et scientifique concernant les concentrations de référence des polluants présents dans le fleuve avant la mise en service de l'usine, ainsi que les résultats de relevés relatifs à ses eaux et aux émissions atmosphériques après le début des activités de production et, pour certains, jusqu'au milieu de l'année 2009.

230. S'agissant des données de référence, les études et rapports soumis par les Parties contenaient des informations et analyses relatives, entre autres, à la qualité de l'eau et de l'air, au phytoplancton et au zooplancton présents dans le fleuve, aux indicateurs de santé et biomarqueurs de pollution chez les poissons du fleuve, à la surveillance de l'ichtyofaune autour de l'usine de pâte à papier Orion (Botnia), aux populations de poissons et à la diversité des espèces du fleuve, aux concentrations en acides résiniques, en phénols chlorés et en phytostérols observées chez les poissons du fleuve, à l'étude des espèces appartenant au genre *Tillandsia*, à l'audit avant la mise en service de l'usine Orion (Botnia) et à des études du mercure et du plomb dans les muscles des poissons.

231. L'Argentine soutient que les données de référence de l'Uruguay laissent à désirer à bien des égards et qu'elles sont, notamment, incomplètes. L'Uruguay rejette cette assertion, et prétend que, de fait, l'Argentine s'est fondée sur ces données pour sa propre évaluation de la qualité de l'eau. L'Uruguay soutient que, contrairement aux affirmations de l'Argentine, il a commencé à recueillir des données de référence en août 2006, dans le cadre du contrôle préopérationnel de la qualité de l'eau effectué par la DINAMA avant la mise en service de l'usine (en novembre 2007). Ce contrôle s'est étendu sur une période de quinze mois et est venu compléter près de quinze années d'une surveillance plus générale menée sous la houlette de la CARU au titre du programme PROCON (Programme de contrôle de la qualité et de la pollution des eaux du fleuve Uruguay, selon l'acronyme espagnol de «Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay»). L'Argentine n'a pas, à l'audience, contesté l'allégation du conseil de l'Uruguay selon laquelle elle s'était servie des données fournies par celui-ci pour sa propre évaluation de la qualité de l'eau.

232. Parmi les données présentées par les Parties concernant le contrôle

mental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

(c) *Impact of the discharges on the quality of the waters of the river*

229. As pointed out earlier (see paragraph 165), the Parties have over the last three years presented to the Court a vast amount of factual and scientific material containing data and analysis of the baseline levels of contaminants already present in the river prior to the commissioning of the plant and the results of measurements of its water and air emissions after the plant started its production activities and, in some cases, until mid-2009.

230. Regarding the baseline data, the studies and reports submitted by the Parties contained data and analysis relating, *inter alia*, to water quality, air quality, phytoplankton and zooplankton of the river, health indicators and biomarkers of pollution in fish from the river, monitoring of fish fauna in the area around the Orion (Botnia) mill, fish community and species diversity in the river, concentrations of resin acids, chlorinated phenols and plant sterols in fish from the river, survey of species belonging to the genus Tillandsia, the Orion (Botnia) mill pre-start-up audit, and analysis of mercury and lead in fish muscle.

231. Argentina contends that Uruguay's baseline data were both inadequate and incomplete in many aspects. Uruguay rejects this allegation, and argues that Argentina has actually relied on Uruguay's baseline data to give its own assessment of water quality. According to Uruguay, contrary to Argentina's assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operational water quality monitoring prior to the commissioning of the plant in November 2007, which served to complement almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme (River Uruguay Water Quality and Pollution Control Programme, from the Spanish acronym for "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay"). Argentina did not challenge counsel for Uruguay's statement during the oral proceedings that it used Uruguay's baseline data for the assessment of water quality.

232. The data presented by the Parties on the post-operation monitor-

et le suivi postopérationnel de la performance effective de l'usine quant aux effets des rejets sur le fleuve figurent des relevés obtenus au moyen de différents programmes de surveillance. Ces derniers ont été réalisés, entre autres, par une équipe scientifique argentine regroupant des chercheurs de deux universités nationales mandatée par le secrétariat d'Etat argentin à l'environnement et au développement durable (dix sites), par l'OSE (l'organisme public uruguayen chargé de l'assainissement et de la distribution de l'eau, selon l'acronyme espagnol d'«Obras Sanitarias del Estado»), par la DINAMA, indépendamment de Botnia (seize sites), et par Botnia faisant rapport à la DINAMA et à la SFI (quatre sites; et prélèvement des effluents).

233. Les sites de prélèvement relevant de la responsabilité de l'Argentine sont situés sur la rive argentine du fleuve, le plus en amont d'entre eux se trouvant à 10 kilomètres de l'usine, le plus en aval à 16 kilomètres environ. Trois d'entre eux (les sites U0, U2 et U3), néanmoins, se trouvent près de l'usine; et trois autres sont situés dans la baie de Nandubaysal et la lagune Inés. Ce sont eux qui ont fourni les données qui, selon le conseil de l'Argentine, «ont permis aux scientifiques argentins de clairement différencier la baie du reste du fleuve, étant donné qu'elle se comporte comme un écosystème relativement autonome par rapport à celui-ci» (rapport scientifique et technique, chapitre 3, annexe intitulée «Background Biogeochemical Studies», par. 4.1.2; voir aussi *ibid.*, par. 4.3.1.2).

234. Les sites de prélèvement relevant de la responsabilité de l'Uruguay (DINAMA) et de Botnia sont situés du côté uruguayen du fleuve. Le point de prélèvement de l'OSE est situé au niveau de la prise d'eau potable de Fray Bentos, devant la station n° 11 de la DINAMA.

235. L'équipe argentine a recueilli des données entre novembre 2007 et avril 2009, une bonne partie de la surveillance commençant à partir d'octobre 2008. L'Uruguay, par l'intermédiaire de la DINAMA, assure une surveillance du site depuis mars 2006, ses plus récents relevés couvrant la période allant jusqu'au mois de juin 2009. L'OSE, dans le cadre de la responsabilité globale qui lui incombe d'assurer la qualité de l'eau uruguayenne, a recueilli des informations utiles, qui ont été reprises dans les rapports périodiques sur l'exploitation de l'usine.

236. La Cour dispose également de l'interprétation des données qu'ont fournie les experts désignés par les Parties, les Parties elles-mêmes et leurs conseils. Toutefois, lorsqu'elle appréciera la valeur des éléments de preuve qui lui ont été soumis, la Cour, afin de déterminer si, en autorisant la construction et la mise en service de l'usine Orion (Botnia), l'Uruguay a violé les obligations qui étaient les siennes en vertu des articles 36 et 41 du statut de 1975, soupèsera et évaluera essentiellement les données elles-mêmes — et non les interprétations divergentes qu'en ont faites les Parties ou leurs experts et consultants.

237. Le désaccord entre les Parties quant à l'impact des effluents rejetés par l'usine Orion (Botnia) sur la qualité de l'eau du fleuve porte sur les paramètres et substances suivants: oxygène dissous; phosphore total (et

ing of the actual performance of the plant in terms of the impact of its emissions on the river includes data obtained through different testing programmes conducted, *inter alia*, by an Argentine scientific team from two national universities, contracted by the National Secretariat of Environment and Sustainable Development of Argentina (ten sites), the OSE (Uruguay's State Agency for Sanitary Works, from the Spanish acronym for "Obras Sanitarias del Estado"), DINAMA, independently of Botnia (16 sites), and Botnia, reporting to DINAMA and the IFC (four sites; and testing the effluent).

233. The monitoring sites maintained by Argentina are located on the Argentine side of the river; with the most upstream position located 10 km from the plant and the furthest downstream one at about 16 km from the plant. Nevertheless, three of the sites (U0, U2 and U3) are near the plant; while another three are in Nandubaysal Bay and Inés Lagoon, the data from which, according to Argentina's counsel, "enabled the scientists to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river" (Scientific and Technical Report, Chapter 3, appendix: "Background Biogeochemical Studies", para. 4.1.2; see also *ibid.*, para. 4.3.1.2).

234. The monitoring sites maintained by Uruguay (DINAMA) and by Botnia are located on the Uruguayan side. The OSE monitoring point is located at the drinking water supply intake pipe for Fray Bentos, at or near DINAMA station 11.

235. Argentina's team gathered data from November 2007 until April 2009 with many of the results being obtained from October 2008. Uruguay, through DINAMA, has been carrying out its monitoring of the site since March 2006. Its most recent data cover the period up to June 2009. The OSE, in terms of its overall responsibility for Uruguayan water quality, has been gathering relevant data which has been used in the periodic reports on the operation of the plant.

236. The Court also has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

237. The particular parameters and substances that are subject to controversy between the Parties in terms of the impact of the discharges of effluent from the Orion (Botnia) mill on the quality of the waters of the

la question connexe de l'eutrophisation due aux phosphates); substances phénoliques; nonylphénols et éthoxylates de nonylphénol; dioxines et furanes. La Cour procédera maintenant à l'examen des moyens de preuve produits par les Parties en ce qui concerne ces paramètres et substances.

i) *L'oxygène dissous*

238. C'est à l'audience que l'Argentine a, pour la première fois, fait état de l'altération des teneurs en oxygène dissous du fleuve que provoquerait l'usine Orion (Botnia), en renvoyant à des données présentées dans le rapport de l'organisme public uruguayen OSE. Pour l'Argentine, puisque l'oxygène dissous contribue à la qualité de l'environnement et qu'il existe une norme de la CARU fixant (à 5,6 mg/l) sa concentration minimale dans les eaux du fleuve, l'introduction dans le milieu aquatique, par l'usine Orion (Botnia), de substances ou d'énergie ayant fait chuter les taux d'oxygène dissous en deçà de ce seuil constitue une violation de l'obligation d'empêcher la pollution et de préserver ce milieu aquatique. L'Uruguay soutient que les chiffres que l'Argentine a puisés dans les relevés de l'OSE concernaient l'«oxidabilidad», qui renvoie à la «demande en oxygène» et non à l'«oxígeno disuelto» — c'est-à-dire l'oxygène dissous —, et qu'une chute du niveau de la demande en oxygène révèle une amélioration de la qualité de l'eau puisque ce niveau doit être maintenu aussi bas que possible.

239. La Cour note qu'en ce qui concerne l'oxygène dissous, une concentration moyenne de 3,8 mg/l après la mise en service de l'usine constituerait effectivement, si elle était avérée, une violation des normes de la CARU, ce chiffre étant au-dessous du seuil de 5,6 mg d'oxygène dissous par litre d'eau requis selon le digeste de la CARU (E3, titre 2, chapitre 4, section 2). Elle estime toutefois que cette allégation de l'Argentine n'a pas été prouvée. Premièrement, les chiffres sur lesquels se fonde l'Argentine ne correspondent pas aux valeurs indiquées dans le troisième rapport de suivi d'EcoMetrix, qui fait état de concentrations d'oxygène dissous supérieures au seuil fixé par la CARU dans tous les échantillons prélevés entre février et octobre 2008. Deuxièmement, le rapport de la DINAMA sur la qualité des eaux de surface et des sédiments de juillet 2009 (rapport semestriel: janvier-juin) (ci-après le «rapport de la DINAMA sur la qualité de l'eau») (voir p. 7, fig. 4.5: moyenne de 9,4 mg/l) fait état de concentrations d'oxygène dissous bien supérieures aux valeurs minimales requises dans le digeste de la CARU. Troisièmement, le rapport de l'Argentine en date du 30 juin 2009 indique, dans son résumé, que les paramètres de qualité de l'eau relevés au cours de la période présentaient des valeurs «normales, avec des variations saisonnières de la température et des concentrations correspondantes en oxygène dissous». Les centaines de valeurs consignées dans les données de ce chapitre du «Rapport Colombo» étayent cette conclusion, même si certaines sont légèrement inférieures. Quatrièmement, les chiffres relatifs à l'oxygène dissous figu-

river are: dissolved oxygen; total phosphorus (and the related matter of eutrophication due to phosphate); phenolic substances; nonylphenols and nonylphenolethoxylates; and dioxins and furans. The Court now turns to the assessment of the evidence presented to it by the Parties with respect to these parameters and substances.

(i) *Dissolved oxygen*

238. Argentina raised for the first time during the oral proceedings the alleged negative impact of the Orion (Botnia) mill on dissolved oxygen in the river referring to data contained in the report of the Uruguayan OSE. According to Argentina, since dissolved oxygen is environmentally beneficial and there is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L), the introduction by the Orion (Botnia) mill into the aquatic environment of substances or energy which caused the dissolved oxygen level to fall below that minimum constitutes a breach of the obligation to prevent pollution and to preserve the aquatic environment. Uruguay argues that Argentina's figures taken from the measurements of the OSE were for "oxidabilidad", which refers to the "demand for oxygen" and not for "oxígeno disuelto" — i.e., dissolved oxygen. Uruguay also claims that a drop in the level of demand for oxygen shows an improvement in the quality of the water, since the level of demand should be kept as low as possible.

239. The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, Title 2, Chapter 4, Section 2). However, the Court finds that the allegation made by Argentina remains unproven. First, the figures on which Argentina bases itself do not correspond to the ones for dissolved oxygen that appear in the EcoMetrix Third Monitoring Report, where the samples taken between February and October 2008 were all above the CARU minimum standard for dissolved oxygen. Secondly, DINAMA's Surface Water and Sediment Quality Data Report of July 2009 (Six Month Report: January-June) (hereinafter "DINAMA's Water Quality Report") (see p. 7, fig. 4.5: average of 9.4 mg/L) displays concentrations of dissolved oxygen that are well above the minimum level required under the CARU Digest. Thirdly, Argentina's 30 June 2009 report says in its summary that the records of water quality parameters over the period were "normal for the river with typical seasonal patterns of temperature and associated dissolved oxygen". The hundreds of measurements presented in the figures in that chapter of the "Colombo Report" support that conclusion even taking account of some slightly lower figures. Fourthly, the figures relating to dissolved oxygen contained in DINAMA's Water Quality Report have essentially the same characteristics as those gathered by Argentina — they

rant dans le rapport de la DINAMA sur la qualité de l'eau présentent essentiellement les mêmes caractéristiques que ceux recueillis par l'Argentine — les valeurs sont supérieures au seuil fixé par la CARU, et sont les mêmes en amont et en aval de l'usine. La Cour en conclut que ces valeurs ne semblent pas avoir notablement changé au fil du temps et que rien ne vient étayer l'affirmation selon laquelle la référence à l'«oxidabilidad» dans le rapport de l'OSE invoquée par l'Argentine devrait être interprétée comme un renvoi à l'«oxygène dissous».

ii) *Le phosphore*

240. Les Parties s'accordent sur le niveau élevé de phosphore total dans le fleuve Uruguay. Selon l'Uruguay, la quantité totale de phosphore (naturel et anthropique) rejeté dans le fleuve est d'environ 19 000 tonnes par an, auxquelles l'usine Orion (Botnia) contribue à hauteur de quelque 15 tonnes (pour l'année 2008), voire moins, selon les estimations pour 2009. L'Argentine n'a pas contesté ces chiffres au cours de la procédure. L'Uruguay avance en outre qu'il ne saurait être allégué de violation des dispositions du statut de 1975, puisque cette forte concentration ne peut être attribuée avec certitude à l'usine Orion (Botnia), et que la CARU n'a fixé aucune norme concernant le phosphore. L'Uruguay soutient également qu'il ressort des données fournies par la DINAMA, comparées aux données de référence également recueillies par cette dernière, que «[l]es teneurs en phosphore étaient généralement plus faibles après la mise en service de l'usine, par rapport aux données de référence de 2005-2006» (troisième rapport de suivi d'EcoMetrix, mars 2009).

241. L'un des grands points de désaccord entre les Parties concerne le lien entre l'augmentation de la concentration de phosphore dans les eaux du fleuve et la prolifération d'algues survenue en février 2009, ainsi que la question de savoir si l'eutrophisation du fleuve est due à l'exploitation de l'usine Orion (Botnia). L'Argentine affirme que l'usine est à l'origine de cette eutrophisation et de l'élévation de la teneur en phosphates, tandis que l'Uruguay nie que l'une comme l'autre soient attribuables à l'exploitation de l'usine à Fray Bentos.

242. La Cour relève que la CARU n'a pas adopté de normes de qualité de l'eau relatives aux concentrations de phosphore total et de phosphates dans le fleuve. L'Argentine ne dispose pas, elle non plus, de normes de qualité de l'eau pour ce qui est du phosphore total. La Cour devra donc se référer aux normes de qualité de l'eau et limites de rejets de phosphore total édictées par l'Uruguay dans le cadre de sa législation interne, telle que qualifiée par la Cour plus haut, au paragraphe 200, afin de déterminer si la teneur en phosphore total a dépassé les limites fixées dans les textes de réglementation des Parties adoptés conformément à l'alinéa *a)* de l'article 41 du statut de 1975. La concentration de phosphore total ne peut, selon les normes de qualité de l'eau fixées par ce décret, excéder 0,025 mg/l pour certaines utilisations, telles que l'eau potable, l'irrigation des cultures destinées à la consommation humaine et l'utilisation de

are above the CARU minimum and are the same upstream and downstream. Thus, the Court concludes that there appears to be no significant difference between the sets of data over time and that there is no evidence to support the contention that the reference to "oxidabilidad" in the OSE report referred to by Argentina should be interpreted to mean "dissolved oxygen".

(ii) *Phosphorus*

240. There is agreement between the Parties that total phosphorus levels in the River Uruguay are high. According to Uruguay, the total amount of (natural and anthropogenic) phosphorus emitted into the river per year is approximately 19,000 tonnes, of which the Orion (Botnia) mill has a share of some 15 tonnes (in 2008) or even less, as was expected for 2009. These figures have not been disputed by Argentina during the proceedings. Uruguay contends further that no violation of the provisions of the 1975 Statute can be alleged since the high concentration cannot be clearly attributed to the Orion (Botnia) mill as the source, and since no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DINAMA, it can be demonstrated that "[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline" (EcoMetrix Third Monitoring Report, March 2009).

241. A major disagreement between the Parties relates to the relationship between the higher concentration of phosphorus in the waters of the river and the algal bloom of February 2009 and whether operation of the Orion (Botnia) mill has caused the eutrophication of the river. Argentina claims that the Orion (Botnia) mill is the cause of the eutrophication and higher concentration of phosphates, while Uruguay denies the attributability of these concentrations as well as the eutrophication to the operation of the plant in Fray Bentos.

242. The Court notes that CARU has not adopted a water quality standard relating to levels of total phosphorus and phosphates in the river. Similarly, Argentina has no water quality standards for total phosphorus. The Court will therefore have to use the water quality and effluent limits for total phosphorus enacted by Uruguay under its domestic legislation, as characterized by the Court in paragraph 200 above, to assess whether the concentration levels of total phosphorus have exceeded the limits laid down in the regulations of the Parties adopted in accordance with Article 41 *(a)* of the 1975 Statute. The water quality standard for total phosphorus under the Uruguayan Regulation is 0.025 mg/L for certain purposes such as drinking water, irrigation of crops for human consumption and water used for recreational purposes which involve direct human contact with the water (Decree No. 253/79, Regulation of

l'eau à des fins récréatives qui impliquent un contact humain direct avec cette eau (décret nº 253/79, réglementation de la qualité de l'eau). Le décret uruguayen fixe aussi — à 5 mg/l — la norme en matière de rejet de phosphore total (*ibid.*, article 11, alinéa 2)). L'usine Orion (Botnia) doit satisfaire à l'une et l'autre de ces normes.

243. La Cour estime que, sur la base des éléments de preuve qui lui ont été soumis, l'usine Orion (Botnia) a jusqu'à présent satisfait aux normes en matière de rejet de phosphore total. Dans ce contexte, la Cour note que, selon le troisième rapport de suivi d'EcoMetrix, les relevés de l'Uruguay enregistrent, pour les rejets d'effluents de l'usine, une valeur moyenne de 0,59 mg/l de phosphore total en 2008. En outre, d'après le rapport de la DINAMA sur les émissions de juillet 2009, les chiffres relatifs aux effluents variaient, pour la période allant de novembre 2008 à mai 2009, entre 0,053 mg/l et 0,41 mg/l (voir, par exemple, DINAMA, rapport semestriel des résultats du plan de contrôle des émissions et de la performance environnementale (11 novembre 2008-31 mai 2009), 22 juillet 2009, p. 5; voir aussi p. 25 et 26). L'Argentine ne conteste pas ces chiffres, dont les valeurs sont clairement inférieures à la norme établie en vertu du décret uruguayen.

244. La Cour notera à cet égard que, dès le 11 février 2005, la DINAMA relevait, dans son rapport d'évaluation de l'impact sur l'environnement relatif à l'usine Orion (Botnia), la forte teneur en nutriments (phosphore et azote) dans le fleuve, et indiquait ceci:

> «Cette situation provoque fréquemment la prolifération d'algues parfois très toxiques en raison de la présence de cyanobactéries. Ces proliférations — qui ont augmenté, à la fois en fréquence et en intensité, ces dernières années — constituent un risque sanitaire et provoquent de lourdes pertes économiques, dans la mesure où elles perturbent certaines utilisations de l'eau comme les activités de loisirs et l'approvisionnement en eau de boisson. A cette situation existante, il convient d'ajouter qu'à l'avenir l'usine rejettera un total de 200 tonnes/an d'azote et de 20 tonnes/an de phosphore, soit des valeurs équivalant approximativement aux rejets d'une ville de 65 000 habitants dépourvue de système de traitement des eaux usées.» (P. 20, par. 6.1.)

245. Le rapport de la DINAMA se poursuit en ces termes:

> «Il est également entendu qu'il serait contre-indiqué d'autoriser le rejet de déchets de nature à accroître la valeur de tout paramètre ayant déjà atteint un seuil critique, même lorsque cette augmentation est considérée comme insignifiante par l'entreprise. Néanmoins, les variations de ces valeurs ne dépendant pas des seuls effluents du projet — ces paramètres étant susceptibles d'être modifiés par le déversement de tout effluent industriel ou domestique —, le rejet des déchets proposé dans le projet pourrait être accepté, à condition de prévoir une compensation en cas d'augmentation provoquant le

Water Quality). The Uruguayan Decree also establishes a total phosphorus discharge standard of 5 mg/L (Decree No. 253/79 Regulation of Water Quality, Art. 11 (2)). The Orion (Botnia) mill must comply with both standards.

243. The Court finds that based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. In this context, the Court notes that, for 2008 according to the EcoMetrix Third Monitoring Report, the Uruguayan data recorded an average of 0.59 mg/L total phosphorus in effluent discharge from the plant. Moreover, according to the DINAMA 2009 Emissions Report, the effluent figures for November 2008 to May 2009 were between 0.053 mg/L and 0.41 mg/L (e.g., DINAMA, "Six Month Report on the Botnia Emission Control and Environmental Performance Plan November 11, 2008 to May 31, 2009" (22 July 2009) p. 5; see also pp. 25 and 26). Argentina does not contest these figures which clearly show values much below the standard established under the Uruguayan Decree.

244. The Court observes in this connection that as early as 11 February 2005, DINAMA, in its environmental impact assessment for the Orion (Botnia) mill, noted the heavy load of nutrients (phosphorus and nitrogen) in the river and stated that:

> "This situation has generated the frequent proliferation of algae, in some cases with an important degree of toxicity as a result of the proliferation of cyanobacteria. These proliferations, which in recent years have shown an increase in both frequency and intensity, constitute a health risk and result in important economic losses since they interfere with some uses of water, such as recreational activities and the public supply of drinking water. To this already existing situation it must be added that, in the future, the effluent in the plant will emit a total of 200 t/a of N[itrogen] and 20 t/a of P[hosphorus], values that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people." (P. 20, para. 6.1.)

245. The DINAMA Report then continues as follows:

> "It is also understood that it is not appropriate to authorize any waste disposal that would increase any of the parameters that present critical values, even in cases in which the increase is considered insignificant by the company. Nevertheless, considering that the parameters in which the quality of water is compromised are not specific to the effluents of this project, but rather would be affected by the waste disposal of any industrial or domestic effluent under consideration, it is understood that the waste disposal proposed in the project may be accepted, as long as there is compensation for any

dépassement de la valeur standard pour l'un quelconque des paramètres critiques.» (Rapport de la DINAMA, p. 21.)

246. La Cour observera en outre que l'autorisation environnementale préalable, accordée le 15 février 2005, faisait obligation à Botnia de respecter ces conditions, les normes de la CARU et les meilleures techniques disponibles, telles que définies dans le document IPPC-BAT de la Commission européenne de décembre 2001. Elle imposait également la réalisation d'un plan de mise en œuvre de mesures d'atténuation et de compensation. Ce plan avait été réalisé avant la fin de l'année 2007 et l'autorisation de mise en service fut accordée le 8 novembre 2007. Le 29 avril 2008, Botnia et l'OSE ont conclu un accord concernant le traitement des eaux usées municipales de Fray Bentos, visant à réduire les rejets de phosphore total et autres polluants.

247. La Cour estime que le volume de phosphore total rejeté dans le fleuve qui est attribuable à l'usine Orion (Botnia) est proportionnellement insignifiant, par rapport à la teneur globale du fleuve en phosphore total provenant d'autres sources. Elle conclut donc que le fait que la concentration de phosphore total dans le fleuve dépasse les limites fixées par la législation uruguayenne en matière de normes de qualité de l'eau ne saurait être considéré comme une violation de l'alinéa *a)* de l'article 41 du statut de 1975, compte tenu de la teneur relativement élevée en phosphore total du fleuve avant la mise en service de l'usine et des mesures prises par l'Uruguay à titre de compensation.

248. La Cour en vient maintenant à l'examen de la question de la prolifération d'algues du 4 février 2009. L'Argentine a attribué celle-ci aux nutriments rejetés dans le fleuve par l'usine Orion (Botnia). A l'appui de cette assertion, elle renvoie à la présence d'effluents dans les algues bleues ainsi qu'à diverses images satellite montrant la concentration de chlorophylle dans l'eau. De telles proliférations se produisent, selon l'Argentine, pendant la saison chaude et sont dues à une croissance explosive d'algues, en particulier de cyanobactéries, consécutive à un enrichissement en nutriments, principalement des phosphates, entre autres éléments entrant dans la composition des détergents et fertilisants.

249. L'Uruguay soutient que la prolifération d'algues de février 2009 — et la forte concentration de chlorophylle — n'a pas été causée par l'usine Orion (Botnia), mais pourrait être apparue très en amont de celle-ci et s'explique très probablement non pas par les rejets d'effluents de l'usine, mais par l'afflux de visiteurs à l'occasion du carnaval annuel de Gualeguaychú et l'augmentation correspondante du volume des eaux usées. L'Uruguay soutient que les relevés de l'Argentine montrent en réalité que, depuis sa mise en service, l'usine Orion (Botnia) n'a à aucun moment provoqué l'augmentation de la concentration de phosphore dans le fleuve.

250. Les Parties sont d'accord sur plusieurs points en ce qui concerne la prolifération d'algues du 4 février 2009 : elles conviennent notamment

increase over and above the standard value for any of the critical parameters." (DINAMA Report, p. 21.)

246. The Court further notes that the initial environmental authorization, granted on 15 February 2005, required compliance by Botnia with those conditions, with CARU standards and with best available techniques as included in the December 2001 IPPC-BAT of the European Commission. It also required the completion of an implementation plan for mitigation and compensation measures. That plan was completed by the end of 2007 and the authorization to operate was granted on 8 November 2007. On 29 April 2008, Botnia and the OSE concluded an Agreement Regarding Treatment of the Municipal Wastewater of Fray Bentos, aimed at reducing total phosphorus and other contaminants.

247. The Court considers that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 *(a)* of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

248. The Court will now turn to the consideration of the issue of the algal bloom of 4 February 2009. Argentina claims that the algal bloom of 4 February 2009 was caused by the Orion (Botnia) mill's emissions of nutrients into the river. To substantiate this claim Argentina points to the presence of effluent products in the blue-green algal bloom and to various satellite images showing the concentration of chlorophyll in the water. Such blooms, according to Argentina, are produced during the warm season by the explosive growth of algae, particularly cyanobacteria, responding to nutrient enrichment, mainly phosphate, among other compounds present in detergents and fertilizers.

249. Uruguay contends that the algal bloom of February 2009, and the high concentration of chlorophyll, was not caused by the Orion (Botnia) mill but could have originated far upstream and may have most likely been caused by the increase of people present in Gualeyguaychú during the yearly carnival held in that town, and the resulting increase in sewage, and not by the mill's effluents. Uruguay maintains that Argentine data actually prove that the Orion (Botnia) mill has not added to the concentration of phosphorus in the river at any time since it began operating.

250. The Parties are in agreement on several points regarding the algal bloom of 4 February 2009, including the fact that the concentrations of

que les concentrations de nutriments dans le fleuve Uruguay ont atteint des niveaux élevés tant avant qu'après cet épisode, et que celui-ci a été très bref. Les Parties semblent également d'accord pour reconnaître l'existence de liens étroits entre prolifération d'algues, élévation des températures, faiblesse ou inversion du courant, et présence dans le fleuve de fortes concentrations de nutriments tels que l'azote et le phosphore. Il n'a toutefois pas été établi à la satisfaction de la Cour que la prolifération d'algues du 4 février 2009 avait été causée par les rejets de nutriments de l'usine Orion (Botnia).

iii) *Les substances phénoliques*

251. L'Argentine soutient que les rejets de polluants émanant de l'usine Orion (Botnia) ont, depuis la mise en service de celle-ci, enfreint la norme relative aux substances phénoliques établie par la CARU, les données de référence antérieures à l'exploitation ne faisant apparaître aucun dépassement des valeurs maximales fixées par celle-ci. L'Uruguay, pour sa part, affirme que ces valeurs ont été maintes fois dépassées, sur toute la longueur du fleuve, bien avant le démarrage des activités de l'usine. A l'appui de cette assertion, il cite plusieurs études, dont l'étude d'impact cumulé finale réalisée par EcoMetrix selon laquelle le taux maximal de substances phénoliques, fixé à 0,001 mg/l par la norme de qualité de l'eau de la CARU, a fréquemment été dépassé.

252. La Cour note également que, selon les données fournies par l'Uruguay, des valeurs supérieures à la limite autorisée par la norme de la qualité de l'eau avaient été observées bien avant la mise en service de l'usine. Ainsi, selon l'étude d'impact cumulé finale réalisée en septembre 2006 par EcoMetrix à la demande de la SFI, les substances phénoliques ont fréquemment excédé la limite autorisée, les concentrations les plus élevées étant mesurées dans la partie argentine du fleuve. Certains relevés figurant dans le rapport le plus récent soumis à la Cour indiquent encore des concentrations excessives, mais la plupart enregistrent des valeurs inférieures à la limite autorisée (Rapport de la DINAMA sur la qualité de l'eau de juillet 2009, p. 21, par. 4.1.11.2 et appendice I, qui indique des taux compris entre 0,0005 et 0,012 mg/l).

253. Un conseil de l'Argentine a fait valoir à l'audience que c'était l'activité de l'usine qui avait entraîné des dépassements des valeurs limites, lesquels n'avaient jamais été observés antérieurement. Les concentrations de substances polluantes, a-t-il déclaré, avaient en moyenne triplé, la valeur maximale étant vingt fois supérieure à la valeur autorisée. Selon l'Uruguay, les données figurant dans le rapport de juillet 2009 de la DINAMA indiquent que les concentrations de substances phénoliques mesurées après la mise en service étaient inférieures aux valeurs de référence sur l'ensemble du fleuve, y compris au niveau de la prise d'eau de l'OSE.

254. D'après les éléments versés au dossier, y compris les données fournies par les Parties, la Cour conclut que les éléments de preuve sont insuf-

nutrients in the River Uruguay have been at high levels both before and after the bloom episode, and the fact that the bloom disappeared shortly after it had begun. The Parties also appear to agree on the interdependence between algae growth, higher temperatures, low and reverse flows, and presence of high levels of nutrients such as nitrogen and phosphorus in the river. It has not, however, been established to the satisfaction of the Court that the algal bloom episode of 4 February 2009 was caused by the nutrient discharges from the Orion (Botnia) mill.

(iii) *Phenolic substances*

251. With regard to phenolic substances, Argentina contends that the Orion (Botnia) mill's emission of pollutants have resulted in violations of the CARU standard for phenolic substances once the plant started operating, while, according to Argentina, pre-operational baseline data did not show that standard to have been exceeded. Uruguay on the other hand argues that there have been numerous violations of the standard, throughout the river, long before the plant went into operation. Uruguay substantiates its arguments by pointing to several studies including the EcoMetrix final Cumulative Impact Study, which had concluded that phenolic substances were found to have frequently exceeded the water quality standard of 0.001 mg/L fixed by CARU.

252. The Court also notes that Uruguayan data indicate that the water quality standard was being exceeded from long before the plant began operating. The Cumulative Impact Study prepared in September 2006 by EcoMetrix for the IFC states that phenolics were found frequently to exceed the standard, with the highest values on the Argentine side of the river. The standard is still exceeded in some of the measurements in the most recent report before the Court but most are below it (DINAMA July 2009 Water Quality Report, p. 21, para. 4.1.11.2 and App. 1, showing measurements from 0.0005 to 0.012 mg/L).

253. During the oral proceedings, counsel for Argentina claimed that the standard had not previously been exceeded and that the plant has caused the limit to be exceeded. The concentrations, he said, had increased on average by three times and the highest figure was 20 times higher. Uruguay contends that the data contained in the DINAMA 2009 Report shows that the post-operational levels of phenolic substances were lower than the baseline levels throughout the river including at the OSE water intake.

254. Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged

fisants pour attribuer l'augmentation alléguée des concentrations de substances phénoliques dans le fleuve aux activités de l'usine Orion (Botnia).

iv) *La présence de nonylphénols dans le milieu aquatique*

255. L'Argentine affirme que l'usine Orion (Botnia) rejette, ou a rejeté, des nonylphénols, ce qui aurait un effet dommageable, ou ferait du moins peser une lourde menace, sur le milieu aquatique. Selon elle, la source de pollution la plus probable est à rechercher dans les agents tensioactifs (détergents), les éthoxylates de nonylphénol, utilisés pour nettoyer la pâte à papier et les équipements de l'usine elle-même. Toujours selon l'Argentine, l'analyse de 46 relevés a permis d'établir que les plus fortes concentrations de nonylphénols, notamment celles qui étaient supérieures aux normes pertinentes de l'Union européenne, se trouvaient dans les échantillons d'eau prélevés dans le tronçon situé en face et en aval de l'usine et dans les échantillons d'algues bleues ayant proliféré le 4 février 2009, avec des concentrations plus faibles en amont et en aval, laissant penser que les effluents rejetés par l'usine Orion (Botnia) étaient la source la plus probable de ces résidus. En outre, les prélèvements effectués sur les sédiments du fond du fleuve dans le tronçon situé en face et en aval de l'usine auraient montré que la concentration de nonylphénols avait augmenté rapidement entre septembre 2006 et février 2009, confirmant ainsi la présence accrue de ces composés dans le fleuve Uruguay. Pour l'Argentine, la répartition spatiale des effets sublétaux détectés chez les rotifères (absence de vertèbres), les coquillages asiatiques transplantés (réduction des réserves lipidiques) et les poissons (effets estrogènes) coïncidait avec le périmètre de distribution des nonylphénols, signe que ces composés pourraient avoir un effet perturbateur important.

256. L'Uruguay rejette les allégations de l'Argentine relatives aux nonylphénols et aux éthoxylates de nonylphénol, et dément catégoriquement l'usage de ces deux substances par l'usine Orion (Botnia). Il fournit des déclarations sous serment émanant de responsables de Botnia selon lesquelles l'usine n'utilise pas, et n'a jamais utilisé, de nonylphénols ou de dérivés d'éthoxylates de nonylphénol dans l'un quelconque de ses procédés de fabrication de pâte à papier, y compris au cours des opérations de lavage et de nettoyage de la pâte, et qu'aucun agent nettoyant contenant des nonylphénols n'est ou n'a été utilisé pour nettoyer les équipements de l'usine (déclaration sous serment de M. González, 2 octobre 2009).

257. La Cour tient à rappeler que la question des nonylphénols n'avait pas été soulevée en l'affaire avant que l'Argentine ne verse au dossier son rapport du 30 juin 2009. Bien que les concentrations de nonylphénols aient été mesurées depuis novembre 2008, l'Argentine n'a pas, de l'avis de la Cour, produit d'éléments de preuve établissant clairement un lien entre les nonylphénols présents dans les eaux du fleuve et l'usine Orion (Botnia). L'Uruguay a également démenti catégoriquement devant la Cour l'utilisation par l'usine Orion (Botnia) d'éthoxylates de nonylphénol dans ses procédés de fabrication et de nettoyage. La Cour est donc amenée à

increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

(iv) *Presence of nonylphenols in the river environment*

255. Argentina claims that the Orion (Botnia) mill emits, or has emitted, nonylphenols and thus has caused damage to, or at least has substantially put at risk, the river environment. According to Argentina, the most likely source of these emissions are surfactants (detergents), nonylphenolethoxylates used to clean the wood pulp as well as the installations of the plant itself. Argentina also contends that from 46 measurements performed in water samples the highest concentrations, in particular those exceeding the European Union relevant standards, were determined in front-downstream the mill and in the bloom sample collected on 4 February 2009, with lower levels upstream and downstream, indicating that the Orion (Botnia) mill effluent is the most probable source of these residues. In addition, according to Argentina, bottom sediments collected in front-downstream the mill showed a rapid increase of nonylphenols from September 2006 to February 2009, corroborating the increasing trend of these compounds in the River Uruguay. For Argentina, the spatial distribution of sub-lethal effects detected in rotifers (absence of spines), transplanted Asiatic clams (reduction of lipid reserves) and fish (estrogenic effects) coincided with the distribution area of nonylphenols suggesting that these compounds may be a significant stress factor.

256. Uruguay rejects Argentina's claim relating to nonylphenols and nonylphenolethoxylates, and categorically denies the use of nonylphenols and nonylphenolethoxylates by the Orion (Botnia) mill. In particular, it provides affidavits from Botnia officials to the effect that the mill does not use and has never used nonylphenols or nonylphenolethoxylate derivatives in any of its processes for the production of pulp, including in the pulp washing and cleaning stages, and that no cleaning agents containing nonylphenols are or have been used for cleaning the plant's equipment (Affidavit of Mr. González, 2 October 2009).

257. The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in

conclure que les éléments versés au dossier ne viennent pas étayer les allégations de l'Argentine.

v) *Les dioxines et furanes*

258. L'Argentine a affirmé que les concentrations de dioxines et de furanes étaient généralement très faibles dans les sédiments de surface, mais que les données issues de ses études laissaient apparaître une tendance à la hausse par rapport aux données recueillies avant la mise en service de l'usine Orion (Botnia). L'Argentine ne prétend pas que les normes établies n'ont pas été respectées, mais s'appuie sur un échantillonnage de poissons *sábalos* effectué par son équipe de surveillance, qui a révélé que l'un de ces poissons présentait des taux élevés de dioxines et de furanes, pour conclure à une présence de plus en plus notable de ces deux substances dans le fleuve depuis la mise en service de l'usine Orion (Botnia). L'Uruguay conteste cette assertion, affirmant que l'élévation de ces taux ne peut être attribuée à l'exploitation de l'usine Orion (Botnia) vu le nombre d'usines en service sur les rives du fleuve et dans la baie voisine de Nandubaysal, et le fait que le *sábalo* ayant fait l'objet de ce contrôle est une espèce de grands migrateurs. En outre, selon l'Uruguay, il ressort des résultats des analyses que ni dioxines ni furanes n'ont été introduits dans les effluents de l'usine Orion (Botnia) puisque les concentrations de ces deux substances n'étaient pas plus élevées, de manière mesurable, dans les effluents de l'usine que dans l'eau puisée dans le fleuve pour les besoins du processus de fabrication.

259. La Cour estime que les éléments de preuve ne permettent pas d'établir clairement un lien entre la présence accrue de dioxines et de furanes dans le fleuve et l'exploitation de l'usine Orion (Botnia).

d) *Effets sur la diversité biologique*

260. L'Argentine affirme que l'Uruguay «a négligé de prendre toutes les mesures propres à protéger et à préserver la diversité biologique du fleuve Uruguay et ses zones d'influence». Selon l'Argentine, l'obligation conventionnelle «de protéger et de préserver le milieu aquatique» comprend une obligation de protéger la diversité biologique du fleuve, y compris «les habitats et les espèces de la flore et de la faune». Par l'effet de la «clause de renvoi» contenue dans l'alinéa *a)* de l'article 41, l'Argentine soutient que le statut de 1975 impose à l'Uruguay, dans le cadre des activités qu'il entreprend sur le fleuve et dans ses zones d'influence, d'honorer les obligations découlant de la convention CITES, de la convention sur la diversité biologique et de la convention de Ramsar. Elle affirme que son programme de surveillance a permis de mettre en évidence des effets anormaux chez les organismes aquatiques — tels que la malformation des rotifères et la réduction des réserves lipidiques des coquillages — et une biomagnification de certains polluants persistants, comme les dioxines et les furanes, chez les poissons détritivores (tel le poisson *sábalo*). L'Argentine affirme également que, lors des inversions de courant,

the record does not substantiate the claims made by Argentina on this matter.

(v) *Dioxins and furans*

258. Argentina has alleged that while the concentration of dioxins and furans in surface sediments is generally very low, data from its studies demonstrated an increasing trend compared to data compiled before the Orion (Botnia) mill commenced operations. Argentina does not claim a violation of standards, but relies on a sample of *sábalo* fish tested by its monitoring team, which showed that one fish presented elevated levels of dioxins and furans which, according to Argentina, pointed to a rise in the incidence of dioxins and furans in the river after the commissioning of the Orion (Botnia) mill. Uruguay contests this claim, arguing that such elevated levels cannot be linked to the operation of the Orion (Botnia) mill, given the presence of so many other industries operating along the River Uruguay and in neighbouring Nandubaysal Bay, and the highly migratory nature of the *sábalo* species which was tested. In addition, Uruguay advances that its testing of the effluent coming from the Orion (Botnia) mill demonstrate that no dioxins and furans could have been introduced into the mill effluent, as the levels detected in the effluent were not measurably higher than the baseline levels in the River Uruguay.

259. The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

(d) *Effects on biodiversity*

260. Argentina asserts that Uruguay "has failed to take all measures to protect and preserve the biological diversity of the River Uruguay and the areas affected by it". According to Argentina, the treaty obligation "to protect and preserve the aquatic environment" comprises an obligation to protect the biological diversity including "habitats as well as species of flora and fauna". By virtue of the "referral clause" in Article 41 *(a)*, Argentina argues that the 1975 Statute requires Uruguay, in respect of activities undertaken in the river and areas affected by it, to comply with the obligations deriving from the CITES Convention, the Biodiversity Convention and the Ramsar Convention. Argentina maintains that through its monitoring programme abnormal effects were detected in aquatic organisms — such as malformation of rotifers and loss of fat by clams — and the biomagnification of persistent pollutants such as dioxins and furans was detected in detritus feeding fish (such as the sábalo fish). Argentina also contends that the operation of the mill poses a threat, under conditions of reverse flow, to the Esteros de Farrapos site, situated "in the lower section of the River . . . downstream from

l'exploitation de l'usine fait peser un risque sur le site d'Esteros de Farrapos, situé sur le cours inférieur du fleuve Uruguay «en aval du barrage de Salto Grande et à la frontière avec l'Argentine», à quelques kilomètres en amont de l'usine Orion (Botnia).

261. L'Uruguay affirme que l'Argentine n'a pas démontré qu'il avait commis la moindre violation de la convention sur la diversité biologique, tandis que la convention de Ramsar est sans pertinence en l'espèce puisque le site d'Esteros de Farrapos ne figure pas sur la liste des sites Ramsar dont les caractéristiques écologiques sont menacées. Quant à la possibilité que le panache d'effluents provenant de l'usine atteigne Esteros de Farrapos, l'Uruguay a reconnu à l'audience qu'un tel phénomène pouvait se produire lorsque certaines conditions étaient réunies. Toutefois l'Uruguay a ajouté que l'on peut s'attendre à ce que la dilution des effluents de l'usine au 1/1000 rende ces derniers relativement inoffensifs, étant ramenée bien en deçà de toute concentration constitutive de pollution. L'Uruguay soutient que les allégations de l'Argentine concernant les effets préjudiciables des effluents de l'usine Orion (Botnia) sur les poissons et les rotifères ne sont pas crédibles. Il renvoie à un rapport détaillé récemment publié par la DINAMA sur l'ichtyofaune, selon lequel la biodiversité des espèces n'a pas changé entre 2008 et 2009. L'Uruguay ajoute que, dans son rapport de juillet 2009 sur les résultats des analyses effectuées en février 2009 sur les sédiments dans lesquels s'alimentent certaines espèces de poissons, la DINAMA a déclaré que «la qualité des sédiments au fond du fleuve Uruguay n'a[vait] pas été altérée du fait de l'activité industrielle de l'usine Botnia».

262. De l'avis de la Cour, dans le cadre de leur obligation de préserver le milieu aquatique, les Parties ont le devoir de protéger la faune et la flore du fleuve. Les normes et les mesures qu'elles sont tenues d'adopter au titre de l'article 41 devraient également refléter leurs engagements internationaux en matière de protection de la biodiversité et des habitats, outre les autres normes relatives à la qualité de l'eau et aux rejets d'effluents. La Cour ne dispose cependant pas d'éléments de preuve suffisants pour lui permettre de conclure que l'Uruguay n'a pas respecté l'obligation lui incombant de préserver le milieu aquatique, y compris en protégeant la faune et la flore. Les éléments recueillis montrent plutôt qu'aucun lien n'a pu être clairement établi entre les effluents de l'usine Orion (Botnia) et les malformations des rotifères, les concentrations de dioxines mesurées chez le *sábalo* ou la réduction des réserves lipidiques des coquillages, dont il est fait état dans les constatations du programme de surveillance environnementale du fleuve Uruguay mis en œuvre par l'Argentine (programme URES).

e) *Pollution atmosphérique*

263. L'Argentine affirme que l'usine Orion (Botnia) a provoqué une pollution atmosphérique, sonore et visuelle qui a eu un impact négatif sur «le milieu aquatique», en violation de l'article 41 du statut de 1975. Elle

the Salto Grande dam and on the frontier with Argentina", a few kilometres upstream from the Orion (Botnia) mill.

261. Uruguay states that Argentina has failed to demonstrate any breach by Uruguay of the Biodiversity Convention, while the Ramsar Convention has no bearing in the present case because Esteros de Farrapos was not included in the list of Ramsar sites whose ecological character is threatened. With regard to the possibility of the effluent plume from the mill reaching Esteros de Farrapos, Uruguay in the oral proceedings acknowledged that under certain conditions that might occur. However, Uruguay added that it would be expected that the dilution of the effluent from the mill of 1:1000 would render the effluent quite harmless and below any concentration capable of constituting pollution. Uruguay contends that Argentina's claims regarding the harmful effects on fish and rotifers as a result of the effluents from the Orion (Botnia) mill are not credible. It points out that a recent comprehensive report of DINAMA on ichthyofauna concludes that compared to 2008 and 2009 there has been no change in species biodiversity. Uruguay adds that the July 2009 report of DINAMA, with results of its February 2009 monitoring of the sediments in the river where some fish species feed, stated that "the quality of the sediments at the bottom of the Uruguay River has not been altered as a consequence of the industrial activity of the Botnia plant".

262. The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

(e) *Air pollution*

263. Argentina claims that the Orion (Botnia) mill has caused air, noise and visual pollution which negatively impact on "the aquatic environment" in violation of Article 41 of the 1975 Statute. Argentina also

fait également valoir que ce dernier a été conclu pour protéger non seulement la qualité des eaux, mais aussi, plus généralement, le «régime» et les «zones d'influence» du fleuve, c'est-à-dire «l'ensemble des éléments qui influencent, et qui sont influencés par, l'écosystème du fleuve pris dans son ensemble». L'Uruguay soutient que la Cour n'est pas compétente pour traiter ces questions et qu'en tout état de cause le bien-fondé des allégations de l'Argentine n'est pas établi.

264. Pour ce qui est de la pollution visuelle et sonore, la Cour a déjà conclu au paragraphe 52 que ces questions ne relevaient pas de sa compétence en vertu du statut de 1975. Pour ce qui est de la pollution atmosphérique, la Cour est d'avis que, si les rejets des cheminées de l'usine déposaient dans le milieu aquatique des substances nocives, cette pollution indirecte du fleuve relèverait des dispositions du statut de 1975. L'Uruguay semble adhérer à cette conclusion. Quoi qu'il en soit, eu égard aux conclusions de la Cour sur la qualité de l'eau, la Cour estime que les éléments versés au dossier n'établissent pas clairement que des substances toxiques ont été introduites dans le milieu aquatique en conséquence des rejets atmosphériques de l'usine Orion (Botnia).

f) *Conclusions relatives à l'article 41*

265. Il découle de ce qui précède que les éléments de preuve versés au dossier ne permettent pas d'établir de manière concluante que l'Uruguay n'a pas agi avec la diligence requise ou que les rejets d'effluents de l'usine Orion (Botnia) ont eu des effets délétères ou ont porté atteinte aux ressources biologiques, à la qualité des eaux ou à l'équilibre écologique du fleuve depuis le démarrage des activités de l'usine en novembre 2007. En conséquence, sur la base des preuves qui lui ont été présentées, la Cour conclut que l'Uruguay n'a pas violé ses obligations au titre de l'article 41.

g) *Obligations continues: suivi et contrôle*

266. De l'avis de la Cour, les deux Parties ont l'obligation de veiller à ce que la CARU, en tant que mécanisme commun créé par le statut de 1975, puisse continûment exercer les pouvoirs que lui confère le statut, y compris ses fonctions de surveillance de la qualité des eaux du fleuve et d'évaluation de l'impact de l'exploitation de l'usine Orion (Botnia) sur le milieu aquatique. L'Uruguay, pour sa part, a l'obligation de poursuivre le contrôle et le suivi du fonctionnement de l'usine conformément à l'article 41 du statut et de s'assurer que Botnia respecte la réglementation interne uruguayenne ainsi que les normes fixées par la commission. En vertu du statut de 1975, les Parties sont juridiquement tenues de poursuivre leur coopération par l'intermédiaire de la CARU et de permettre à cette dernière de développer les moyens nécessaires à la promotion de l'utilisation équitable du fleuve, tout en protégeant le milieu aquatique.

* *

argues that the 1975 Statute was concluded not only to protect the quality of the waters, but also, more generally, the "régime" of the river and "the areas affected by it, i.e., all the factors that affect, and are affected by the ecosystem of the river as a whole". Uruguay contends that the Court has no jurisdiction over those matters and that, in any event, the claims are not established on the merits.

264. With respect to noise and visual pollution, the Court has already concluded in paragraph 52 that it has no jurisdiction on such matters under the 1975 Statute. As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

(f) *Conclusions on Article 41*

265. It follows from the above that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

(g) *Continuing obligations: monitoring*

266. The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

* *

## V. Les demandes présentées par les Parties dans leurs conclusions finales

267. La Cour ayant conclu que l'Uruguay a manqué aux obligations de nature procédurale lui incombant en vertu du statut de 1975 (voir paragraphes 111, 122, 131, 149, 157 et 158 ci-dessus), il lui appartient de tirer les conséquences de ces faits internationalement illicites qui engagent la responsabilité internationale de l'Uruguay et de déterminer le contenu de celle-ci.

268. L'Argentine demande en premier lieu à la Cour de constater que l'Uruguay a violé les obligations de nature procédurale lui incombant en vertu du statut de 1975, et a engagé sa responsabilité internationale à ce titre. Elle demande aussi à la Cour d'ordonner à l'Uruguay la cessation immédiate de ces faits internationalement illicites.

269. La Cour considère que la constatation du comportement illicite de l'Uruguay en ce qui concerne ses obligations de nature procédurale constitue en elle-même une mesure de satisfaction pour l'Argentine. Les manquements de l'Uruguay aux obligations de nature procédurale ayant eu lieu par le passé et ayant pris fin, il n'y a pas lieu d'en ordonner la cessation.

270. L'Argentine estime toutefois qu'un constat d'illicéité constituerait une forme de réparation insuffisante, quand bien même la Cour constaterait que l'Uruguay n'a manqué à aucune obligation de fond découlant du statut de 1975, mais seulement à certaines de ses obligations de nature procédurale. L'Argentine soutient en effet que les obligations de nature procédurale et les obligations de fond prévues par le statut de 1975 sont étroitement liées et qu'on ne saurait les dissocier sous l'angle de la réparation, car les manquements aux premières continueraient à produire des effets indésirables alors même qu'ils auraient pris fin. En conséquence, l'Argentine estime que l'Uruguay est tenu de «rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de[s] ... faits internationalement illicites». A ce titre, l'usine Orion (Botnia) devrait être démantelée. Selon l'Argentine, la *restitutio in integrum* serait en effet la forme de réparation de principe du fait internationalement illicite. En s'appuyant sur l'article 35 des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite, l'Argentine soutient que la restitution jouirait d'une priorité sur toutes les autres formes de réparation, sauf lorsqu'elle est «matériellement impossible» ou impose «une charge hors de toute proportion avec l'avantage qui dériverait de la restitution plutôt que de l'indemnisation». Elle expose que le démantèlement de l'usine n'est pas matériellement impossible et n'emporterait par ailleurs pas de charge hors de toute proportion dans le chef de l'Etat défendeur, dès lors que ce dernier a

> «souligné que la construction des usines ne reviendrait pas à constituer un fait accompli susceptible de porter préjudice aux droits de l'Argentine, et que la décision de poursuivre les travaux et de

## V. The Claims Made by the Parties in Their Final Submissions

267. Having concluded that Uruguay breached its procedural obligations under the 1975 Statute (see paragraphs 111, 122, 131, 149, 157 and 158 above), it is for the Court to draw the conclusions following from these internationally wrongful acts giving rise to Uruguay's international responsibility and to determine what that responsibility entails.

268. Argentina first requests the Court to find that Uruguay has violated the procedural obligations incumbent on it under the 1975 Statute and has thereby engaged its international responsibility. Argentina further requests the Court to order that Uruguay immediately cease these internationally wrongful acts.

269. The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

270. Argentina nevertheless argues that a finding of wrongfulness would be insufficient as reparation, even if the Court were to find that Uruguay has not breached any substantive obligation under the 1975 Statute but only some of its procedural obligations. Argentina maintains that the procedural obligations and substantive obligations laid down in the 1975 Statute are closely related and cannot be severed from one another for purposes of reparation, since undesirable effects of breaches of the former persist even after the breaches have ceased. Accordingly, Argentina contends that Uruguay is under an obligation to "re-establish on the ground and in legal terms the situation that existed before [the] internationally wrongful acts were committed". To this end, the Orion (Botnia) mill should be dismantled. According to Argentina, *restitutio in integrum* is the primary form of reparation for internationally wrongful acts. Relying on Article 35 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Argentina maintains that restitution takes precedence over all other forms of reparation except where it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation". It asserts that dismantling the mill is not materially impossible and would not create for the Respondent State a burden out of all proportion, since the Respondent has

> "maintained that construction of the mills would not amount to a fait accompli liable to prejudice Argentina's rights and that it was for Uruguay alone to decide whether to proceed with construction

prendre ainsi le risque de devoir démanteler les usines en cas de décision défavorable de la Cour relevait de sa seule responsabilité»,

ainsi que la Cour l'a noté dans son ordonnance sur la demande en indication de mesures conservatoires soumise par l'Argentine en la présente affaire (*ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 125, par. 47). L'Argentine ajoute que le caractère éventuellement disproportionné de la restitution doit s'apprécier au plus tard au moment du dépôt de la requête introductive d'instance, puisque dès cet instant l'Uruguay ne pouvait ignorer le risque qu'il encourait en poursuivant la construction de l'usine litigieuse, ayant connaissance de la demande argentine de cessation des travaux et de rétablissement de la situation antérieure. L'Argentine considère enfin que les articles 42 et 43 du statut de 1975 sont inapplicables en l'espèce car ils établissent un régime de responsabilité en l'absence de fait illicite.

271. Considérant que les obligations de nature procédurale sont distinctes des obligations de fond prévues par le statut de 1975, et que le contenu de la règle en cause doit être pris en compte pour déterminer la forme que doit prendre l'obligation de réparer découlant de sa violation, l'Uruguay soutient que la restitution ne serait pas une forme de réparation appropriée s'il n'était trouvé responsable que de manquements à des obligations de nature procédurale. L'Uruguay souligne qu'en toute hypothèse le démantèlement de l'usine Orion (Botnia) emporterait une «disproportion frappante entre la gravité des conséquences du fait illicite reproché et celles du remède demandé», le caractère éventuellement disproportionné de la charge que représente la restitution devant s'apprécier au moment où la Cour statue et non, comme le soutient l'Argentine, au moment de sa saisine. L'Uruguay ajoute que le statut de 1975 constitue une *lex specialis* au regard du droit de la responsabilité internationale, ses articles 42 et 43 érigeant l'indemnisation, et non la restitution, comme la forme de réparation appropriée en cas de pollution du fleuve survenant en violation du statut de 1975.

272. N'ayant pas été saisie d'une demande de réparation fondée sur un régime de responsabilité en l'absence de fait illicite, la Cour n'estime pas nécessaire de déterminer si les articles 42 et 43 du statut de 1975 établissent un tel régime. Il ne saurait par contre être déduit du texte desdits articles, qui visent spécifiquement des cas de pollution, qu'ils auraient pour objet ou pour effet d'écarter toute autre forme de réparation que l'indemnisation en cas de manquement aux obligations de nature procédurale découlant du statut de 1975.

273. La Cour rappelle que, selon le droit international coutumier, la restitution est l'une des formes de réparation du préjudice; elle consiste dans le rétablissement de la situation qui existait avant la survenance du fait illicite. La Cour rappelle également que, dans les cas où la restitution est matériellement impossible ou emporte une charge hors de toute proportion avec l'avantage qui en dériverait, la réparation prend alors la forme de l'indemnisation ou de la satisfaction, voire de l'indemnisation et

> and thereby assume the risk of having to dismantle the mills in the event of an adverse decision by the Court",

as the Court noted in its Order on Argentina's request for the indication of provisional measures in this case (*Order of 13 July 2006, I.C.J. Reports 2006*, p. 125, para. 47). Argentina adds that whether or not restitution is disproportionate must be determined at the latest as of the filing of the Application instituting proceedings, since as from that time Uruguay, knowing of Argentina's request to have the work halted and the *status quo ante* re-established, could not have been unaware of the risk it ran in proceeding with construction of the disputed mill. Lastly, Argentina considers Articles 42 and 43 of the 1975 Statute to be inapplicable in the present case, since they establish a régime of responsibility in the absence of any wrongful act.

271. Taking the view that the procedural obligations are distinct from the substantive obligations laid down in the 1975 Statute, and that account must be taken of the purport of the rule breached in determining the form to be taken by the obligation of reparation deriving from its violation, Uruguay maintains that restitution would not be an appropriate form of reparation if Uruguay is found responsible only for breaches of procedural obligations. Uruguay argues that the dismantling of the Orion (Botnia) mill would at any rate involve a "striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed", and that whether or not a disproportionate burden would result from restitution must be determined as of when the Court rules, not, as Argentina claims, as of the date it was seised. Uruguay adds that the 1975 Statute constitutes a *lex specialis* in relation to the law of international responsibility, as Articles 42 and 43 establish compensation, not restitution, as the appropriate form of reparation for pollution of the river in contravention of the 1975 Statute.

272. The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

273. The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),*

de la satisfaction (voir *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 81, par. 152; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004 (I)*, p. 198, par. 152-153; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 233, par. 460; voir également les articles 34 à 37 des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite).

274. Tout comme les autres formes de réparation, la restitution doit être appropriée au préjudice subi, compte tenu de la nature du fait illicite dont il procède. Comme la Cour l'a souligné,

> «savoir ce qui constitue «une réparation dans une forme adéquate» ... dépend, manifestement, des circonstances concrètes de chaque affaire ainsi que de la nature exacte et de l'importance du préjudice, puisqu'il s'agit de déterminer quelle est la «réparation dans une forme adéquate» qui correspond à ce préjudice» (*Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 59, par. 119).

275. Comme la Cour a eu l'occasion de le montrer (voir paragraphes 154 à 157 ci-dessus), les obligations de nature procédurale du statut de 1975 n'emportaient pas, après l'expiration de la période de négociation, l'interdiction pour l'Uruguay de construire l'usine Orion (Botnia) en l'absence du consentement de l'Argentine. La Cour a relevé cependant que la construction de cette usine avait commencé avant la fin des négociations, en violation des obligations de nature procédurale énoncées par le statut de 1975. Par ailleurs, ainsi que la Cour l'a constaté sur la base des éléments de preuve qui lui ont été soumis, le fonctionnement de l'usine Orion (Botnia) n'a pas entraîné une violation des obligations de fond prévues par le statut de 1975 (paragraphes 180, 189 et 265 ci-dessus). Dès lors qu'il n'était pas interdit à l'Uruguay de construire et de mettre en service l'usine Orion (Botnia) après l'expiration de la période de négociation, et que l'Uruguay n'a violé aucune des obligations de fond imposées par le statut de 1975, ordonner le démantèlement de cette installation ne saurait constituer, de l'avis de la Cour, une forme de réparation appropriée à la violation des obligations de nature procédurale.

276. L'Uruguay n'ayant pas manqué aux obligations de fond découlant du statut de 1975, la Cour ne saurait davantage, pour les mêmes raisons, accueillir la demande de l'Argentine relative à l'indemnisation de certains préjudices dans différents secteurs économiques, notamment le tourisme et l'agriculture, dont elle allègue l'existence.

277. L'Argentine demande aussi à la Cour de dire et juger que l'Uruguay doit «donner des garanties adéquates qu'[il] s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité».

*Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, paras. 152-153; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 233, para. 460; see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts).

274. Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it. As the Court has made clear,

> "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119).

275. As the Court has pointed out (see paragraphs 154 to 157 above), the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute (paragraphs 180, 189 and 265 above). As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

276. As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

277. Argentina further requests the Court to adjudge and declare that Uruguay must "provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty".

278. La Cour n'aperçoit pas en la présente espèce de circonstances spéciales requérant d'ordonner une mesure telle que celle que réclame l'Argentine. Comme la Cour a eu récemment l'occasion de le rappeler :

> «[S]i la Cour peut, comme il lui est arrivé de le faire, ordonner à l'Etat responsable d'un comportement internationalement illicite d'offrir à l'Etat lésé des assurances et des garanties de non-répétition, c'est seulement si les circonstances le justifient, ce qu'il lui appartient d'apprécier.
>
> En règle générale, il n'y a pas lieu de supposer que l'Etat dont un acte ou un comportement a été déclaré illicite par la Cour répétera à l'avenir cet acte ou ce comportement, puisque sa bonne foi doit être présumée (voir *Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 63 ; *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 272, par. 60 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 63 ; et *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 437, par. 101). Il n'y a donc pas lieu, sauf circonstances spéciales ... d'ordonner [que des assurances et des garanties de non-répétition soient offertes].» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 267, par. 150.)

279. L'Uruguay demande pour sa part à la Cour de confirmer son droit «de poursuivre l'exploitation de l'usine Botnia conformément aux dispositions du statut de 1975». L'Argentine estime que cette demande doit être rejetée, notamment parce que, ayant été formulée pour la première fois dans la duplique de l'Uruguay, elle constituerait une demande reconventionnelle irrecevable au regard de l'article 80 du Règlement.

280. Sans qu'il soit nécessaire à la Cour de trancher la question de recevabilité de cette demande, il lui suffit de constater que la demande de l'Uruguay n'a aucune portée utile dès lors que les demandes de l'Argentine relatives aux violations, par l'Uruguay, de ses obligations de fond et au démantèlement de l'usine Orion (Botnia) ont été rejetées.

* * *

281. La Cour souligne enfin que le statut de 1975 impose aux Parties de coopérer entre elles, selon les modalités qu'il précise, afin d'assurer la réalisation de son objet et de son but. Cette obligation de coopération s'étend au contrôle et au suivi d'une installation industrielle, telle que l'usine Orion (Botnia). A cet égard, la Cour relève qu'il existe entre les Parties une longue et efficace tradition de coopération et de coordination dans le cadre de la CARU. En agissant conjointement au sein de la CARU, les Parties ont établi une réelle communauté d'intérêts et de droits dans la gestion du fleuve Uruguay et dans la protection de son environnement. Elles ont également coordonné leurs actions au moyen

278. The Court fails to see any special circumstances in the present case requiring the ordering of a measure such as that sought by Argentina. As the Court has recently observed:

> "[W]hile the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.
>
> As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition]." (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.)

279. Uruguay, for its part, requests the Court to confirm its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute". Argentina contends that this claim should be rejected, in particular because it is a counter-claim first put forward in Uruguay's Rejoinder and, as such, is inadmissible by virtue of Article 80 of the Rules of Court.

280. There is no need for the Court to decide the admissibility of this claim; it is sufficient to observe that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

* * *

281. Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment. They have also co-ordinated their actions through the joint

du mécanisme conjoint constitué par la CARU, conformément aux dispositions du statut de 1975, et trouvé dans ce cadre des solutions appropriées à leurs divergences sans éprouver la nécessité d'avoir recours au règlement judiciaire des différends prévu à l'article 60 du statut, jusqu'à ce que la présente affaire soit portée devant la Cour.

* * *

282. Par ces motifs,

La COUR,

1) Par treize voix contre une,

*Dit* que la République orientale de l'Uruguay a manqué aux obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut du fleuve Uruguay de 1975 et que la constatation par la Cour de cette violation constitue une satisfaction appropriée;

POUR: M. Tomka, *vice-président, faisant fonction de président en l'affaire*; MM. Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, *juges*; M. Vinuesa, *juge* ad hoc;

CONTRE: M. Torres Bernárdez, *juge* ad hoc;

2) Par onze voix contre trois,

*Dit* que la République orientale de l'Uruguay n'a pas manqué aux obligations de fond lui incombant en vertu des articles 35, 36 et 41 du statut du fleuve Uruguay de 1975;

POUR: M. Tomka, *vice-président, faisant fonction de président en l'affaire*; MM. Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, *juges*; M. Torres Bernárdez, *juge* ad hoc;

CONTRE: MM. Al-Khasawneh, Simma, *juges*; M. Vinuesa, *juge* ad hoc;

3) A l'unanimité,

*Rejette* le surplus des conclusions des Parties.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le vingt avril deux mille dix, en trois exemplaires, dont l'un sera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République argentine et au Gouvernement de la République orientale de l'Uruguay.

Le vice-président,
*(Signé)* Peter TOMKA.

Le greffier,
*(Signé)* Philippe COUVREUR.

mechanism of CARU, in conformity with the provisions of the 1975 Statute, and found appropriate solutions to their differences within its framework without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.

* * *

282. For these reasons,

THE COURT,

(1) By thirteen votes to one,

*Finds* that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Vinuesa;

AGAINST: *Judge* ad hoc Torres Bernárdez;

(2) By eleven votes to three,

*Finds* that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Judges* Al-Khasawneh, Simma; *Judge* ad hoc Vinuesa;

(3) Unanimously,

*Rejects* all other submissions by the Parties.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of April, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Argentine Republic and the Government of the Eastern Republic of Uruguay, respectively.

*(Signed)* Peter TOMKA,
Vice-President.

*(Signed)* Philippe COUVREUR,
Registrar.

MM. les juges AL-KHASAWNEH et SIMMA joignent à l'arrêt l'exposé de leur opinion dissidente commune ; M. le juge KEITH joint à l'arrêt l'exposé de son opinion individuelle ; M. le juge SKOTNIKOV joint une déclaration à l'arrêt ; M. le juge CANÇADO TRINDADE joint à l'arrêt l'exposé de son opinion individuelle ; M. le juge YUSUF joint une déclaration à l'arrêt ; M. le juge GREENWOOD joint à l'arrêt l'exposé de son opinion individuelle ; M. le juge *ad hoc* TORRES BERNÁRDEZ joint à l'arrêt l'exposé de son opinion individuelle ; M. le juge *ad hoc* VINUESA joint à l'arrêt l'exposé de son opinion dissidente.

*(Paraphé)* P.T.
*(Paraphé)* Ph.C.

Judges AL-KHASAWNEH and SIMMA append a joint dissenting opinion to the Judgment of the Court; Judge KEITH appends a separate opinion to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge GREENWOOD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* TORRES BERNÁRDEZ appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VINUESA appends a dissenting opinion to the Judgment of the Court.

*(Initialled)* P.T.

*(Initialled)* Ph.C.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

**JUDGMENT OF 25 SEPTEMBER 1997**

# 1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

(HONGRIE/SLOVAQUIE)

**ARRÊT DU 25 SEPTEMBRE 1997**

Official citation:
*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7

Mode officiel de citation:
*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 7

ISSN 0074-4441
ISBN 92-1-070757-5

**Sales number**
**N° de vente: 692**

25 SEPTEMBER 1997

JUDGMENT

# GABČÍKOVO-NAGYMAROS PROJECT
# (HUNGARY/SLOVAKIA)

---

# PROJET GABČÍKOVO-NAGYMAROS
# (HONGRIE/SLOVAQUIE)

25 SEPTEMBRE 1997

ARRÊT

INTERNATIONAL COURT OF JUSTICE

1997
25 September
General List
No. 92

YEAR 1997

**25 September 1997**

# CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

## (HUNGARY/SLOVAKIA)

*Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks — "Related instruments".*

*Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — "Essential interest" of the State committing the act — Environment — "Grave and imminent peril" — Act having to constitute the "only means" of safeguarding the interest threatened — State having "contributed to the occurrence of the state of necessity".*

*Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.*

*Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an "object" indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permit-*

COUR INTERNATIONALE DE JUSTICE

ANNÉE 1997

1997
25 septembre
Rôle général
n° 92

**25 septembre 1997**

# AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

## (HONGRIE/SLOVAQUIE)

*Traité du 16 septembre 1977 relatif à la construction et au fonctionnement du système d'écluses de Gabčikovo-Nagymaros — « Instruments y afférents ».*

*Suspension et abandon par la Hongrie, en 1989, de travaux relatifs au projet — Applicabilité de la convention de Vienne de 1969 sur le droit des traités — Droit des traités et droit de la responsabilité des Etats — Etat de nécessité en tant que cause d'exclusion de l'illicéité d'un fait — « Intérêt essentiel » de l'Etat auteur du fait — Environnement — « Péril grave et imminent » — Fait devant constituer le « seul moyen » de sauvegarder l'intérêt en cause — Etat ayant « contribué à la survenance de l'état de nécessité ».*

*Recours par la Tchécoslovaquie, en novembre 1991, à la « variante C » et mise en service, à partir d'octobre 1992, de cette variante — Argumentation tirée d'un principe allégué d'application par approximation — Respect des limites du traité — Droit à une part équitable et raisonnable des ressources d'un cours d'eau international — Réalisation d'un fait illicite et comportement antérieur présentant un caractère préparatoire — Obligation d'atténuer les dommages — Principe concernant seulement le calcul de dommages et intérêts — Contre-mesures — Riposte à un fait internationalement illicite — Proportionnalité — Prise de contrôle unilatérale d'une ressource partagée.*

*Notification par la Hongrie, le 19 mai 1992, de la terminaison du traité de 1977 et des instruments y afférents — Effets juridiques — Question relevant du droit des traités — Articles 60 à 62 de la convention de Vienne sur le droit des traités — Droit coutumier — Impossibilité d'exécution — Disparition ou destruction définitives d'un « objet » indispensable à l'exécution — Impossibilité d'exécution résultant de la violation, par la partie qui l'invoque, d'une obligation découlant du traité — Changement fondamental de circonstances — Base essentielle du consentement des parties — Portée des obligations restant à exécuter — Stabilité des relations conventionnelles — Violation substantielle du traité — Date à laquelle la violation a été commise et date de la notification de terminaison — Victime d'une violation ayant elle-même commis une violation préalable du traité — Emergence de nouvelles normes du droit de l'environnement*

*ting the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule* pacta sunt servanda *— Treaty remaining in force until terminated by mutual consent.*

*Legal consequences of the Judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations "attaching" to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations —* Ex injuria jus non oritur *— Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint régime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.*

## JUDGMENT

*Present:* *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judge* ad hoc SKUBISZEWSKI; *Registrar* VALENCIA-OSPINA.

In the case concerning the Gabčíkovo-Nagymaros Project,

*between*

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs,

as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands,

as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (retd.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,

*— Développement durable — Dispositions du traité permettant aux parties, d'un commun accord, de tenir compte de ces normes — Rejet du traité — Manquements réciproques — Intégrité de la règle* pacta sunt servanda *— Traité demeurant en vigueur tant qu'il n'y est pas mis fin d'un commun accord.*

*Conséquences juridiques de l'arrêt de la Cour — Dissolution de la Tchécoslovaquie — Article 12 de la convention de Vienne de 1978 sur la succession d'Etats en matière de traités — Droit coutumier — Succession d'Etats sans incidence sur un traité créant des droits et obligations «attachés» au territoire — Situation irrégulière due aux manquements des deux Parties à leurs obligations conventionnelles —* Ex injuria jus non oritur *— Objectifs du traité — Obligations dépassées par les événements — Positions adoptées par les parties après la conclusion du traité — Négociations de bonne foi — Incidences du projet sur l'environnement — Solution à trouver de commun accord par les Parties — Régime conjoint — Réparation des actes commis par les deux Parties — Coopération pour l'utilisation des ressources en eau partagées — Dommages et intérêts — Succession en ce qui concerne les droits et obligations relatifs au projet — Actes illicites croisés — Règlement des comptes concernant la construction des ouvrages.*

## ARRÊT

*Présents:* M. SCHWEBEL, *Président*; M. WEERAMANTRY, *Vice-Président*; MM. ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK, *juges*; M. SKUBISZEWSKI, *juge* ad hoc; M. VALENCIA-OSPINA, *Greffier*.

En l'affaire relative au projet Gabčíkovo-Nagymaros,

*entre*

la République de Hongrie,

représentée par

S. Exc. M. György Szénási, ambassadeur, directeur du département de droit international au ministère des affaires étrangères,

comme agent et conseil;

S. Exc. M. Dénes Tomaj, ambassadeur de la République de Hongrie aux Pays-Bas,

comme coagent;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge,

M. Pierre-Marie Dupuy, professeur à l'Université Panthéon-Assas (Paris II) et directeur de l'Institut des hautes études internationales de Paris,

M. Alexandre Kiss, directeur de recherches au Centre national de la recherche scientifique (en retraite),

M. László Valki, professeur de droit international à l'Université Eötvös Loránd de Budapest,

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,

as Advisers;

Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator;

Ms Éva Kocsis,
Ms Katinka Tompa,

as Secretaries,

*and*

the Slovak Republic,

represented by

H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Dr. Václav Mikulka, Member of the International Law Commission,

as Co-Agent, Counsel and Advocate;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the

M. Boldizsár Nagy, professeur associé de droit international à l'Université Eötvös Loránd de Budapest,
M. Philippe Sands, chargé de cours de droit international à la School of Oriental and African Studies de l'Université de Londres, et *Global Professor of Law* à l'Université de New York,
M^me^ Katherine Gorove, juriste-conseil,

comme conseils et avocats;

M. Howard Wheater, professeur d'hydrologie à l'Imperial College de Londres,
M. Gábor Vida, professeur de biologie à l'Université Eötvös Loránd de Budapest, membre de l'Académie des sciences de Hongrie,
M. Roland Carbiener, professeur émérite de l'Université de Strasbourg,
M. Klaus Kern, ingénieur-conseil à Karlsruhe,

comme avocats;

M. Edward Helgeson,
M. Stuart Oldham,
M. Péter Molnár,

comme conseillers;

M. György Kovács,
M. Timothy Walsh,
M. Zoltán Kovács,

comme conseillers techniques;

M. Attila Nyikos,

comme assistant;

M. Axel Gosseries, LL.M.,

comme traducteur;

M^me^ Eva Kocsis,
M^me^ Katinka Tompa,

comme secrétaires,

*et*

la République slovaque,

représentée par

S. Exc. M. Peter Tomka, ambassadeur, conseiller juridique du ministère des affaires étrangères,

comme agent;

M. Václav Mikulka, membre de la Commission du droit international,

comme coagent, conseil et avocat;

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge, ancien membre de la Commission du droit international,

comme conseil;

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento (Etats-Unis d'Amérique), ancien membre de la Commission du droit international,
M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut

Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,

Mr. Jens Christian Refsgaard, Head of Research and Development, Danish Hydraulic Institute,

as Counsel and Experts;

Dr. Cecília Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

Dr. Peter Vršanský, Minister-Counsellor, Chargé d'affaires *a.i.*, of the Embassy of the Slovak Republic, The Hague,

as Counsellors;

Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Štefánek, attaché, Ministry of Foreign Affairs,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

d'études politiques de Paris, membre de la Commission du droit international,
M. Walter D. Sohier, membre des barreaux de l'Etat de New York et du district de Columbia,
sir Arthur Watts, K.C.M.G., Q.C., *Barrister*, membre du barreau d'Angleterre et du pays de Galles,
M. Samuel S. Wordsworth, avocat à la cour d'appel de Paris et *Solicitor* auprès de la Cour suprême d'Angleterre et du pays de Galles, Frere Cholmeley, Paris,

comme conseils et avocats;

M. Igor Mucha, professeur d'hydrogéologie et ancien directeur du département des eaux souterraines à la faculté des sciences naturelles de l'Université Comenius de Bratislava,
M. Karra Venkateswara Rao, directeur de la section des techniques d'aménagement hydrauliques du département du génie civil de la City University de Londres,
M. Jens Christian Refsgaard, directeur de la recherche et du développement à l'Institut danois d'hydraulique,

comme conseils et experts;

M^me^ Cecília Kandráčová, directeur de département au ministère des affaires étrangères,
M. Luděk Krajhanzl, avocat, cabinet Vyroubal Krajhanzl Skácel et associés, Prague,
M. Miroslav Liška, directeur de la division des relations publiques et de l'expertise de l'entreprise d'Etat pour la mise en valeur des ressources en eau, Bratislava,
M. Peter Vršanský, ministre conseiller, chargé d'affaires par intérim de l'ambassade de la République slovaque aux Pays-Bas,

comme conseillers;

M^lle^ Anouche Beaudouin, allocataire de recherche à l'Université de Paris X-Nanterre,
M^me^ Cheryl Dunn, Frere Cholmeley, Paris,
M^me^ Nikoleta Glindová, attachée au ministère des affaires étrangères,
M. Drahoslav Štefánek, attaché au ministère des affaires étrangères,

comme assistants juridiques,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

*rend l'arrêt suivant:*

1. Par lettre en date du 2 juillet 1993, déposée au Greffe de la Cour le même jour, l'ambassadeur aux Pays-Bas de la République de Hongrie (dénommée ci-après la «Hongrie») et le chargé d'affaires par intérim aux Pays-Bas de la République slovaque (dénommée ci-après la «Slovaquie») ont notifié conjointement à la Cour un compromis en langue anglaise, signé à Bruxelles le 7 avril 1993 et entré en vigueur le 28 juin 1993 à la date de l'échange des instruments de ratification.

2. Dans sa traduction française, le texte du compromis se lit comme suit:

"*The Republic of Hungary and the Slovak Republic,*

*Considering* that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

*Bearing in mind* that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

*Recognizing* that the Parties concerned have been unable to settle these differences by negotiations;

*Having in mind* that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

*Desiring* that these differences should be settled by the International Court of Justice;

*Recalling* their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

*Desiring* further to define the issues to be submitted to the International Court of Justice,

*Have agreed as follows:*

*Article 1*

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

*Article 2*

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

*(a)* whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

«*La République de Hongrie et la République slovaque*,

*Considérant* que des contestations ont surgi entre la République fédérative tchèque et slovaque et la République de Hongrie concernant l'application et la terminaison du traité relatif à la construction et au fonctionnement du système de barrage de Gabčíkovo-Nagymaros, signé à Budapest le 16 septembre 1977, et des instruments y afférents (ci-après dénommés le «traité»), ainsi que la construction et le fonctionnement de la «solution provisoire»;

*Tenant compte* de ce que la République slovaque est l'un des deux Etats successeurs de la République fédérative tchèque et slovaque et l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros;

*Reconnaissant* que les parties concernées ne sont pas parvenues à régler ces contestations par voie de négociation;

*Ayant à l'esprit* que tant la délégation tchécoslovaque que la délégation hongroise ont déclaré qu'elles s'engageaient à soumettre les contestations liées au projet Gabčíkovo-Nagymaros sous tous ses aspects à un arbitrage international obligatoire ou à la Cour internationale de Justice;

*Souhaitant* que ces contestations soient réglées par la Cour internationale de Justice;

*Rappelant* qu'elles se sont engagées à appliquer, en attendant l'arrêt de la Cour internationale de Justice, le régime temporaire de gestion des eaux du Danube dont seront convenues les Parties;

*Désirant* en outre définir les questions à soumettre à la Cour internationale de Justice,

*Sont convenues de ce qui suit:*

*Article premier*

Les Parties soumettent à la Cour internationale de Justice, conformément au paragraphe 1 de l'article 40 du Statut de la Cour, les questions énoncées à l'article 2 ci-après.

*Article 2*

1) La Cour est priée de dire, sur la base du traité et des règles et principes du droit international général, ainsi que de tous autres traités qu'elle jugera applicables:

*a)* si la République de Hongrie était en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité;

*b)* si la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de mettre en service, à partir d'octobre 1992, ce système, décrit dans le rapport en date du 23 novembre 1992 du groupe de travail d'experts indépendants nommés par la Commission des Communautés européennes, la République de Hongrie et la République fédérative tchèque et slovaque (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation);

*(c)* what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

*Article 3*

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

*(a)* a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

*(b)* a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

*(c)* a Reply presented by each of the Parties within such time-limits as the Court may order.

*(d)* The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

*Article 4*

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

*Article 5*

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

*Article 6*

(1) The present Special Agreement shall be subject to ratification.

*c)* quels sont les effets juridiques de la notification, le 19 mai 1992, de la terminaison du traité par la République de Hongrie.

2) La Cour est également priée de déterminer les conséquences juridiques, y compris les droits et obligations pour les Parties, de l'arrêt qu'elle rendra sur les questions énoncées au paragraphe 1 du présent article.

*Article 3*

1) Toutes les questions de procédure et de preuve seront réglées conformément aux dispositions du Statut et du Règlement de la Cour.

2) Toutefois, les Parties prient la Cour de bien vouloir ordonner que la procédure écrite comprenne les pièces suivantes:

*a)* un mémoire présenté par chacune des Parties au plus tard dix mois après la date de la notification du présent compromis au Greffier de la Cour internationale de Justice;

*b)* un contre-mémoire présenté par chacune des Parties au plus tard sept mois après la date à laquelle chacune aura reçu la copie certifiée conforme du mémoire de l'autre Partie;

*c)* une réplique présentée par chacune des Parties dans les délais que la Cour indiquera.

*d)* La Cour pourra, si elle le juge utile, demander aux Parties de déposer des pièces de procédure écrite supplémentaires.

3) Les pièces de procédure écrite susmentionnées et leurs annexes, déposées auprès du Greffier, ne seront transmises à l'autre Partie que lorsque le Greffier aura reçu de ladite Partie la pièce de procédure correspondante.

*Article 4*

1) Les Parties conviennent, en attendant l'arrêt définitif de la Cour, d'établir et d'appliquer un régime temporaire de gestion des eaux pour le Danube.

2) Les Parties conviennent en outre qu'au cas où, au cours de la période précédant l'établissement ou l'application d'un tel régime, l'une d'entre elles considérerait que la conduite de l'autre met ses droits en danger, elle pourra demander des consultations immédiates et, au besoin, qu'il soit recouru à des experts, y compris la Commission des Communautés européennes, en vue de protéger ces droits; et que la protection de ces droits ne sera pas recherchée au moyen d'une demande présentée à la Cour en vertu de l'article 41 du Statut.

3) Les deux Parties acceptent cet engagement en tant qu'élément fondamental de la conclusion et du maintien de la validité du compromis.

*Article 5*

1) Les Parties s'engagent à accepter l'arrêt de la Cour comme définitif et obligatoire pour elles et à l'exécuter intégralement et de bonne foi.

2) Aussitôt que l'arrêt leur aura été remis, les Parties engageront des négociations pour fixer les modalités de son exécution.

3) Si les Parties ne peuvent parvenir à un accord dans un délai de six mois, l'une ou l'autre d'entre elles pourra prier la Cour de rendre un arrêt supplémentaire pour déterminer les modalités d'exécution de son arrêt.

*Article 6*

1) Le présent compromis est soumis à ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b)*, of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c)*, of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court

2) Les instruments de ratification seront échangés aussitôt que possible à Bruxelles.

3) Le présent compromis entrera en vigueur à la date de l'échange des instruments de ratification. Il fera ensuite l'objet d'une notification conjointe au Greffier de la Cour.

En foi de quoi les soussignés, dûment habilités à cet effet, ont signé le présent compromis et y ont apposé leur sceau.»

3. Conformément au paragraphe 3 de l'article 40 du Statut et à l'article 42 du Règlement de la Cour, des copies de la notification et du compromis ont été transmises par le Greffier au Secrétaire général de l'Organisation des Nations Unies, aux Membres des Nations Unies et aux autres Etats admis à ester devant la Cour.

4. La Cour ne comptant pas sur le siège de juge de nationalité slovaque, la Slovaquie s'est prévalue du droit que lui confère le paragraphe 2 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire: elle a désigné à cet effet M. Krzysztof Jan Skubiszewski.

5. Par ordonnance en date du 14 juillet 1993, la Cour a fixé au 2 mai 1994 la date d'expiration du délai pour le dépôt d'un mémoire par chaque Partie, et au 5 décembre 1994 la date d'expiration du délai pour le dépôt par chacune d'elles d'un contre-mémoire, eu égard aux dispositions de l'article 3, paragraphe 2, alinéas *a)* et *b)*, du compromis. Ces pièces ont été dûment déposées dans les délais ainsi prescrits.

6. Par ordonnance en date du 20 décembre 1994, le Président de la Cour, après avoir entendu les agents des Parties, a fixé au 20 juin 1995 la date d'expiration du délai pour le dépôt des répliques, eu égard aux dispositions de l'article 3, paragraphe 2, alinéa *c)*, du compromis. Les répliques ont été dûment déposées dans le délai ainsi prescrit et, la Cour n'ayant pas demandé la production de pièces supplémentaires, l'affaire s'est alors trouvée en état.

7. Par lettres du 27 janvier 1997, l'agent de la Slovaquie, se référant aux dispositions du paragraphe 1 de l'article 56 du Règlement, a exprimé le désir de son gouvernement de produire deux nouveaux documents; par lettre du 10 février 1997, l'agent de la Hongrie a fait savoir que son gouvernement s'y opposait. Le 26 février 1997, après avoir dûment recueilli les vues des deux Parties, la Cour a décidé, conformément au paragraphe 2 de l'article 56 du Règlement, d'autoriser la production de ces documents sous certaines conditions dont les Parties ont été avisées. Dans le délai fixé par la Cour à cet effet, la Hongrie a présenté des observations au titre du paragraphe 3 du même article sur l'un de ces documents. La Cour a autorisé la Slovaquie, comme celle-ci en avait exprimé le souhait, à soumettre à son tour des commentaires sur ces observations; lesdits commentaires ont été reçus dans le délai prescrit à cette fin.

8. Chacune des Parties a en outre demandé de pouvoir présenter une vidéocassette au cours de la procédure orale. La Cour a accédé à ces demandes, à la condition que les cassettes en question soient au préalable échangées entre les Parties par l'entremise du Greffe. Il a ainsi été procédé.

9. Conformément au paragraphe 2 de l'article 53 du Règlement, la Cour a décidé, après s'être renseignée auprès des Parties, que des exemplaires des pièces de procédure et des documents y annexés seraient rendus accessibles au public à compter de l'ouverture de la procédure orale.

10. Par lettre en date du 16 juin 1995, l'agent de la Slovaquie avait invité la

to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

*For Hungary:* H.E. Mr. Szénási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheater,
Ms Gorove,
Professor Dupuy,
Professor Sands.

*For Slovakia:* H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Refsgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

*

Cour à se déplacer sur les lieux auxquels se rapporte l'affaire et à y exercer ses fonctions relatives à l'établissement des preuves, conformément à l'article 66 du Règlement. Pour sa part, l'agent de la Hongrie avait indiqué, par lettre en date du 28 juin 1995, que, si la Cour jugeait une telle visite utile, son gouvernement serait heureux de collaborer à l'organisation de celle-ci. Par lettre du 14 novembre 1995, les agents des Parties notifièrent conjointement à la Cour le texte d'un protocole d'accord, conclu à Budapest et à New York le même jour, en vue de proposer à la Cour les modalités d'une telle descente sur les lieux; et, par lettre du 3 février 1997, ils lui notifièrent conjointement le texte d'un procès-verbal établi à Budapest et à New York le même jour, qui complétait le protocole d'accord du 14 novembre 1995. La Cour, par ordonnance en date du 5 février 1997, a décidé de donner suite à l'invitation qui lui était faite d'exercer ses fonctions relatives à l'établissement des preuves sur les lieux auxquels l'affaire se rapporte, et d'adopter à cette fin les modalités proposées par les Parties. La Cour s'est déplacée sur les lieux du 1er au 4 avril 1997; elle a visité un certain nombre de sites le long du Danube et a pris note des explications techniques qui lui ont été fournies par les représentants que les Parties avaient désignés à cet effet.

11. La Cour a tenu une première série de dix audiences publiques du 3 au 7 mars et du 24 au 27 mars 1997; elle a tenu une seconde série de quatre audiences publiques les 10, 11, 14 et 15 avril 1997, après avoir effectué la descente sur les lieux dont il est fait mention au paragraphe précédent. Au cours de ces audiences ont été entendus en leurs plaidoiries et réponses:

*Pour la Hongrie:*
S. Exc. M. Szénási,
M. Valki,
M. Kiss,
M. Vida,
M. Carbiener,
M. Crawford,
M. Nagy,
M. Kern,
M. Wheater,
Mme Gorove,
M. Dupuy,
M. Sands.

*Pour la Slovaquie:*
S. Exc. M. Tomka,
M. Mikulka,
M. Wordsworth,
M. McCaffrey,
M. Mucha,
M. Pellet,
M. Refsgaard,
sir Arthur Watts.

12. Les Parties ont répondu oralement et par écrit à diverses questions posées par des membres de la Cour. Se référant aux dispositions de l'article 72 du Règlement, chacune des Parties a fait tenir à la Cour des observations sur les réponses données par l'autre Partie à certaines de ces questions.

*

13. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of Hungary,*

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

*Requests the Court to adjudge and declare*

*First*, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

*Second*, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

*Third*, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 16 September 1977;

*Requests the Court to adjudge and declare further*

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

(1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;
(2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;
(3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';
(4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;
(5) that the Slovak Republic is under the following obligations:
   *(a)* to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
   *(b)* to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and
   *(c)* to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

13. Dans la procédure écrite, les conclusions ci-après ont été présentées par les Parties:

*Au nom de la Hongrie,*

dans le mémoire, le contre-mémoire et la réplique (textes identiques *mutatis mutandis*):

«Sur la base des éléments de preuve et des arguments juridiques présentés dans son mémoire, son contre-mémoire et sa réplique, la République de Hongrie

*Prie la Cour de dire et juger:*

*Premièrement*, que la République de Hongrie était en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie était responsable aux termes du traité;

*Deuxièmement*, que la République fédérative tchèque et slovaque n'était pas en droit de recourir à la «solution provisoire» (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation);

*Troisièmement*, que, par sa déclaration du 19 mai 1992, la Hongrie a valablement mis fin au traité du 16 septembre 1977 relatif à la construction et au fonctionnement du système de barrage de Gabčíkovo-Nagymaros;

*Prie la Cour de dire et juger également*

que les conséquences juridiques de ces conclusions et des éléments de preuve et arguments présentés à la Cour sont les suivantes:

1) que le traité du 16 septembre 1977 n'a jamais été en vigueur entre la République de Hongrie et la République slovaque;
2) que la République slovaque est responsable envers la Hongrie pour avoir poursuivi l'exploitation de la «solution provisoire»;
3) que la République slovaque est internationalement responsable des dommages et pertes que la République de Hongrie et ses ressortissants ont subis du fait de la «solution provisoire»;
4) que la République slovaque est tenue de réparer ces dommages et ces pertes, et que le montant de ladite réparation sera déterminé par la Cour si les Parties ne peuvent en convenir entre elles dans les six mois suivant la date à laquelle la Cour aura rendu son arrêt;
5) que la République slovaque est tenue des obligations suivantes:
   *a)* rétablir les eaux du Danube dans leur cours le long de la frontière internationale entre la République de Hongrie et la République slovaque, c'est-à-dire le principal chenal de navigation tel que défini par les traités applicables;
   *b)* rétablir la situation dans laquelle le Danube se trouvait avant la mise en service de la solution provisoire;
   *c)* fournir des garanties adéquates contre la répétition des dommages et pertes subis par la République de Hongrie et par ses ressortissants.»

*On behalf of Slovakia,*

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

*Requests the Court to adjudge and declare:*

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.
2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.
3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.
4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.
5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties

*On behalf of Hungary,*

at the hearing of 11 April 1997:

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

*On behalf of Slovakia,*

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

*Requests the Court to adjudge and declare:*

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčikovo/Nagymaros System of Locks and related instruments, concluded between Hungary and

*Au nom de la Slovaquie,*

dans le mémoire, le contre-mémoire et la réplique (textes identiques *mutatis mutandis*):

«Sur la base des éléments de preuve et des arguments juridiques présentés dans son mémoire, son contre-mémoire et sa réplique, et en se réservant le droit de compléter ou de modifier son argumentation à la lumière d'autres exposés, la République slovaque

*Prie la Cour de dire et juger:*

1. Que le traité du 16 septembre 1977 entre la Hongrie et la Tchécoslovaquie relatif à la construction et à l'exploitation du système d'écluses de Gabčíkovo-Nagymaros, et les instruments s'y rapportant, à l'égard duquel il est reconnu que la République slovaque est l'Etat successeur, constitue un traité en vigueur et ce depuis la date de sa conclusion; et que la notification de terminaison effectuée le 19 mai 1992 par la République de Hongrie est sans effet juridique.
2. Que la République de Hongrie n'était pas en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité de 1977.
3. Que le recours à la variante C, la «solution provisoire», et sa mise en service constituaient un acte licite.
4. Que la République de Hongrie doit dès lors mettre immédiatement un terme à toute conduite qui empêche l'application intégrale et de bonne foi du traité de 1977 et doit prendre toutes les mesures nécessaires pour s'acquitter des obligations que lui impose ce traité sans plus tarder, afin de faire en sorte que le traité soit à nouveau respecté.
5. Qu'en conséquence de sa violation du traité de 1977 la République de Hongrie doit payer, et la République slovaque a le droit de recevoir, une indemnisation complète au titre des pertes et dommages occasionnés par ces violations à la République slovaque, y compris les intérêts et la réparation du manque à gagner, dont le montant sera déterminé par la Cour lors d'une phase ultérieure de la présente instance.»

14. Dans la procédure orale, les conclusions ci-après ont été présentées par les Parties:

*Au nom de la Hongrie,*

à l'audience du 11 avril 1997:

Les conclusions lues à l'audience étaient *mutatis mutandis* identiques à celles présentées par la Hongrie dans la procédure écrite.

*Au nom de la Slovaquie,*

à l'audience du 15 avril 1997:

«Sur la base des éléments de preuve et des arguments juridiques présentés dans ses écritures et ses plaidoiries orales, la République slovaque

*Prie la Cour de bien vouloir dire et juger:*

1. Que le traité, tel qu'il est défini à l'alinéa premier du préambule du compromis entre les Parties en date du 7 avril 1993, relatif à la construction et à l'exploitation du système d'écluses de Gabčíkovo-Nagymaros et les instrurnents s'y rapportant, conclu entre la Hongrie et la Tché-

Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;
3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;
5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;
6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;
7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

> "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

coslovaquie, à l'égard duquel la République slovaque est l'Etat successeur, n'a jamais cessé d'être en vigueur et le demeure, et que la notification, le 19 mai 1992, de la prétendue terminaison du traité par la République de Hongrie n'a eu aucun effet sur la validité de celui-ci;

2. Que la République de Hongrie n'était pas en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité;
3. Que la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de mettre ce système en service à partir d'octobre 1992 et que la République slovaque était et demeure en droit de continuer à mettre en œuvre ce système;
4. Que la République de Hongrie doit dès lors mettre immédiatement un terme à toute conduite qui empêche l'application de bonne foi du traité de 1977 et qu'elle doit prendre toutes les mesures nécessaires pour s'acquitter sans retard des obligations que lui impose ce traité, afin de faire en sorte que le traité soit à nouveau respecté, sous réserve des modifications qui pourraient y être apportées par accord entre les Parties;
5. Que la République de Hongrie doit donner des garanties adéquates de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système;
6. Qu'en conséquence de sa violation du traité de 1977, la République de Hongrie doit, outre la reprise immédiate de l'exécution de ses obligations en vertu du traité, payer à la République slovaque une indemnisation complète au titre des pertes et dommages, y compris le manque à gagner, occasionnés par ces violations, assortis des intérêts;
7. Que les Parties doivent engager immédiatement des négociations en vue, notamment, de l'adoption d'un nouveau calendrier et de mesures appropriées pour la mise en œuvre du traité par les deux Parties et la fixation du montant de l'indemnité due par la République de Hongrie à la République slovaque; et que si les Parties ne peuvent parvenir à un accord dans un délai de six mois, l'une ou l'autre d'entre elles pourra prier la Cour de rendre un arrêt supplémentaire pour déterminer les modalités d'exécution de son arrêt.»

* * *

15. La présente affaire trouve son origine dans la signature, le 16 septembre 1977, par la République populaire hongroise et la République socialiste tchécoslovaque d'un traité «relatif à la construction et au fonctionnement du système d'écluses de Gabčíkovo-Nagymaros» (dénommé ci-après le «traité de 1977»). Le nom des deux Etats contractants a varié au cours des ans; ils seront dénommés ci-après la Hongrie et la Tchécoslovaquie. Le traité de 1977 est entré en vigueur le 30 juin 1978.

Il prévoit la construction et l'exploitation du système d'écluses par les parties «en tant qu'investissement conjoint». Selon le préambule du traité, le système de barrage avait pour but

> «de mettre en valeur, de façon générale, les ressources naturelles de la section Bratislava-Budapest du Danube aux fins du développe-

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory, Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

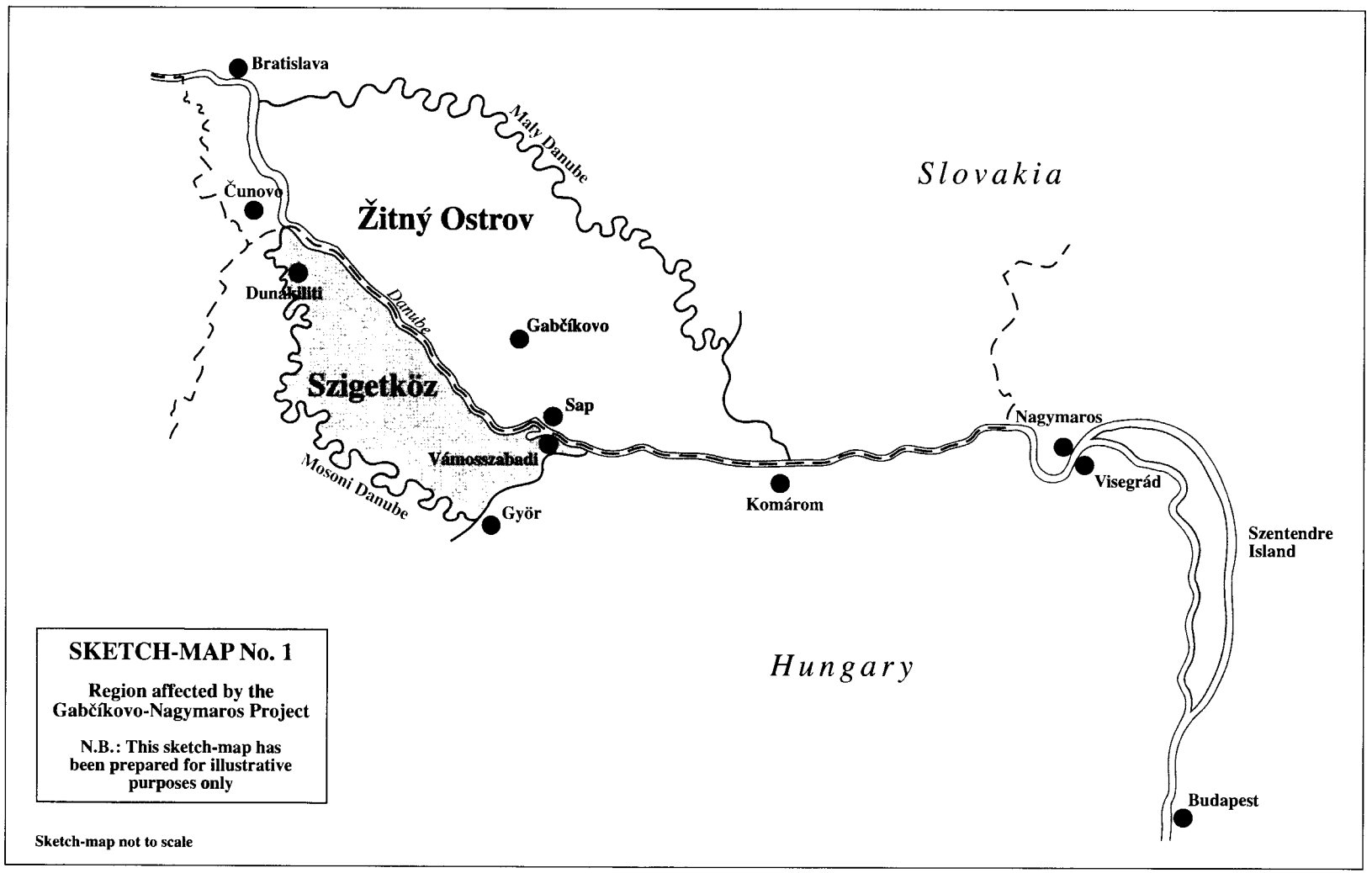
17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.

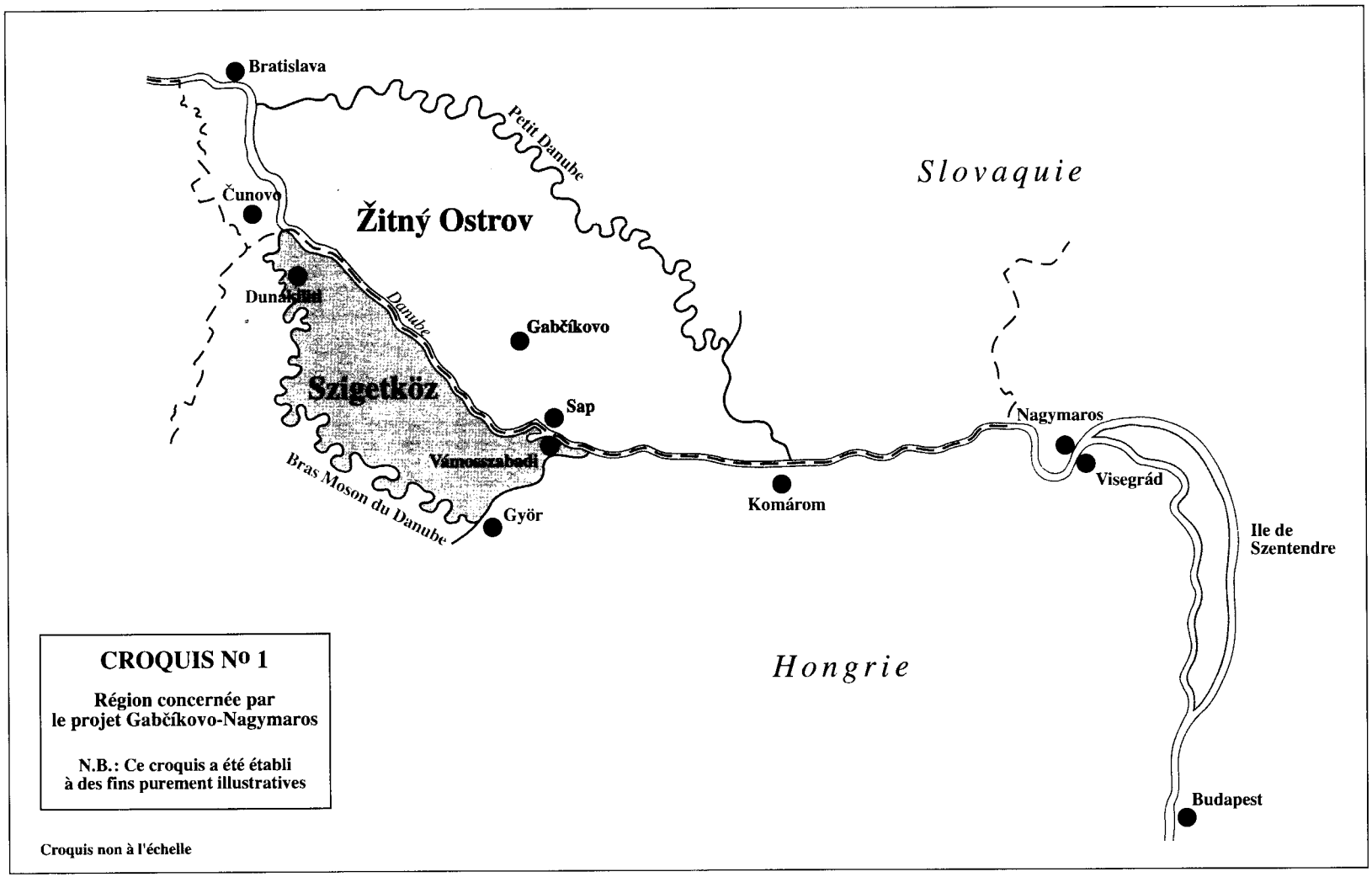
ment des secteurs des ressources hydrauliques, de l'énergie, des transports et de l'agriculture et des autres secteurs de l'économie nationale des parties contractantes».

L'investissement conjoint tendait ainsi essentiellement à la production d'hydro-électricité, à l'amélioration de la navigation sur le tronçon en cause du Danube et à la protection des régions riveraines contre les inondations. En même temps, les parties contractantes, selon les termes du traité, s'engageaient tant à veiller à ce que la mise en œuvre du projet ne compromette pas la qualité des eaux du Danube qu'à s'acquitter de leurs obligations concernant la protection de la nature et découlant de la construction et du fonctionnement du système d'écluses.

16. Par sa longueur, le Danube est le deuxième fleuve d'Europe, longeant ou traversant neuf pays sur un cours de 2860 kilomètres et se dirigeant vers l'est, depuis la Forêt-Noire jusqu'à la mer Noire. Sur 142 kilomètres, il constitue la frontière entre la Slovaquie et la Hongrie. Le secteur auquel se rapporte la présente affaire est un tronçon d'environ 200 kilomètres, entre Bratislava, en Slovaquie, et Budapest, en Hongrie. En aval de Bratislava, la déclivité du fleuve diminue sensiblement, créant une plaine alluviale de gravier et de sédiments sableux. Cette plaine est délimitée au nord-est, en territoire slovaque, par le petit Danube et au sud-ouest, en territoire hongrois, par le bras Moson du Danube. La frontière entre les deux Etats est constituée dans la majeure partie de cette région par le chenal principal du fleuve. La zone comprise entre le petit Danube et ce chenal constitue, en territoire slovaque, le Žitný Ostrov; celle comprise entre le chenal principal et le bras Moson du Danube constitue, en territoire hongrois, le Szigetköz. Čunovo et, plus en aval, Gabčíkovo sont situés dans ce secteur du fleuve, en territoire slovaque; Čunovo est situé sur la rive droite du fleuve et Gabčíkovo sur la rive gauche. Plus bas, après jonction des divers bras, le fleuve entre en territoire hongrois et le relief devient plus accidenté. Nagymaros se trouve dans une vallée étroite à un endroit où le Danube fait un coude juste avant de se diriger vers le sud, entourant la grande île fluviale de Szentendre avant d'atteindre Budapest (voir ci-après, p. 19, le croquis n° 1).

17. Le Danube a toujours joué un rôle vital dans le développement commercial et économique des Etats riverains; il a mis en évidence et a accru leur interdépendance, rendant indispensable la coopération internationale. Des améliorations apportées au chenal de navigation ont permis au Danube, aujourd'hui relié par un canal au Main et de là au Rhin, de devenir une importante artère de navigation reliant la mer du Nord à la mer Noire. Dans le tronçon du fleuve auquel se rapporte la présente affaire, des mesures de protection contre les inondations ont été prises au cours des siècles, l'agriculture et la sylviculture ont été pratiquées et, plus récemment, la région a connu un essor démographique et industriel. Les effets cumulatifs, sur le fleuve et l'environnement, des diverses activités humaines menées au cours des ans n'ont pas tous été positifs, notamment en ce qui concerne le régime des eaux.


Bratislava
Čunovo
Žitný Ostrov
Malý Dunaj
Slovakia
Dunakiliti
Danube
Gabčíkovo
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Szentendre Island
Budapest
Hungary
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale




**CROQUIS Nº 1**

**Région concernée par le projet Gabčíkovo-Nagymaros**

**N.B.: Ce croquis a été établi à des fins purement illustratives**

**Croquis non à l'échelle**

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1:

> "Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . (. . . 'government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating

Des mesures destinées à atténuer ces problèmes ne pouvaient être prises que dans le cadre d'une coopération internationale. Les projets de gestion des eaux du Danube ont souvent cherché à combiner amélioration des conditions de navigation, lutte contre les inondations et production d'électricité par des centrales hydro-électriques. Certains Etats riverains ont largement tiré parti des ressources du Danube en matière de production d'énergie hydro-électrique. Les tentatives qui ont été faites pour exploiter le potentiel du tronçon particulier du fleuve qui est en cause dans la présente instance se sont échelonnées sur une période de vingt-cinq ans, qui a culminé avec la signature du traité de 1977.

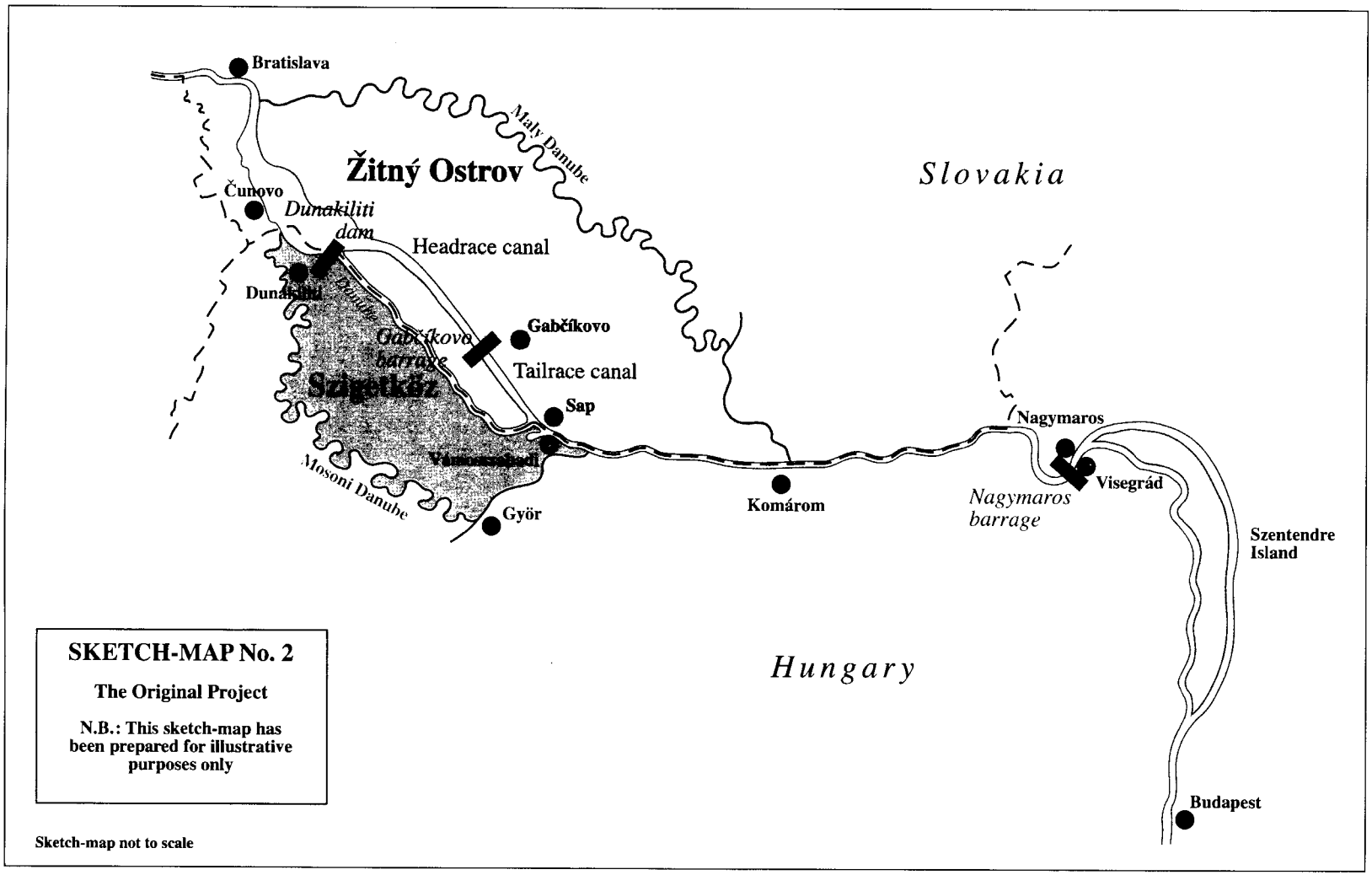
18. Les principaux ouvrages à construire en exécution du projet sont décrits au paragraphe 1 de l'article premier du traité de 1977. Deux séries d'écluses étaient prévues, l'une à Gabčíkovo (en territoire tchécoslovaque), l'autre à Nagymaros (en territoire hongrois), en vue de constituer «un système d'ouvrages opérationnel, unique et indivisible» (voir ci-après, p. 21, le croquis n° 2). La Cour aura plus loin l'occasion de revenir sur le détail de ces ouvrages, qui devaient notamment comprendre un réservoir en amont de Dunakiliti, en territoire hongrois et en territoire tchécoslovaque; un barrage à Dunakiliti, en territoire hongrois; un canal de dérivation, en territoire tchécoslovaque, sur lequel devait être construit le système d'écluses de Gabčíkovo (de même qu'une centrale hydro-électrique d'une capacité installée de 720 mégawatts (MW)); l'approfondissement du lit du Danube après la jonction du canal de dérivation et de l'ancien lit du fleuve; un renforcement des ouvrages de protection contre les inondations le long du Danube en amont de Nagymaros; le système d'écluses de Nagymaros, en territoire hongrois (avec une centrale hydro-électrique d'une capacité de 158 MW); et l'approfondissement du lit du Danube en aval.

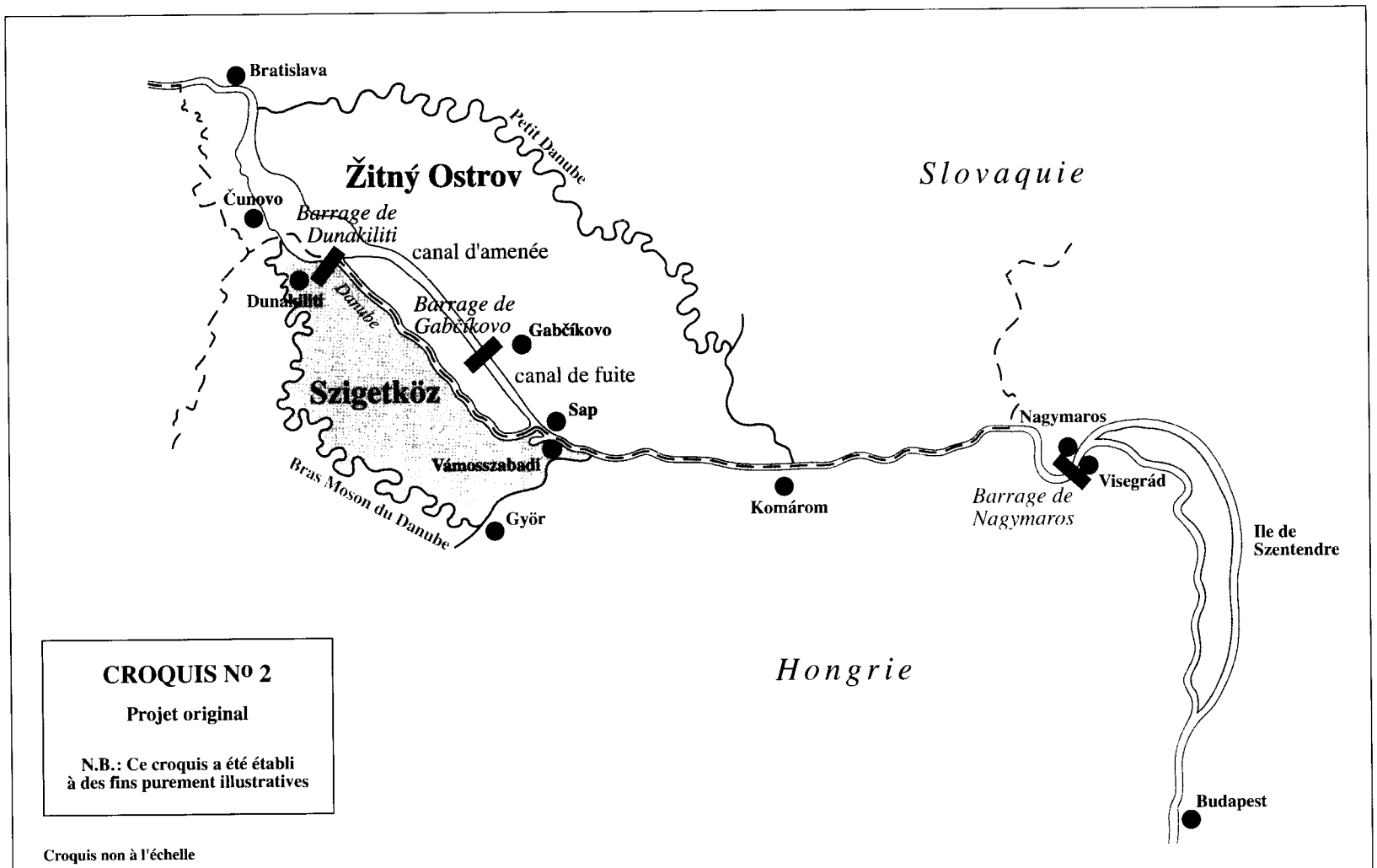
Le paragraphe 4 de l'article premier du traité prévoyait que les spécifications techniques concernant le système seraient fixées dans le «plan contractuel conjoint», qui devait être établi conformément à l'accord signé à cette fin par les deux gouvernements le 6 mai 1976; le paragraphe 1 de l'article 4 précisait quant à lui que «l'investissement conjoint [serait] effectué conformément au plan contractuel conjoint».

Aux termes du paragraphe 1 de l'article 3:

> «Les opérations liées à la réalisation de l'investissement conjoint et à l'exécution des tâches relatives au fonctionnement du système d'écluses seront dirigées et supervisées par les gouvernements des parties contractantes, par l'intermédiaire de ... ( ... «délégués gouvernementaux»).»

Ces délégués étaient notamment chargés de «veiller à ce que la construction du système d'écluses soit ... réalisée conformément au plan contractuel conjoint approuvé et au calendrier des travaux du projet». Lors de la mise en service des ouvrages, ils devaient en outre «établir les procédures


Bratislava
Mały Dunaj
Žitný Ostrov
Slovakia
Čunovo
Dunakiliti dam
Headrace canal
Dunakiliti
Danube
Gabčíkovo barrage
Gabčíkovo
Tailrace canal
Szigetköz
Sap
Nagymaros
Mosoni Danube
Komárom
Nagymaros barrage
Visegrád
Szentendre Island
Győr
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale


Bratislava
Petit Danube
Žitný Ostrov
Slovaquie
Čunovo
Barrage de Dunakiliti
canal d'amenée
Dunakiliti
Danube
Barrage de Gabčikovo
Gabčíkovo
canal de fuite
Szigetköz
Sap
Nagymaros
Vámosszabadi
Bras Moson du Danube
Komárom
Barrage de Nagymaros
Visegrád
Ile de Szentendre
Győr
Hongrie
Budapest
CROQUIS Nº 2
Projet original
N.B.: Ce croquis a été établi à des fins purement illustratives
Croquis non à l'échelle

and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

> "Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

> "The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

> "In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

> "shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

opérationnelles concernant le système d'écluses et en assurer l'observation».

Le paragraphe 4 de l'article 4 stipulait que:

> «Les opérations liées à l'investissement conjoint ser[aient] organisées par les parties contractantes de façon que les centrales de génération d'énergie soient mises en service pendant la période 1986-1990.»

L'article 5 disposait que les coûts de l'investissement conjoint seraient pris en charge, à parts égales, par les parties contractantes. Il précisait les travaux à réaliser par chacune d'entre elles. L'article 8 ajoutait que le barrage de Dunakiliti, le canal de dérivation et les deux séries d'écluses de Gabčíkovo et Nagymaros seraient «la propriété conjointe, à parts égales», des parties contractantes. Les autres ouvrages devaient être la propriété de l'Etat sur le territoire duquel ils étaient construits.

Les parties devaient de même participer à parts égales à l'utilisation du système mis en place et plus particulièrement à l'utilisation de l'énergie de base et de pointe générée dans les centrales hydro-électriques (art. 9).

Aux termes de l'article 10, les ouvrages devaient être gérés par l'Etat sur le territoire duquel ils se trouvaient, «conformément aux procédures opérationnelles arrêtées d'un commun accord», alors que l'article 12 prévoyait que les frais d'exploitation, d'entretien (réparation) et de reconstruction des ouvrages du système d'écluses appartenant en commun aux parties contractantes seraient aussi pris en charge conjointement, à parts égales, par celles-ci.

Conformément à l'article 14:

> «Le débit spécifié dans l'équilibre hydraulique prévu dans le plan contractuel conjoint approuvé sera assuré dans le lit du Danube [entre Dunakiliti et Sap], à moins que des conditions naturelles ou d'autres circonstances n'exigent temporairement un débit supérieur ou inférieur.»

Le paragraphe 3 de cet article était ainsi libellé:

> «Au cas où les prélèvements d'eau du Danube, dans le secteur hungaro-tchécoslovaque, dépasseraient les quantités d'eau spécifiées dans l'équilibre hydraulique prévu dans le plan contractuel conjoint approuvé et où les prélèvements entraîneraient une diminution de la production d'énergie électrique, la part d'énergie électrique revenant à la partie contractante ayant procédé aux prélèvements excédentaires sera réduite en conséquence.»

L'article 15 précisait que les parties contractantes

> «veiller[aient], selon les modalités spécifiées dans le plan contractuel conjoint, à ce que la qualité des eaux du Danube ne soit pas compromise par suite de la construction et du fonctionnement du système d'écluses».

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

> "The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

> "*(d)* In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system

L'article 16 indiquait quelles étaient les obligations des parties contractantes en ce qui concerne l'entretien du lit du Danube.

Quant à l'article 18, il prévoyait ce qui suit en son paragraphe 1:

> «Les parties contractantes, conformément aux obligations qu'elles ont précédemment assumées et en particulier à l'article 3 de la convention relative au régime de la navigation sur le Danube signée à Belgrade le 18 août 1948, veilleront à ce que la navigation puisse se poursuivre de façon ininterrompue et dans des conditions de sécurité dans le chenal international, tant pendant la construction que pendant le fonctionnement du système d'écluses.»

L'article 19 stipulait:

> «Les parties contractantes assureront, par les moyens spécifiés dans le plan contractuel conjoint, le respect des obligations concernant la protection de la nature découlant de la construction et du fonctionnement du système d'écluses.»

L'article 20 disposait que, dans le cadre de leurs investissements nationaux, les parties contractantes prendraient les mesures appropriées pour protéger les intérêts en matière de pêche conformément à la convention relative à la pêche dans le Danube, signée à Bucarest le 29 janvier 1958.

Aux termes du paragraphe 1 de l'article 22 du traité, les parties contractantes étaient convenues, dans le contexte de la construction et du fonctionnement du système d'écluses, d'apporter des modifications mineures au tracé de la frontière d'Etat qui les sépare; ces modifications étaient les suivantes:

> «*d)* Dans le secteur d'amont de Dunakiliti-Hrušov, la frontière d'Etat ira du point frontière 161.V.O.á. à la borne frontière n° I.5., en ligne droite, de façon que les territoires affectés, à concurrence d'environ 10-10 hectares, soient répartis également entre les deux Etats.»

Il était en outre disposé, au paragraphe 2, que la revision de la frontière d'Etat et l'échange de territoires ainsi prévus seraient effectués «par les parties contractantes sur la base d'un traité distinct». Un tel traité n'a pas été conclu.

Enfin, l'article 27 contenait des dispositions relatives au règlement des différends, rédigées comme suit:

> «1. Le règlement des différends concernant toutes questions relatives à la réalisation et au fonctionnement du système d'écluses incombera aux délégués gouvernementaux.
>
> 2. Si les délégués gouvernementaux ne peuvent parvenir à un accord sur les questions en litige, ils les soumettront aux gouvernements des parties contractantes pour décisions.»

19. Sur un grand nombre de points, le plan contractuel conjoint mentionné au paragraphe précédent précisait à la fois les objectifs du système

and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second ($m^3/s$). The power plant would include "Eight . . . turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

> "The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 $m^3/s$ additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 $m^3/s$, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

> "The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 $m^3/s$ discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 $m^3/s$" per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

*

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at

et les caractéristiques des ouvrages. Dans sa dernière version, il spécifiait en son paragraphe 6.2 que le canal de dérivation de Gabčíkovo aurait une capacité de débit de 4000 mètres cubes par seconde ($m^3/s$). La centrale compterait «huit turbines ... avec des aubes de 9,20 mètres de diamètre» et «fonctionner[ait] principalement en régime de pointe et en mode continu lors des hautes eaux». Ce type de fonctionnement permettrait une production d'énergie électrique de 2650 gigawatts/heure (GWh) par an. Le plan ajoutait en son paragraphe 4.4.2:

> «Les basses eaux sont emmagasinées chaque jour pour permettre le fonctionnement en régime de pointe de la centrale hydro-électrique de Gabčíkovo ... tandis qu'un débit minimum de 50 $m^3/s$ est assuré à l'ancien lit [du Danube] en sus de l'eau fournie au système de bras.»

Le plan spécifiait en outre que, dans les cas où le débit dans le canal de dérivation dépasserait 4000-4500 $m^3/s$, les quantités d'eau excédentaires seraient déversées dans l'ancien lit. Enfin, selon le paragraphe 7.7 du plan:

> «Le règlement opérationnel conjoint prévoit qu'en cas de besoin pendant la saison végétative le barrage de Dunakiliti devra envoyer 200 $m^3/s$ dans l'ancien lit du Danube en sus des volumes occasionnellement nécessaires pour le rinçage du lit.»

Le plan contractuel conjoint comprenait également des «consignes provisoires d'exploitation et d'entretien» dont l'article 23 précisait que: «Les consignes d'exploitation définitives [seraient] agréées dans un délai d'un an à compter de la mise en service du système.» (Plan contractuel conjoint, documentation de synthèse, vol. O-1-A.)

Quant à Nagymaros, avec six turbines, il devait s'agir, selon le paragraphe 6.3 du plan, d'une «centrale hydro-électrique ... du type centrale de base capable de fonctionner en régime de pointe pendant cinq heures avec un débit situé entre 1000 et 2500 $m^3/s$» par jour. La production annuelle prévue était de 1025 GWh (soit trente-huit pour cent de la production de Gabčíkovo pour une puissance installée n'atteignant que vingt et un pour cent de celle de Gabčíkovo).

20. Ainsi, le projet devait se présenter comme un projet conjoint intégré dans lequel les deux parties contractantes seraient sur un pied d'égalité en ce qui concerne le financement, la construction et l'exploitation des ouvrages. Son caractère unique et indivisible devait être concrétisé grâce au plan contractuel conjoint qui complétait le traité. C'est sous le contrôle de la Hongrie, en particulier, que se seraient trouvés les vannes de Dunakiliti et les ouvrages de Nagymaros, tandis que les ouvrages de Gabčíkovo aurait été placés sous le contrôle de la Tchécoslovaquie.

*

21. Le calendrier de réalisation des travaux avait pour sa part été fixé dans un accord d'assistance mutuelle signé par les deux parties le 16 sep-

the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošt' and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted

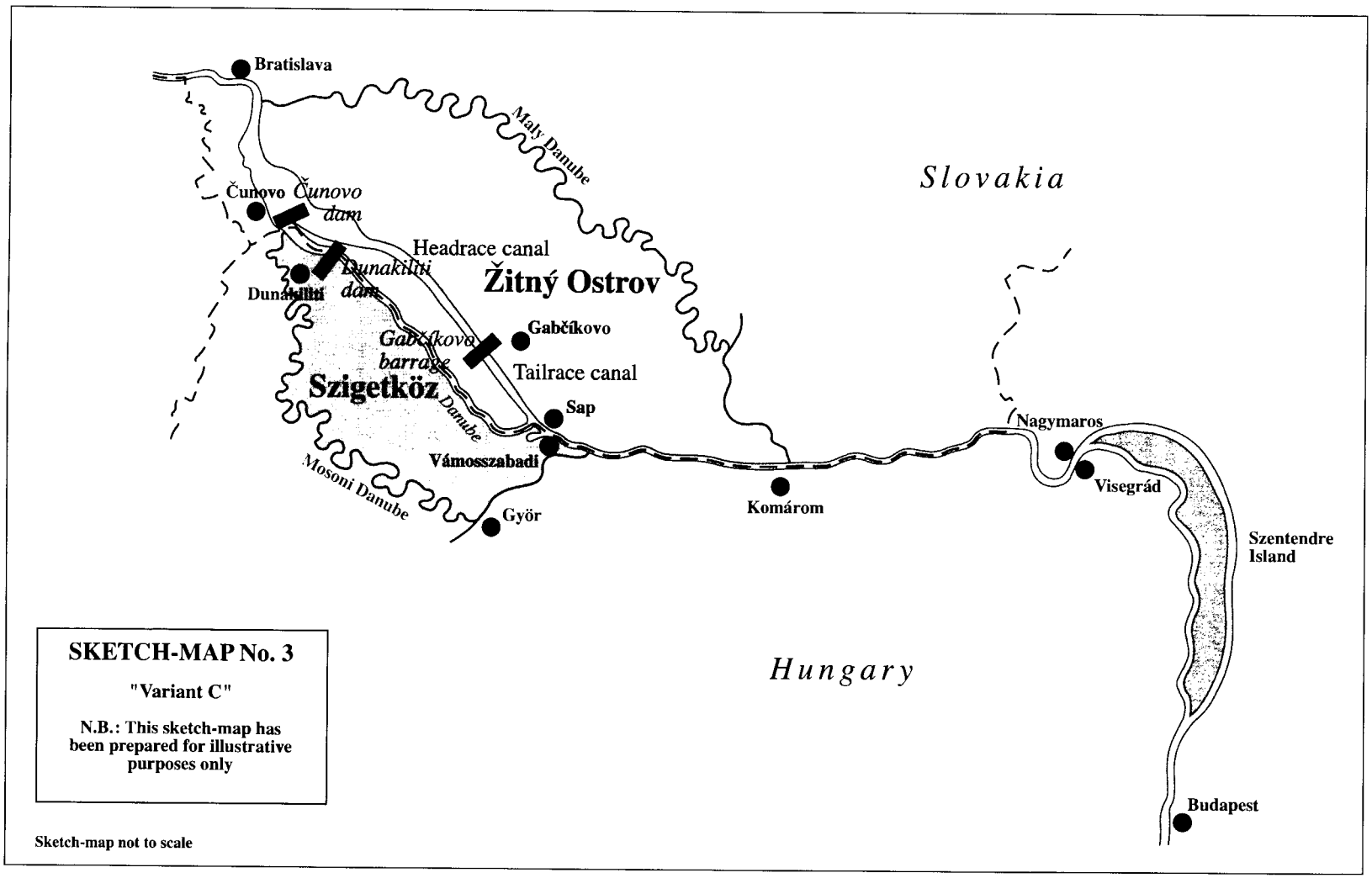
tembre 1977, en même temps que le traité lui-même. L'accord apportait par ailleurs quelques retouches à la répartition des travaux entre les parties telle qu'opérée par le traité.

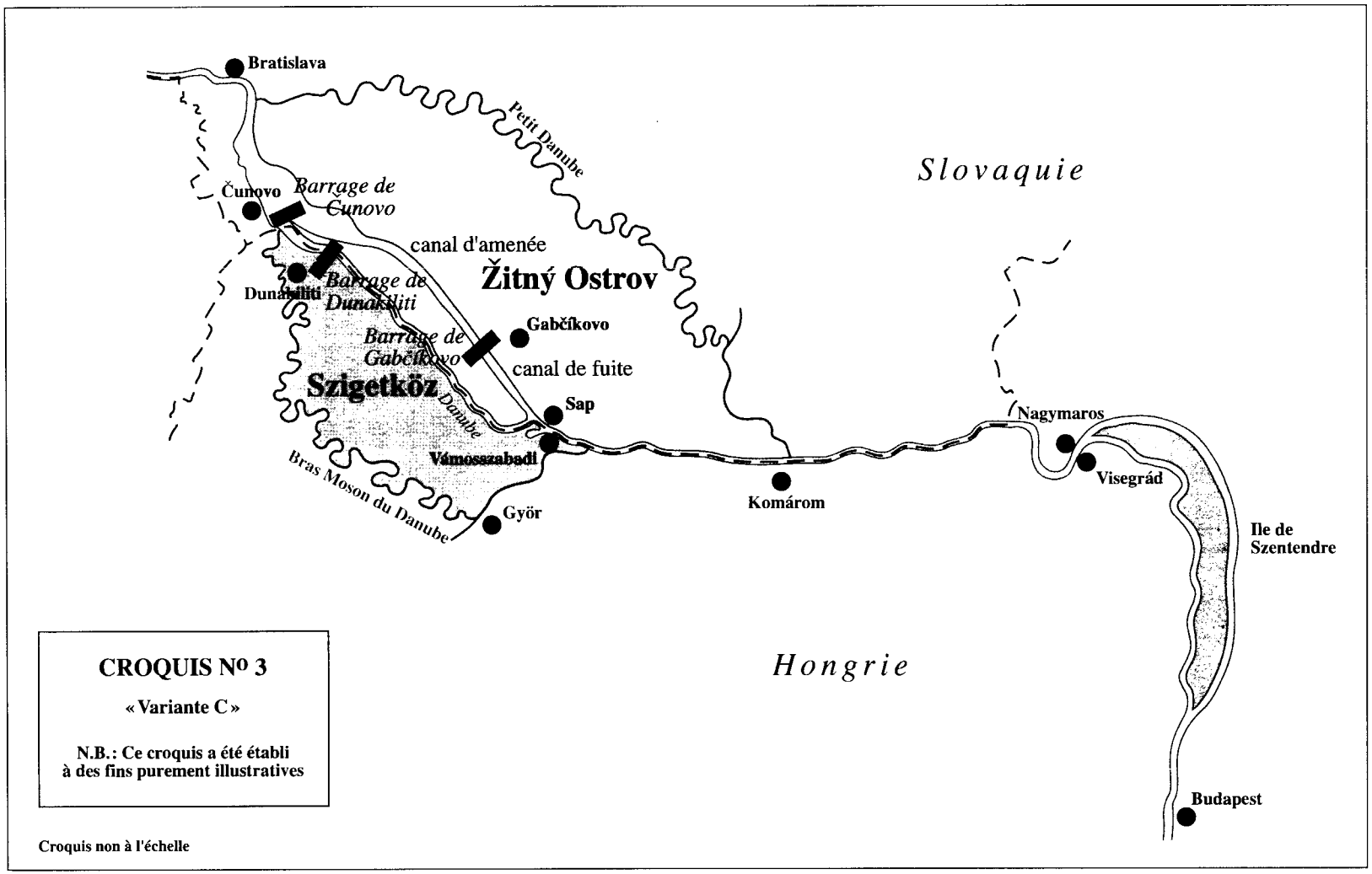
Les travaux relatifs au projet commencèrent en 1978. A l'initiative de la Hongrie, les deux parties convinrent d'abord, par deux protocoles signés le 10 octobre 1983 (l'un amendant le paragraphe 4 de l'article 4 du traité de 1977 et l'autre l'accord d'assistance mutuelle), de ralentir les travaux et de différer la mise en service des centrales, puis, par un protocole signé le 6 février 1989 (qui amendait l'accord d'assistance mutuelle), d'accélérer le projet.

22. A la suite de vives critiques que le projet avait suscitées en Hongrie, le Gouvernement hongrois décida le 13 mai 1989 de suspendre les travaux à Nagymaros en attendant l'achèvement de diverses études que les autorités compétentes devaient mener à bien avant le 31 juillet 1989. Le 21 juillet 1989, le Gouvernement hongrois prolongea jusqu'au 31 octobre 1989 la suspension des travaux à Nagymaros et suspendit en outre les travaux à Dunakiliti jusqu'à la même date. Enfin, le 27 octobre 1989, la Hongrie décida d'abandonner les travaux à Nagymaros et de maintenir le statu quo à Dunakiliti.

23. Au cours de cette période, des négociations furent tenues entre les parties. La Tchécoslovaquie mit aussi à l'étude des solutions de rechange. L'une d'entre elles, dénommée par la suite «variante C», impliquait le détournement unilatéral du Danube par la Tchécoslovaquie sur son territoire à quelque 10 kilomètres en amont de Dunakiliti (voir ci-après, p. 26, le croquis n° 3). Dans son dernier état, la variante C comportait la construction à Čunovo d'un barrage déversoir et d'une digue reliant ce barrage à la rive sud du canal de dérivation. Le réservoir correspondant devait avoir une surface plus réduite et disposer d'une capacité de retenue d'environ trente pour cent inférieure à celle du réservoir initialement envisagé. Des ouvrages accessoires étaient prévus, à savoir: une prise d'eau destinée à alimenter le bras Moson du Danube; un déversoir permettant, notamment, de diriger les eaux de crue dans l'ancien lit du Danube; une écluse de navigation auxiliaire; et deux centrales hydroélectriques (l'une permettant une production annuelle de 4 GWh sur le bras Moson du Danube, l'autre une production de 174 GWh sur l'ancien lit du Danube). L'alimentation en eau des bras secondaires du Danube sur la rive tchécoslovaque devait être assurée grâce à deux prises d'eau situées, dans le canal de dérivation, à Dobrohošt' et à Gabčíkovo. Une solution devait être trouvée pour la rive hongroise. En outre, la question de l'approfondissement du lit du Danube au confluent du canal de dérivation et de l'ancien lit du fleuve restait posée.

Le 23 juillet 1991, le Gouvernement slovaque décida de «commencer en septembre 1991 les constructions en vue de permettre la mise en exploitation du projet de Gabčíkovo grâce à la solution provisoire». Cette décision fut entérinée par le Gouvernement fédéral tchécoslovaque le 25 juillet. Les travaux relatifs à la variante C commencèrent en novembre 1991. Les discussions se poursuivirent en vain entre les deux parties


Bratislava
Mały Danube
Slovakia
Čunovo
Čunovo dam
Headrace canal
Dunakiliti
Dunakiliti dam
Žitný Ostrov
Gabčíkovo
Gabčíkovo barrage
Tailrace canal
Szigetköz
Danube
Sap
Nagymaros
Vámosszabadi
Mosoni Danube
Visegrád
Győr
Komárom
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale


Bratislava
Petit Danube
Slovaquie
Čunovo
Barrage de Čunovo
canal d'amenée
Žitný Ostrov
Dunakiliti
Barrage de Dunakiliti
Gabčíkovo
Barrage de Gabčíkovo
canal de fuite
Szigetköz
Danube
Sap
Vámosszabadi
Bras Moson du Danube
Győr
Komárom
Nagymaros
Visegrád
Ile de Szentendre
Budapest
Hongrie
CROQUIS Nº 3
« Variante C »
N.B.: Ce croquis a été établi à des fins purement illustratives
Croquis non à l'échelle

to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary *v.* The Czech and Slovak Federal Republic on the Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and . . . lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Čunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

> "In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube",

et, le 19 mai 1992, le Gouvernement hongrois transmit au Gouvernement tchécoslovaque une note verbale mettant fin, à compter du 25 mai 1992, au traité de 1977. Le 15 octobre 1992, la Tchécoslovaquie entama les travaux devant permettre la fermeture du Danube et elle procéda, à partir du 23 octobre, au barrage du fleuve.

24. Le 23 octobre 1992, la Cour fut saisie d'une «requête de la République de Hongrie contre la République fédérative tchèque et slovaque concernant le détournement du Danube»; toutefois, la Hongrie reconnaissait qu'il n'y avait aucune base sur laquelle la Cour eût pu fonder sa compétence pour connaître de cette requête, à laquelle la Tchécoslovaquie ne donna pas suite. Dans l'intervalle, la Commission des Communautés européennes avait offert sa médiation et, lors d'une réunion tenue à Londres le 28 octobre 1992 entre les deux parties et la Commission, les parties prirent divers engagements transitoires. Elles convinrent surtout que le différend serait soumis à la Cour internationale de Justice, qu'une mission d'enquête tripartite ferait rapport sur la variante C le 31 octobre au plus tard et qu'un groupe tripartite d'experts indépendants ferait des propositions concernant les mesures d'urgence à prendre.

25. Le 1er janvier 1993, la Slovaquie devint un Etat indépendant. Le 7 avril 1993 fut signé à Bruxelles le «Compromis visant à soumettre à la Cour internationale de Justice les contestations entre la République de Hongrie et la République slovaque concernant le projet Gabčíkovo-Nagymaros», dont le texte est reproduit au paragraphe 2 ci-dessus. Après la notification du compromis à la Cour, la Hongrie, par lettre du 9 août 1993, informa la Cour qu'elle considérait sa «requête initiale [comme désormais] sans objet et ... caduque».

Aux termes de l'article 4 du compromis: «Les Parties [étaient convenues], en attendant l'arrêt définitif de la Cour, d'établir et d'appliquer un régime temporaire de gestion des eaux pour le Danube.» Toutefois, l'établissement de ce régime ne fut pas aisé. La mise en eau du barrage de Čunovo avait rapidement entraîné une importante réduction du débit et du niveau des eaux en aval dans l'ancien lit du Danube comme dans les bras secondaires du fleuve. Le 26 août 1993, la Hongrie et la Slovaquie s'accordèrent pour créer un groupe tripartite d'experts (un expert nommé par chaque partie et trois experts indépendants nommés par la Commission des Communautés européennes)

> «afin de recueillir des données fiables et incontestées sur les effets les plus importants du débit actuel et des mesures correctives déjà entreprises, ainsi que pour formuler des recommandations sur les mesures appropriées».

Le 1er décembre 1993, les experts nommés par la Commission des Communautés européennes recommandèrent l'adoption de diverses mesures en vue de remédier, à titre temporaire, à la situation. Les Parties ne purent se mettre d'accord sur ces recommandations. A l'issue de longues négociations, elles conclurent finalement, le 19 avril 1995, un accord «concernant certaines mesures techniques temporaires et les débits d'eau dans le Danube

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 $m^3/s$. It provided for an annual average of 400 $m^3/s$ in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments"; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs *(a)* and *(c)*, of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other . . . related Treaties and inter-State agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *

et le bras Moson du Danube». Cet accord portait le débit d'eau dans le bras Moson à 43 $m^3/s$. Il prévoyait une moyenne annuelle de 400 $m^3/s$ dans l'ancien lit (en ce non compris les eaux de crue). Il prescrivait enfin la construction par la Hongrie d'un déversoir partiellement noyé près de Dunakiliti, en vue d'améliorer l'alimentation en eau des bras secondaires du Danube du côté hongrois. Il était précisé que cet accord temporaire prendrait fin quatorze jours après le prononcé de l'arrêt de la Cour.

* * *

26. Le premier alinéa du préambule du compromis vise les contestations surgies entre la Tchécoslovaquie et la Hongrie concernant l'application et la terminaison non seulement du traité de 1977, mais aussi des «instruments y afférents»; l'alinéa précise qu'aux fins du compromis le traité de 1977 et lesdits instruments seront dénommés le «traité». Il est expressément fait référence au «traité» dans le texte des questions posées à la Cour à l'article 2, paragraphe 1, alinéas *a)* et *c)*, du compromis.

Le compromis ne définit toutefois pas la notion d'«instruments ... afférents» au traité de 1977 et n'énumère pas davantage ceux-ci. Quant aux Parties, elles ont consacré quelques développements à cette question — essentiellement dans la procédure écrite — sans parvenir à s'entendre sur le sens exact de l'expression ni sur les instruments concrets auxquels elle renverrait. La Cour constate cependant que les Parties paraissent s'accorder pour considérer que cette expression vise au moins les instruments liés au traité de 1977 qui en assurent la mise en œuvre, tels que l'accord d'assistance mutuelle du 16 septembre 1977 et ses protocoles modificatifs en date, respectivement, du 10 octobre 1983 et du 6 février 1989 (voir paragraphe 21 ci-dessus), et l'accord relatif à la réglementation opérationnelle commune applicable aux plénipotentiaires s'acquittant de fonctions liées à la construction et à l'exploitation du système de barrage de Gabčíkovo-Nagymaros, signé à Bratislava le 11 octobre 1979. La Cour note que la Hongrie, contrairement à la Slovaquie, a dénié le caractère d'instrument afférent au traité de 1977 au plan contractuel conjoint (voir paragraphe 19 ci-dessus), dans lequel elle a refusé de voir «un accord au même titre que les autres traités et accords entre Etats ... liés [au traité de 1977]».

La Cour fera enfin observer qu'en exposant quelles sont, à leur sens, les réponses qui devraient être données aux questions posées dans le compromis, les Parties ont concentré leur argumentation sur le traité de 1977; et qu'elles paraissent avoir étendu leurs arguments à des instruments y afférents» en les considérant comme des éléments accessoires d'un ensemble conventionnel, dont le sort était en principe lié à celui de l'élément principal constitué par le traité. La Cour prend acte de ces positions des Parties et estime ne pas avoir à approfondir davantage cette question à ce stade.

* * *

27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works".

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

"*(a)* the Dunakiliti-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

*(b)* the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

*(c)* the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

*(d)* series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

*(e)* improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

*(f)* deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"*(a)* head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

*(b)* series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

*(c)* deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

27. La Cour passera maintenant à l'examen des questions soumises par les Parties. Aux termes de l'article 2, paragraphe 1, alinéa *a)*, du compromis, il est demandé en premier lieu à la Cour de dire

> «si la République de Hongrie était en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité».

28. La Cour rappellera que le système d'écluses de Gabčíkovo-Nagymaros est qualifié, au paragraphe 1 de l'article premier du traité de 1977, de «système d'ouvrages opérationnel, unique et indivisible».

Les principaux ouvrages qui devaient constituer ce système ont été décrits en termes généraux ci-dessus (voir paragraphe 18). Le détail en est donné aux paragraphes 2 et 3 de l'article premier du traité.

S'agissant de Gabčíkovo, le paragraphe 2 énumère les ouvrages suivants:

«*a)* les installations d'amont de Dunakiliti-Hrušov, dans le secteur du Danube, aux kilomètres 1860-1842, conçues pour un niveau maximal des hautes eaux de 131,10 mètres au-dessus du niveau de la mer, système de la Baltique, en territoires hongrois et tchécoslovaque;

*b)* le barrage de Dunakiliti et l'écluse de navigation auxiliaire au kilomètre 1842, en territoire hongrois;

*c)* le canal de dérivation (canal d'amont et canal d'aval) aux kilomètres 1842-1811, en territoire tchécoslovaque;

*d)* une série d'écluses sur le canal de dérivation, en territoire tchécoslovaque, comprenant une centrale hydro-électrique d'une capacité installée de 720 MW, des écluses de navigation doubles et le matériel connexe;

*e)* une amélioration de l'ancien lit du Danube aux kilomètres 1842-1811, dans le secteur commun hungaro-tchécoslovaque;

*f)* l'approfondissement et la régulation du lit du Danube aux kilomètres 1811-1791, dans le secteur conjoint hungaro-tchécoslovaque».

Quant à Nagymaros, le paragraphe 3 énumère les ouvrages ci-après:

«*a)* installations d'amont et ouvrages de protection contre les inondations dans le secteur du Danube aux kilomètres 1791-1696,25 et dans les secteurs des affluents affectés par les crues, conçus pour un niveau maximum des hautes eaux de 107,83 mètres au-dessus du niveau de la mer, système de la Baltique, en territoires hongrois et tchécoslovaque;

*b)* une série d'écluses au kilomètre 1696,25, en territoire hongrois, comprenant un barrage, une centrale hydro-électrique d'une capacité installée de 158 MW, des écluses de navigation doubles et un matériel connexe;

*c)* l'approfondissement et la régulation du lit du Danube, dans ses deux branches, aux kilomètres 1696,25-1657, dans le secteur hongrois».

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

*(a)* The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory;

*(b)* The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

29. Par ailleurs, la ventilation précise des travaux incombant à chaque partie était opérée comme suit au paragraphe 5 de l'article 5 du traité de 1977:

«5. La main-d'œuvre et les fournitures nécessaires pour la réalisation de l'investissement conjoint seront réparties comme suit entre les parties contractantes:

*a)* la partie tchécoslovaque sera responsable:

1) des installations d'amont de Dunakiliti-Hrušov sur la rive gauche, en territoire tchécoslovaque;
2) du canal d'amont du canal de dérivation, en territoire tchécoslovaque;
3) de la série d'écluses de Gabčíkovo, en territoire tchécoslovaque;
4) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros, en territoire tchécoslovaque, à l'exception du district inférieur d'Ipel;
5) de la remise en état de la végétation en territoire tchécoslovaque;

*b)* la partie hongroise sera responsable:

1) des installations d'amont de Dunakiliti-Hrušov, sur la rive droite, en territoire tchécoslovaque, y compris la vanne de connexion et la vanne de détournement;
2) des installations d'amont de Dunakiliti-Hrušov, sur la rive droite, en territoire hongrois;
3) du barrage de Dunakiliti, en territoire hongrois;
4) du canal d'aval du canal de dérivation, en territoire tchécoslovaque;
5) de l'approfondissement du lit du Danube en aval de Palkovičovo, en territoire hongrois et en territoire tchécoslovaque;
6) de l'amélioration de l'ancien lit du Danube, en territoire hongrois et en territoire tchécoslovaque;
7) du matériel opérationnel du système d'écluses de Gabčíkovo (matériel de transport, machines d'entretien), en territoire tchécoslovaque;
8) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros dans le district inférieur d'Ipel, en territoire tchécoslovaque;
9) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros, en territoire hongrois;
10) de la série d'écluses de Nagymaros, en territoire hongrois;
11) de l'approfondissement du lit d'aval en dessous du système d'écluses de Nagymaros, en territoire hongrois;
12) du matériel opérationnel du système d'écluses de Nagymaros (matériel de transport, machines d'entretien), en territoire hongrois;
13) de la remise en état de la végétation en territoire hongrois.»

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

> "the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of

30. Comme la Cour l'a déjà indiqué (voir paragraphe 18), le paragraphe 4 de l'article premier du traité de 1977 stipulait en termes généraux que les «spécifications techniques» concernant le système d'écluses seraient fixées dans le «plan contractuel conjoint». Le calendrier de réalisation des travaux avait pour sa part été fixé dans l'accord d'assistance mutuelle signé par les deux parties le 16 septembre 1977 (voir paragraphe 21 ci-dessus). Conformément aux dispositions du paragraphe 1 de l'article premier de cet accord, l'ensemble des travaux du système de barrage devaient être achevés en 1991. Ainsi qu'il était indiqué au paragraphe 2 du même article, un calendrier sommaire des travaux de construction était annexé à l'accord; il y était prévu qu'un échéancier plus détaillé serait établi dans le cadre du plan contractuel conjoint. L'accord du 16 septembre 1977 fut amendé à deux reprises. Par un protocole signé le 10 octobre 1983, il fut d'abord convenu par les parties de repousser de quatre années les travaux et la mise en service des centrales; puis, par un protocole signé le 6 février 1989, les parties décidèrent à l'inverse de les accélérer de quinze mois, l'ensemble du système devant être opérationnel en 1994. Un nouveau calendrier sommaire des travaux de construction était annexé à chacun de ces protocoles; ces calendriers devaient à leur tour recevoir effet au moyen de nouveaux échéanciers détaillés inscrits dans le plan contractuel conjoint.

31. Au printemps 1989, les travaux concernant le secteur de Gabčíkovo étaient bien avancés: le barrage de Dunakiliti était réalisé à 90 %, celui de Gabčíkovo à 85 %, le canal de dérivation entre 60 % (en aval de Gabčíkovo) et 95 % (en amont de Gabčíkovo) et les digues du réservoir de Dunakiliti-Hrušov entre 70 et 98 %, selon les endroits. Il n'en allait pas de même dans le secteur de Nagymaros où, si des digues avaient été édifiées, le seul ouvrage relatif au barrage lui-même à avoir été mis en place était le batardeau qui devait en permettre la construction.

32. Dans le sillage des changements politiques et économiques profonds survenus à cette époque en Europe centrale, le projet Gabčíkovo-Nagymaros suscita en Tchécoslovaquie et tout particulièrement en Hongrie de plus en plus d'appréhensions dans une partie de l'opinion publique et du monde scientifique. Les incertitudes éprouvées, non seulement quant à la viabilité économique du projet, mais aussi et plus encore quant aux garanties qu'il présentait pour ce qui est du respect de l'environnement, engendrèrent un climat d'inquiétude et de contestation croissantes autour de ce projet.

33. C'est dans ce contexte que le Gouvernement hongrois adopta, le 13 mai 1989, une résolution par laquelle il suspendait les travaux à Nagymaros et ordonnait

> «aux ministres intéressés de faire faire de nouvelles études afin de mettre le conseil des ministres en mesure de présenter au Parlement des suggestions dûment fondées concernant la modification du traité international sur l'investissement considéré. Il nous faut, à cet égard,

> the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

> "The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

> "The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).
>
> . . . . . .
>
> Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.
>
> In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will

examiner les conséquences internationales et juridiques, les aspects techniques, l'obligation que nous avons d'assurer la navigation continue sur le Danube et les incidences du point de vue écologique et sismique de l'arrêt éventuel de l'investissement de Nagymaros. Il convient en outre d'examiner les possibilités de remplacer l'énergie électrique perdue ainsi que les moyens à mettre en œuvre pour réduire au minimum les demandes d'indemnisation.»

La suspension des travaux à Nagymaros était prévue pour le temps de la réalisation de ces études; celles-ci devaient être terminées pour le 31 juillet 1989. La Tchécoslovaquie protesta immédiatement; un document définissant la position tchécoslovaque fut remis à l'ambassadeur de Hongrie à Prague le 15 mai 1989. Les premiers ministres des deux pays se rencontrèrent le 24 mai 1989, sans que leurs entretiens n'aboutissent à des résultats tangibles. Le 2 juin, le Parlement hongrois autorisa le gouvernement à entamer des négociations avec la Tchécoslovaquie à l'effet de modifier le traité de 1977.

34. Au cours d'une réunion que les plénipotentiaires tinrent les 8 et 9 juin 1989, la Hongrie donna à la Tchécoslovaquie diverses assurances concernant la poursuite des travaux dans le secteur de Gabčíkovo; le protocole signé qui rend compte de cette réunion contient le passage suivant:

«Le commissaire du Gouvernement hongrois et le plénipotentiaire hongrois ont fait savoir que la partie hongroise mènerait à bien la réalisation du projet de Gabčíkovo dans les délais convenus et conformément aux plans du projet. Des directives ont déjà été données pour que les travaux suspendus pour cause de malentendu reprennent dans la zone.»

Ces assurances furent réitérées dans une lettre que le commissaire du Gouvernement hongrois adressa au plénipotentiaire tchécoslovaque le 9 juin 1989.

35. S'agissant de la suspension des travaux à Nagymaros, le vice-premier ministre hongrois, dans une lettre en date du 24 juin 1989 adressée à son homologue tchécoslovaque, s'exprima dans les termes suivants:

«L'Académie des sciences de Hongrie (ASH) a étudié les conséquences qu'aurait sur l'environnement, l'écologie et la qualité de l'eau ainsi que sur la situation sismologique, la décision d'abandonner ou de réaliser la construction du barrage de Nagymaros, dans le cadre du système de barrage de Gabčíkovo-Nagymaros.

. . . . . .

Après avoir étudié les conséquences prévues de la construction réalisée selon le plan initial, le comité *[ad hoc]* de l'Académie [créé à cette fin] est arrivé à la conclusion que nous ne disposons pas de connaissances satisfaisantes sur les conséquences des risques écologiques.

A son avis, le risque qu'entraînerait la construction du système de barrage conformément au plan initial ne peut être considéré comme acceptable. On ne peut évidemment pas déclarer non plus que des consé-

ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at . . . Dunakiliti"; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to co-operate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and . . . its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčíkovo sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de] . . . a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the . . . System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the

quences préjudiciables se produiraient inévitablement et il est donc nécessaire, conformément à la recommandation du comité, d'effectuer de nouvelles études approfondies qui exigeront beaucoup de temps.»

36. Les premiers ministres hongrois et tchécoslovaque se rencontrèrent de nouveau le 20 juillet 1989, sans succès. Aussitôt après cette rencontre, le Gouvernement hongrois adopta une deuxième résolution, aux termes de laquelle la suspension des travaux à Nagymaros était prorogée jusqu'au 31 octobre 1989. Cette résolution allait cependant plus loin, car elle prescrivait également la suspension, jusqu'à la même date, des «travaux préparatoires en vue de la fermeture du lit du fleuve à Dunakiliti»; cette mesure avait pour objet d'inviter «[des] institutions scientifiques internationales et ... [des] instituts et experts scientifiques étrangers» à coopérer avec «[les] instituts et experts hongrois et tchécoslovaques» en vue d'apprécier les incidences écologiques du projet et de «mettre au point et réaliser un système technique et opérationnel garantissant la qualité de l'eau».

37. Dans la période qui suivit, des négociations furent menées à divers niveaux entre les deux Etats, mais elles s'avérèrent infructueuses. Finalement, par lettre en date du 4 octobre 1989, le premier ministre hongrois proposa formellement à la Tchécoslovaquie l'abandon du projet dans le secteur de Nagymaros et la conclusion d'un accord ayant pour objet de réduire les risques écologiques liés au projet dans le secteur de Gabčíkovo. Il suggérait que cet accord soit conclu avant le 30 juillet 1990.

Les deux chefs de gouvernement se rencontrèrent le 26 octobre 1989 et ne purent parvenir à un accord. Par note verbale du 30 octobre 1989, la Tchécoslovaquie, confirmant le point de vue qu'elle avait exprimé lors de ces entretiens, proposa à la Hongrie de négocier un accord au sujet d'un système de garanties techniques, opérationnelles et écologiques relatif au projet Gabčíkovo-Nagymaros, «en partant de l'hypothèse que la partie hongroise commencera immédiatement les travaux de préparation du remplissage du lit du Danube dans la région de Dunakiliti». Elle ajoutait que les principes techniques dudit accord pourraient être paraphés sous quinzaine et que l'accord lui-même devrait être signé avant la fin mars 1990. Dès le paraphe, la Hongrie «devra[it] commencer à fermer effectivement le lit du Danube». La Tchécoslovaquie se disait en outre prête à «conclure un accord distinct par lequel les deux parties s'engageraient d'elles-mêmes à limiter ou à exclure le fonctionnement en régime de pointe du système». Elle proposait encore «de revenir ... aux dates limites indiquées dans le protocole d'octobre 1983», les délais de construction de Nagymaros étant ainsi prorogés de quinze mois afin de permettre à la Hongrie de mettre à profit le temps gagné pour étudier les questions écologiques et formuler ses propositions en temps voulu. Enfin, la Tchécoslovaquie annonçait que, si la Hongrie continuait à enfreindre unilatéralement les dispositions du traité, la Tchécoslovaquie se verrait contrainte de mettre en œuvre une solution provisoire.

Dans l'intervalle, le Gouvernement hongrois avait adopté le 27 octobre 1989 une nouvelle résolution par laquelle il décidait d'abandonner la construc-

Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a "totalitarian, gigomaniac monument which is against nature", while emphasizing that "the problem [was] that [the Gabčíkovo power plant] [had] already been built". For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that "the G/N Project [was] an old, obsolete one", but that, if there were "many reasons to change, modify the treaty . . . it [was] not acceptable to cancel the treaty . . . and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b)*, of the 1977 Treaty.

* *

tion du barrage de Nagymaros et de maintenir les mesures de suspension des travaux antérieurement adoptées pour Dunakiliti. Puis, par des notes verbales en date des 3 et 30 novembre 1989, la Hongrie proposa à la Tchécoslovaquie un projet de traité concrétisant ses propositions antérieures et portant renonciation à l'exploitation de la centrale de Gabčíkovo en régime de pointe et abandon de la construction du barrage de Nagymaros. Le projet prévoyait en outre la conclusion d'un accord sur l'achèvement de Gabčíkovo au prix de garanties concernant la protection de l'environnement. Il envisageait enfin la possibilité pour l'une ou l'autre partie de saisir un tribunal arbitral ou la Cour internationale de Justice au cas où des divergences de vues auraient surgi et persisté entre les deux gouvernements au sujet de la construction et du fonctionnement du barrage de Gabčíkovo ainsi que des mesures à prendre pour protéger l'environnement. La Hongrie se déclarait prête à engager immédiatement «les opérations de préparation du décantage du lit du Danube», mais précisait que le fleuve ne serait barré à Dunakiliti qu'après conclusion de l'accord sur les garanties.

38. Au cours de l'hiver 1989-1990, la situation politique changea profondément tant en Tchécoslovaquie qu'en Hongrie et les nouveaux gouvernements eurent à faire face à de nombreux nouveaux problèmes.

Au printemps 1990, le nouveau Gouvernement hongrois, en présentant son «programme de renouveau national», déclara que l'ensemble du projet Gabčíkovo-Nagymaros constituait une «erreur» et qu'il engagerait aussitôt que possible des négociations avec le Gouvernement tchécoslovaque «sur la remise en l'état des lieux et le partage des dommages». Le 20 décembre 1990, le Gouvernement hongrois adopta une résolution en vue de l'ouverture de négociations avec la Tchécoslovaquie sur la terminaison du traité par consentement mutuel et la conclusion d'un accord qui réglerait les conséquences de cette terminaison. Le 15 février 1991, le plénipotentiaire hongrois faisait parvenir à son homologue tchécoslovaque un projet d'accord en ce sens.

Le même jour, le président tchécoslovaque déclara que le projet Gabčíkovo-Nagymaros constituait un «monument totalitaire, atteint de gigantisme et contraire à la nature», tout en soulignant que «le problème [était] que [la centrale de Gabčíkovo] a[vait] déjà été construite». Pour sa part, le ministre tchécoslovaque de l'environnement indiqua, dans un discours prononcé devant des commissions du Parlement hongrois le 11 septembre 1991, que «le projet G/N constituait un vieux projet, de caractère désuet», mais que s'il existait «de nombreuses raisons de changer, de modifier le traité ... il n'[était] pas acceptable d'annuler le traité ... et de négocier plus tard».

La Hongrie, au cours de la période qui suivit, s'abstint de terminer les travaux qui lui incombaient encore à Dunakiliti. Elle continua cependant d'entretenir les ouvrages qu'elle y avait déjà construits et, à la fin de l'année 1991, elle termina les travaux afférents au canal de fuite du canal de dérivation, dont elle avait la responsabilité en vertu de l'article 5, paragraphe 5, alinéa *b)*, du traité de 1977.

* *

39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 $km^2$) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 $m^3/s$, in addition to the water provided to the system of side-arms. That volume could be increased to 200 $m^3/s$ during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built,

39. Les deux Parties à la présente instance s'accordent pour reconnaître que le traité de 1977 ainsi que l'accord d'assistance mutuelle de 1977 et le protocole de 1989 susmentionnés ont été valablement conclus et étaient dûment en vigueur au moment où se sont produits les faits ci-dessus rapportés.

Elles ne contestent pas davantage que ces textes, aussi souples qu'ils aient été, n'envisageaient pas la possibilité pour les signataires de suspendre ou d'abandonner unilatéralement les travaux qui y étaient prévus, voire de réaliser ceux-ci selon un calendrier nouveau qui n'eût pas été agréé par les deux partenaires.

40. Tout au long de la procédure, la Hongrie a soutenu que, si elle avait suspendu ou abandonné certains travaux, elle n'avait en revanche jamais suspendu l'application du traité de 1977 lui-même. Elle a essentiellement invoqué, pour justifier sa conduite, un «état de nécessité écologique».

La Hongrie a fait valoir que les diverses installations du système d'écluses de Gabčíkovo-Nagymaros avaient été conçues pour permettre à la centrale de Gabčíkovo de fonctionner en régime de pointe. L'eau ne se serait écoulée à travers la centrale que deux fois par jour, lors des périodes de forte demande d'électricité. L'exploitation en régime de pointe rendait nécessaires l'énorme étendue (60 $km^2$) du réservoir prévu à Dunakiliti ainsi que le barrage de Nagymaros, qui devait atténuer les vagues de fond et réduire la variation du niveau des eaux en aval de Gabčíkovo. Un tel régime, considéré comme économiquement plus rentable que l'utilisation des installations au fil de l'eau, comportait des risques écologiques inacceptables pour elle.

D'après la Hongrie, les principaux dangers écologiques qu'aurait engendrés le système étaient les suivants. Pour ce qui est de Gabčíkovo/Dunakiliti, selon le projet initial, tel qu'il a été précisé dans le plan contractuel conjoint, le débit réservé dans l'ancien lit du Danube était limité à 50 $m^3/s$, en sus de l'eau fournie au système de bras. Ce volume pouvait être porté à 200 $m^3/s$ en saison végétative. Des déversements supplémentaires, et notamment des inondations artificielles, pouvaient également être réalisés, à un rythme non précisé. Dans ces conditions, le niveau des eaux souterraines aurait baissé dans la plus grande partie du Szigetköz. En outre, la nappe aquifère aurait désormais été alimentée non plus par le Danube — qui au contraire aurait joué le rôle de drain —, mais par le réservoir d'eaux stagnantes de Dunakiliti et les bras secondaires qui se seraient envasés. Sur le long terme, la qualité des eaux en aurait gravement souffert. En ce qui concerne les eaux de surface, des risques d'eutrophisation seraient apparus, notamment dans le réservoir. A l'ancien Danube aurait par ailleurs été substituée une rivière ensablée où n'aurait coulé qu'un filet d'eau assez mince. Le réseau des bras aurait été isolé le plus souvent du lit principal. La faune et la flore du fleuve, comme celles des plaines alluviales, auraient été condamnées à disparaître.

Quant à Nagymaros, la Hongrie a fait valoir que, si ce barrage avait

the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while

été construit, le lit du Danube en amont se serait envasé et, par suite, la qualité de l'eau recueillie dans les puits filtrants sur berge se serait détériorée dans ce secteur. Bien plus, l'exploitation de la centrale de Gabčíkovo en régime de pointe aurait engendré d'importantes variations journalières du niveau des eaux dans le réservoir d'amont, ce qui aurait notamment menacé les habitats aquatiques. En outre, la construction et l'exploitation du barrage de Nagymaros auraient entraîné une érosion du lit en aval, le long de l'île de Szentendre. De ce fait, le niveau des eaux dans le fleuve aurait baissé sur ce tronçon et la productivité des puits filtrants sur berge assurant, pour les deux tiers, l'alimentation en eau de la ville de Budapest aurait sensiblement diminué. Par ailleurs, la couche filtrante se serait amincie et aurait même pu disparaître; des sédiments fins se seraient déposés dans certaines poches du fleuve. Pour cette double raison, la qualité de l'eau d'infiltration aurait été gravement menacée.

De l'ensemble de ces prévisions, à l'appui desquelles elle a cité diverses études scientifiques, la Hongrie a conclu qu'un «état de nécessité écologique» existait bien en 1989.

41. Dans ses écritures, la Hongrie a aussi reproché à la Tchécoslovaquie d'avoir, dès avant 1989, violé différentes dispositions du traité de 1977 — en particulier ses articles 15 et 19 relatifs, respectivement, à la protection de la qualité des eaux et à la protection de la nature — en refusant de prendre en considération les dangers écologiques qui s'étaient alors précisés et en insistant sur la poursuite des travaux, notamment à Nagymaros. La Hongrie a soutenu dans ce contexte que, conformément aux termes du paragraphe 2 de l'article 3 de l'accord du 6 mai 1976 relatif au plan contractuel conjoint, les recherches concernant l'impact du projet sur l'environnement incombaient à la Tchécoslovaquie; et la Hongrie a souligné que les recherches entreprises par la partie tchécoslovaque n'avaient pas été menées de manière adéquate, les effets potentiels du projet sur l'environnement n'ayant été évalués par la Tchécoslovaquie qu'à partir de septembre 1990. Toutefois, dans le dernier état de son argumentation, la Hongrie ne semble pas avoir entendu formuler ce grief comme un moyen autonome tendant à justifier formellement la suspension et l'abandon des travaux dont elle était responsable aux termes du traité de 1977. Elle a plutôt présenté les violations du traité antérieures à 1989, qu'elle impute à la Tchécoslovaquie, comme l'un des éléments qui ont concouru à la survenance d'un état de nécessité.

42. La Hongrie a d'ailleurs d'emblée soutenu que sa conduite en l'espèce ne devrait pas être appréciée exclusivement à l'aune du droit des traités. Elle a en outre fait observer que, conformément aux dispositions de son article 4, la convention de Vienne du 23 mai 1969 sur le droit des traités ne pouvait s'appliquer au traité de 1977, conclu avant que celle-ci n'entre en vigueur entre les parties. La Hongrie a certes reconnu, en faisant référence à la jurisprudence de la Cour, qu'à bien des égards la convention traduit le droit coutumier existant. Elle n'en a pas moins souligné la nécessité de faire preuve de prudence, tout en suggérant que la

suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in viola-

Cour examine dans chaque cas si les prescriptions de la convention correspondent à l'état du droit international coutumier.

43. La Slovaquie, pour sa part, a dénié que la suspension ou l'abandon de l'exécution d'une obligation conventionnelle puisse trouver son fondement hors du droit des traités. Elle a reconnu que la convention de Vienne de 1969 ne pouvait pas s'appliquer comme telle au traité de 1977; mais elle a en même temps souligné que nombre de ses dispositions traduisent des règles préexistantes du droit international coutumier et a précisé que tel est en particulier le cas des dispositions de sa partie V afférente à la nullité, à l'extinction et à la suspension de l'application des traités. La Slovaquie a par ailleurs fait observer qu'après l'entrée en vigueur de la convention de Vienne entre les deux parties, la Hongrie avait confirmé son adhésion aux obligations de fond créées par le traité de 1977 en signant le protocole du 6 février 1989 qui abrégeait le calendrier des travaux; et elle en a conclu que la convention de Vienne s'appliquait au «régime juridique contractuel» constitué par le réseau d'accords liés les uns aux autres dont le protocole de 1989 faisait partie.

44. Au cours de la procédure, la Slovaquie a longuement plaidé que l'état de nécessité invoqué par la Hongrie ne constituait pas un motif de suspension d'une obligation conventionnelle reconnu par le droit des traités. Elle a en même temps mis en doute que la «nécessité écologique» ou le «risque écologique» puissent constituer, au regard du droit de la responsabilité des Etats, une circonstance excluant l'illicéité d'un acte.

La Slovaquie a en tout état de cause nié qu'il y ait eu en l'espèce un quelconque «état de nécessité écologique», en 1989 ou par la suite. Se réclamant de diverses études scientifiques, elle a prétendu que la Hongrie avait donné une description exagérément pessimiste de la situation. La Slovaquie n'a certes pas contesté que des problèmes écologiques auraient pu se poser; mais elle a fait valoir qu'il aurait pu y être largement remédié. Ainsi, elle a souligné qu'aucun accord n'était intervenu quant aux modalités d'exploitation de la centrale de Gabčíkovo en régime de pointe, et a affirmé que les appréhensions hongroises ne se rapportaient qu'à des conditions d'exploitation de nature extrême. De même, elle a soutenu que le projet initial avait déjà subi depuis 1977 diverses modifications et qu'il aurait pu être encore modifié, par exemple en ce qui concerne le débit de l'eau réservé pour l'ancien lit du Danube ou l'alimentation des bras secondaires par l'effet de déversoirs noyés.

45. La Slovaquie a en outre démenti avoir violé de quelque façon que ce soit le traité de 1977 — en particulier ses articles 15 et 19 — et a notamment fait valoir que, conformément aux termes du paragraphe 2 de l'article 3 de l'accord du 6 mai 1976 relatif au plan contractuel conjoint, les recherches concernant l'impact du projet sur l'environnement n'incombaient pas exclusivement à la Tchécoslovaquie, mais à l'une ou à l'autre des parties, selon l'emplacement des ouvrages.

Enfin, elle a à son tour fait grief à la Hongrie d'avoir arrêté ses mesures unilatérales de suspension et d'abandon des travaux en violation des dis-

tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971,* p. 47, and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 228; and see Article 17 of the Draft Articles on State Responsi-

positions de l'article 27 du traité de 1977 (voir paragraphe 18 ci-dessus), qui, d'après elle, prescrivaient le recours préalable aux mécanismes de règlement des différends prévus par cet article.

* *

46. La Cour n'a pas à s'attarder sur la question de l'applicabilité en l'espèce de la convention de Vienne de 1969 sur le droit des traités. Il lui suffira de rappeler qu'à plusieurs reprises déjà elle a eu l'occasion de dire que certaines des règles énoncées dans ladite convention pouvaient être considérées comme une codification du droit coutumier existant. La Cour est d'avis qu'à bien des égards tel est le cas des règles de la convention de Vienne afférentes à l'extinction et à la suspension de l'application des traités, énoncées à ses articles 60 à 62 (voir *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 47, et *Compétence en matière de pêcheries (Royaume-Uni c. Islande), compétence de la Cour, arrêt, C.I.J. Recueil 1973*, p. 18; voir également *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980*, p. 95-96).

La Cour ne perd pas non plus de vue que la convention de Vienne est en tout état de cause applicable au protocole du 6 février 1989 par lequel la Hongrie et la Tchécoslovaquie étaient convenues d'accélérer les travaux relatifs au projet Gabčíkovo-Nagymaros.

47. La Cour n'a pas davantage à s'étendre sur la question des relations qu'entretiennent le droit des traités et le droit de la responsabilité des Etats, à laquelle les Parties ont consacré de longs développements. Ces deux branches du droit international ont en effet, à l'évidence, des champs d'application distincts. C'est au regard du droit des traités qu'il convient de déterminer si une convention est ou non en vigueur, et si elle a ou non été régulièrement suspendue ou dénoncée. C'est en revanche au regard du droit de la responsabilité des Etats qu'il y a lieu d'apprécier dans quelle mesure la suspension ou la dénonciation d'une convention qui serait incompatible avec le droit des traités engage la responsabilité de l'Etat qui y a procédé.

Ainsi, la convention de Vienne de 1969 sur le droit des traités se borne à définir — de façon limitative — les conditions dans lesquelles un traité peut, de façon licite, être dénoncé ou suspendu; les effets d'une dénonciation ou d'une suspension qui ne satisferait pas à ces conditions sont par contre expressément exclus du champ d'application de la convention par le jeu de son article 73. Il est au demeurant bien établi que, dès lors qu'un Etat a commis un acte internationalement illicite, sa responsabilité internationale est susceptible d'être engagée, quelle que soit la nature de l'obligation méconnue (voir *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950*, p. 228, et l'article 17 du projet d'articles sur la

bility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

*

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"*Article 33. State of Necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

*(a)* the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

responsabilité des Etats adopté à titre provisoire par la Commission du droit international en première lecture, *Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 30-31).

48. La Cour ne peut suivre la Hongrie lorsque celle-ci soutient qu'en suspendant puis en abandonnant en 1989 les travaux dont elle avait encore la charge à Nagymaros et à Dunakiliti elle n'a pas pour autant suspendu l'application du traité de 1977 lui-même, puis rejeté ce traité. Le comportement de la Hongrie à l'époque ne peut être interprété que comme traduisant sa volonté de ne pas exécuter au moins certaines dispositions du traité et du protocole du 6 février 1989, telles que précisées dans le plan contractuel conjoint. L'effet du comportement de la Hongrie a été de rendre impossible la réalisation du système d'ouvrages que le traité qualifiait expressément d'«unique et indivisible».

La Cour fera d'ailleurs observer qu'en invoquant l'état de nécessité pour tenter de justifier ce comportement la Hongrie a choisi de se placer d'emblée sur le terrain du droit de la responsabilité des Etats, impliquant par là qu'en l'absence d'une telle circonstance sa conduite eût été illicite. L'état de nécessité allégué par la Hongrie — à le supposer établi — ne pourrait donc permettre de conclure qu'en 1989 elle aurait agi conformément à ses obligations en vertu du traité de 1977 ou que ces obligations auraient cessé de la lier. Il permettrait seulement d'affirmer que, compte tenu des circonstances, la Hongrie n'aurait pas engagé sa responsabilité internationale en agissant comme elle l'a fait. La Cour notera enfin que la Hongrie a expressément reconnu qu'en tout état de cause un tel état de nécessité ne la dispenserait pas de devoir dédommager son partenaire.

*

49. La Cour examinera à présent la question de savoir s'il existait, en 1989, un état de nécessité qui eût permis à la Hongrie, sans engager sa responsabilité internationale, de suspendre et d'abandonner des travaux qu'elle était tenue de réaliser conformément au traité de 1977 et aux instruments y afférents.

50. Dans l'instance, les Parties se sont accordées pour estimer que l'existence d'un état de nécessité doit être appréciée à la lumière des critères énoncés par la Commission du droit international à l'article 33 du projet d'articles sur la responsabilité internationale des Etats qu'elle a adopté en première lecture. Cette disposition est ainsi conçue:

«*Article 33. Etat de nécessité*

1. L'état de nécessité ne peut pas être invoqué par un Etat comme une cause d'exclusion de l'illicéité d'un fait de cet Etat non conforme à une de ses obligations internationales, à moins que

*a)* ce fait n'ait constitué le seul moyen de sauvegarder un intérêt essentiel dudit Etat contre un péril grave et imminent; et que

*(b)* the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

*(a)* if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

*(b)* if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

*(c)* if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

> "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*ibid.*, para. 1).

It concluded that "the notion of state of necessity is . . . deeply rooted in general legal thinking" (*ibid.*, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

> "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." *(ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must

*b)* ce fait n'ait pas gravement porté atteinte à un intérêt essentiel de l'Etat à l'égard duquel l'obligation existait.

2. En tout état de cause, l'état de nécessité ne peut pas être invoqué par un Etat comme une cause d'exclusion d'illicéité

*a)* si l'obligation internationale à laquelle le fait de l'Etat n'est pas conforme découle d'une norme impérative du droit international général; ou

*b)* si l'obligation internationale à laquelle le fait de l'Etat n'est pas conforme est prévue par un traité qui, explicitement ou implicitement, exclut la possibilité d'invoquer l'état de nécessité en ce qui concerne cette obligation; ou

*c)* si l'Etat en question a contribué à la survenance de l'état de nécessité.» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 33.)

Dans son commentaire, la Commission a défini l'«état de nécessité» comme

> «la situation où se trouve un Etat n'ayant absolument pas d'autre moyen de sauvegarder un intérêt essentiel menacé par un péril grave et imminent que celui d'adopter un comportement non conforme à ce qui est requis de lui par une obligation internationale envers un autre Etat» (*ibid.*, par. 1).

Elle a conclu que: «La notion d'état de nécessité est ... profondément enracinée dans la théorie générale du droit.» (*Ibid.*, p. 47, par. 31.)

51. La Cour considère tout d'abord que l'état de nécessité constitue une cause, reconnue par le droit international coutumier, d'exclusion de l'illicéité d'un fait non conforme à une obligation internationale. Elle observe en outre que cette cause d'exclusion de l'illicéité ne saurait être admise qu'à titre exceptionnel. Telle était aussi l'opinion de la Commission du droit international lorsqu'elle a expliqué qu'elle avait opté pour une formule négative à l'article 33 de son projet

> «pour marquer, par cet aspect formel aussi, que l'hypothèse d'une invocation à titre de justification de l'état de nécessité doit être considérée comme constituant vraiment une exception — une exception encore plus rarement admissible que ce n'est le cas pour les autres circonstances excluant l'illicéité...» (*ibid.*, p. 50, par. 40).

Ainsi, d'après la Commission, l'état de nécessité ne peut être invoqué qu'à certaines conditions, strictement définies, qui doivent être cumulativement réunies; et l'Etat concerné n'est pas seul juge de la réunion de ces conditions.

52. Dans la présente affaire, les conditions de base suivantes, énoncées au projet d'article 33, sont pertinentes: un «intérêt essentiel» de l'Etat auteur du fait contraire à l'une de ses obligations internationales doit avoir été en cause; cet intérêt doit avoir été menacé par un «péril grave et imminent»; le fait incriminé doit avoir été le «seul moyen» de sauvegar-

have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

der ledit intérêt; ce fait ne doit pas avoir «gravement porté atteinte à un intérêt essentiel» de l'Etat à l'égard duquel l'obligation existait; et l'Etat auteur dudit fait ne doit pas avoir «contribué à la survenance de l'état de nécessité». Ces conditions reflètent le droit international coutumier.

La Cour s'emploiera maintenant à rechercher si ces conditions étaient remplies au moment de la suspension et de l'abandon, par la Hongrie, des travaux qu'elle devait accomplir conformément au traité de 1977.

53. La Cour ne voit aucune difficulté à reconnaître que les préoccupations exprimées par la Hongrie en ce qui concerne son environnement naturel dans la région affectée par le projet Gabčíkovo-Nagymaros avaient trait à un «intérêt essentiel» de cet Etat, au sens où cette expression est utilisée à l'article 33 du projet de la Commission du droit international.

La Commission, dans son commentaire, a indiqué qu'il ne fallait pas, dans ce contexte, réduire un «intérêt essentiel» de l'Etat à sa seule «existence», et que tout était, en définitive, question d'espèce (voir *Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 32); en même temps, elle a mentionné, parmi les situations susceptibles d'engendrer un état de nécessité, «un danger grave ... pour la conservation écologique [du] territoire [d'un Etat] ou d'une partie de son territoire» (*ibid.*, p. 34, par. 3) et a précisé, en se référant à la pratique des Etats, que: «C'est surtout dans les deux dernières décennies que la sauvegarde de l'équilibre écologique en est venue à être considérée comme répondant à un «intérêt essentiel» de tous les Etats.» (*Ibid.*, p. 38, par. 14.)

La Cour rappellera qu'elle a récemment eu l'occasion de souligner dans les termes suivants toute l'importance que le respect de l'environnement revêt à son avis, non seulement pour les Etats mais aussi pour l'ensemble du genre humain:

> «l'environnement n'est pas une abstraction, mais bien l'espace où vivent les êtres humains et dont dépendent la qualité de leur vie et leur santé, y compris pour les générations à venir. L'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale fait maintenant partie du corps de règles du droit international de l'environnement.» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996*, p. 241-242, par. 29.)

54. La vérification de l'existence, en 1989, du «péril» invoqué par la Hongrie, de son caractère «grave et imminent», ainsi que de l'absence, pour y faire face, de tout «moyen» autre que les mesures de suspension et d'abandon des travaux prises par la Hongrie, constitue autant d'opérations complexes.

As the Court has already indicated (see paragraphs 33 *et seq.*), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-

Comme la Cour l'a déjà indiqué (voir paragraphes 33 et suivants), la Hongrie a à maintes reprises fait état, en 1989, de ses «incertitudes» quant aux incidences écologiques de la mise en place du système de barrage de Gabčíkovo-Nagymaros: c'est la raison pour laquelle elle a demandé avec insistance que de nouvelles études scientifiques soient effectuées.

La Cour considère cependant que, quelque sérieuses qu'aient été ces incertitudes, elles ne sauraient, à elles seules, établir l'existence objective d'un «péril» en tant qu'élément constitutif d'un état de nécessité. Le mot «péril» évoque certes l'idée de «risque»; c'est précisément en cela que le «péril» se distingue du dommage matérialisé. Mais il ne saurait y avoir d'état de nécessité sans un «péril» dûment avéré au moment pertinent; la seule appréhension d'un «péril» possible ne saurait à cet égard suffire. Il pourrait d'ailleurs difficilement en aller autrement dès lors que le «péril» constitutif de l'état de nécessité doit être à la fois «grave» et «imminent». L'«imminence» est synonyme d'«immédiateté» ou de «proximité» et dépasse de loin le concept d'«éventualité». Comme l'a souligné la Commission du droit international dans son commentaire, le péril «extrêmement grave et imminent» doit s'être «trouvé peser au moment même sur l'intérêt menacé» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 33). Cela n'exclut pas, de l'avis de la Cour, qu'un «péril» qui s'inscrirait dans le long terme puisse être tenu pour «imminent» dès lors qu'il serait établi, au moment considéré, que la réalisation de ce péril, pour lointaine qu'elle soit, n'en serait pas moins certaine et inévitable.

La thèse hongroise sur l'état de nécessité ne pourrait emporter la conviction de la Cour s'il n'était pas au moins prouvé qu'un «péril» réel, «grave» et «imminent» existait en 1989 et que seules les mesures prises par la Hongrie pouvaient permettre d'y faire face.

Les deux Parties ont versé au dossier de l'affaire un impressionnant matériel de nature scientifique à l'effet d'étayer leurs thèses respectives. La Cour a étudié très attentivement ce matériel, dans lequel les Parties ont développé leurs points de vue opposés sur les conséquences écologiques du projet. Elle conclut toutefois que, comme elle le montrera ci-après, il ne lui est pas nécessaire, pour répondre aux questions qui lui ont été posées dans le compromis, de déterminer lequel de ces points de vue est scientifiquement le plus solide.

55. La Cour se penchera d'abord sur la situation à Nagymaros. Comme cela a déjà été mentionné (voir paragraphe 40), la Hongrie a soutenu que, si les ouvrages de Nagymaros avaient été réalisés comme prévu, l'environnement — et en particulier les ressources en eau potable — dans la région aurait été exposé à de graves dangers en raison, d'une part, des problèmes liés au réservoir d'amont et, d'autre part, des risques d'érosion du lit du fleuve en aval.

La Cour constate que les dangers imputés au réservoir d'amont s'inscrivaient pour la plupart dans le long terme et, surtout, qu'ils demeuraient incertains. Même si le plan contractuel conjoint envisageait que

číkovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

la centrale de Gabčíkovo «fonctionner[ait] principalement en régime de pointe et en mode continu lors des hautes eaux», les consignes d'exploitation définitives n'avaient pas encore été arrêtées (voir le paragraphe 19 ci-dessus); or tout danger lié à la mise en œuvre de la partie du projet concernant Nagymaros aurait été étroitement dépendant de la mesure dans laquelle et des modalités selon lesquelles il aurait été recouru au régime de pointe. En conséquence, même s'il avait pu être établi — ce que la Cour, au vu des éléments de preuve qui lui ont été soumis, n'estime pas être le cas — que le réservoir d'amont aurait en définitive constitué un «péril grave» pour l'environnement dans la région, force est de conclure que ce péril n'était pas «imminent» au moment où la Hongrie a suspendu puis abandonné les travaux afférents au barrage.

Pour ce qui est de l'abaissement du lit du fleuve en aval du barrage de Nagymaros, le danger pouvait paraître à la fois plus grave et plus pressant, dans la mesure où c'était l'alimentation en eau potable de la ville de Budapest qui aurait été affectée. La Cour fera toutefois observer que le lit du Danube dans la région de Szentendre avait déjà été approfondi avant 1980 en vue d'en extraire des matériaux de construction et que le fleuve avait dès cette époque atteint dans ce secteur la profondeur requise par le traité de 1977. Le péril invoqué par la Hongrie s'était ainsi déjà largement réalisé depuis plusieurs années, si bien qu'il ne pouvait pas, en 1989, s'agir d'un péril résultant entièrement du projet. La Cour soulignera cependant que, à supposer que la construction et l'exploitation du barrage auraient créé de graves risques, comme l'a soutenu la Hongrie, celle-ci avait à sa disposition des moyens, autres que la suspension et l'abandon des travaux, pour faire face à cette situation. Elle aurait ainsi pu procéder régulièrement au déversement de gravier dans le fleuve en aval du barrage. Elle aurait également pu, si nécessaire, pourvoir à l'alimentation de Budapest en eau potable en traitant de manière appropriée l'eau du fleuve. Les deux Parties ont expressément reconnu que cette possibilité demeurait ouverte même si — ce qui ne constitue pas un élément déterminant au regard de l'état de nécessité — l'épuration des eaux du fleuve, comme les autres mesures envisagées, aurait à l'évidence constitué une technique plus coûteuse.

56. La Cour en vient maintenant au secteur de Gabčíkovo. Elle rappellera que les préoccupations hongroises dans ce secteur concernaient d'une part la qualité des eaux de surface dans le réservoir de Dunakiliti, avec ses incidences sur la qualité des eaux souterraines dans la région, et, d'autre part, plus généralement, le niveau, le mouvement et la qualité tant des eaux de surface que des eaux souterraines dans l'ensemble du Szigetköz, avec leurs incidences sur la faune et la flore de la plaine alluviale du Danube (voir le paragraphe 40 ci-dessus).

Qu'il s'agisse du site de Dunakiliti ou de l'ensemble du Szigetköz, la Cour constate ici encore que le péril allégué par la Hongrie s'inscrivait dans le long terme et — élément plus important — demeurait incertain. Comme le reconnaît elle-même la Hongrie, les dommages qu'elle appré-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

> "The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

> "It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.
>
> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context

hendait devaient résulter avant tout de processus naturels relativement lents dont les effets ne pouvaient être aisément évalués.

Même si les travaux étaient plus avancés dans ce secteur qu'à Nagymaros, ils n'étaient pas terminés en juillet 1989 et, comme la Cour l'a exposé au paragraphe 34 ci-dessus, la Hongrie s'était expressément engagée, au début du mois de juin 1989, à les poursuivre. Le rapport en date du 23 juin 1989 du comité *ad hoc* de l'Académie des sciences de Hongrie, auquel il a été fait allusion au paragraphe 35 du présent arrêt, n'exprime pas la conscience d'un péril avéré — pas même sous la forme d'un péril précis, dont la réalisation aurait été inéluctable dans le long terme — lorsqu'il déclare:

> «Pour prévoir de façon fiable les incidences du système de barrage sur l'environnement, il est indispensable de disposer des résultats de mesures effectuées au cours d'une période de suivi d'au moins cinq ans à compter de l'achèvement des travaux de construction à Gabčíkovo. Il est sans aucun doute nécessaire de mettre en place et d'exploiter régulièrement un système de suivi global, qui devrait être beaucoup plus développé qu'à l'heure actuelle. Il conviendrait d'y inclure l'analyse, jusqu'ici négligée, d'indicateurs biologiques capables de révéler avec sensibilité les changements qui se produisent dans l'environnement.»

Et le rapport de conclure:

> «On peut dire que, de la période de conception et de construction jusqu'à ce jour, les incidences sur l'environnement, l'écologie et la qualité de l'eau n'ont pas été correctement prises en compte. Il est impossible d'évaluer les incidences sur l'environnement en raison de la complexité des processus écologiques ainsi que du manque de données chiffrées et de calculs pertinents.
>
> Les données recueillies grâce au système de suivi récemment mis en œuvre dans une zone très limitée ne permettent pas de prévoir les incidences qui se produiront probablement à plus long terme. Afin de limiter toute nouvelle dégradation de la qualité de l'eau, qui joue un rôle primordial en l'occurrence, il y a lieu de procéder à une nouvelle analyse sur plusieurs années de manière à disposer de données plus complètes et plus fréquentes. La qualité prévue de l'eau influe également sur les écosystèmes aquatiques, les sols et l'utilisation de la zone à des fins récréatives et touristiques.»

La Cour notera aussi que, dans l'instance, la Hongrie a reconnu qu'en règle générale la qualité des eaux du Danube s'était améliorée au cours des vingt dernières années, même si ces eaux restaient sujettes à des conditions hypertrophiques.

Si «grave» qu'il eût pu être, le péril allégué pouvait difficilement, au vu de ce qui précède, être tenu pour suffisamment certain et, dès lors, «imminent», en 1989.

La Cour estime en outre que la Hongrie aurait là encore pu recourir à

also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,

d'autres moyens pour faire face aux dangers qu'elle redoutait. Dans le cadre du projet initial, la Hongrie paraissait notamment en mesure de contrôler au moins partiellement la répartition des eaux entre le canal de dérivation, l'ancien lit du Danube et les bras secondaires. On ne saurait perdre de vue que le barrage de Dunakiliti était situé en territoire hongrois et que la Hongrie pouvait aménager des ouvrages de régulation des flux dans l'ancien lit du Danube et dans les bras secondaires. De plus, il y a lieu de rappeler que l'article 14 du traité de 1977 prévoyait la possibilité pour chacune des parties de prélever des quantités d'eau supérieures à celles spécifiées dans le plan contractuel conjoint, tout en précisant qu'en pareil cas «la part d'énergie électrique revenant à la partie contractante ayant procédé aux prélèvements excédentaires sera[it] réduite en conséquence».

57. La Cour conclut de ce qui précède que, s'agissant aussi bien de Nagymaros que de Gabčíkovo, les périls invoqués par la Hongrie, sans préjudice de leur gravité éventuelle, n'étaient en 1989 ni suffisamment établis, ni «imminents»; et que, pour y faire face, la Hongrie disposait à l'époque d'autres moyens que la suspension et l'abandon de travaux dont elle avait la charge. Qui plus est, des négociations étaient en cours, qui auraient pu aboutir à une revision du projet et au report de certaines de ses échéances, sans qu'il fût besoin de l'abandonner. La Cour en infère que le respect par la Hongrie, en 1989, de ses obligations aux termes du traité de 1977 n'aurait pas abouti à une situation «que l'adage *summum jus summa injuria* caractérise parfaitement» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 31).

En outre, la Cour fera observer que la Hongrie a décidé de conclure le traité de 1977, traité qui — quelles que fussent les circonstances politiques dans lesquelles il a été conclu — a été considéré par la Hongrie comme valide et en vigueur jusqu'à la date indiquée pour sa terminaison en mai 1992. Comme il ressort des éléments en possession de la Cour, de nombreuses études de nature scientifique et technique avaient auparavant été menées, tant par la Hongrie que par la Tchécoslovaquie. On peut donc supposer que c'était en étant consciente de la situation telle qu'elle était alors connue que la Hongrie avait assumé ses obligations aux termes du traité. La Hongrie a soutenu devant la Cour que ces études avaient été insuffisantes et que l'état des connaissances à l'époque ne permettait pas d'évaluer pleinement les incidences écologiques du projet Gabčíkovo-Nagymaros. Il n'en reste pas moins que, bien que le traité de 1977 eût pour principal objet la construction d'un système d'écluses pour la production d'électricité, l'amélioration de la navigation sur le Danube et la protection contre les inondations, la nécessité d'assurer la protection de l'environnement n'avait pas échappé aux parties, ainsi qu'en témoignent les articles 15, 19 et 20 du traité.

De surcroît, la Cour ne peut manquer de noter les positions adoptées par la Hongrie après l'entrée en vigueur du traité de 1977. En 1983, la Hongrie a sollicité le ralentissement des travaux prescrits par le traité,

for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

> "*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'

pour des raisons essentiellement économiques mais aussi, subsidiairement, écologiques. En 1989, alors que, selon la Hongrie elle-même, l'état des connaissances scientifiques avait sensiblement évolué, elle a sollicité l'accélération desdits travaux, pour décider ensuite, trois mois plus tard, de les suspendre, puis de les abandonner. La Cour n'en ignore pas pour autant que de profonds changements étaient en cours en Hongrie en 1989 et que, pendant cette phase transitoire, il pouvait s'avérer bien plus difficile qu'à l'ordinaire de coordonner les différents points de vues qui prévalaient à divers moments.

La Cour infère de tous ces éléments qu'en l'espèce, même s'il avait été établi qu'il existait en 1989 un état de nécessité lié à l'exécution du traité de 1977, la Hongrie n'aurait pas été admise à s'en prévaloir pour justifier le manquement à ses obligations conventionnelles, car elle aurait contribué, par action ou omission, à sa survenance.

58. En conséquence, la Cour n'a pas à examiner la question de savoir si, en procédant comme elle l'a fait en 1989, la Hongrie aurait «gravement porté atteinte à un intérêt essentiel» de la Tchécoslovaquie, au sens de l'article 33 susmentionné du projet de la Commission du droit international; cette constatation ne saurait en rien préjuger des dommages que la Tchécoslovaquie affirme avoir subis du fait de la position hongroise.

La Cour n'a pas davantage à se pencher sur l'argument présenté par la Hongrie, suivant lequel certaines violations des articles 15 et 19 du traité de 1977, commises par la Tchécoslovaquie dès avant 1989, auraient concouru à l'état de nécessité allégué; et elle n'a pas non plus à se prononcer sur l'argument avancé par la Slovaquie, selon lequel la Hongrie aurait violé les dispositions de l'article 27 du traité, en 1989, en prenant des mesures unilatérales sans avoir au préalable eu recours aux mécanismes de règlement des différends prévus à cet article.

* *

59. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *a)*, du compromis (voir ci-dessus paragraphe 27) que la Hongrie n'était pas en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont elle était responsable aux termes du traité de 1977 et des instruments y afférents.

* * *

60. Aux termes de l'article 2, paragraphe 1, alinéa *b)*, du compromis, il est demandé en second lieu à la Cour de dire

> «*b)* si la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de

and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the

mettre en service, à partir d'octobre 1992, ce système, décrit dans le rapport en date du 23 novembre 1992 du groupe de travail d'experts indépendants nommés par la Commission des Communautés européennes, la République de Hongrie et la République fédérative tchèque et slovaque (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation)».

61. La Cour rappellera que, dès que la Hongrie a suspendu les travaux à Nagymaros le 13 mai 1989 et a étendu cette suspension à certains travaux qui devaient être réalisés à Dunakiliti, la Tchécoslovaquie a informé la Hongrie qu'elle se verrait contrainte de prendre des mesures unilatérales si cette dernière persistait dans son refus de reprendre les travaux. Cela fut notamment exprimé de la façon suivante dans la note verbale tchécoslovaque en date du 30 octobre 1989, à laquelle il est fait référence au paragraphe 37 ci-dessus:

> «Si la République de Hongrie ne s'acquittait pas de ses responsabilités et continuait à enfreindre unilatéralement les dispositions du traité et des documents juridiques y afférents, la partie tchécoslovaque se verrait contrainte d'entreprendre à la place un projet provisoire sur son territoire pour éviter de nouvelles pertes. Ce projet provisoire conduirait à diriger vers le barrage de Gabčíkovo toute la quantité d'eau convenue dans le plan de construction conjoint.»

Comme la Cour l'a déjà indiqué (voir paragraphe 23), différentes solutions de rechange furent envisagées par la Tchécoslovaquie. En septembre 1990, les autorités hongroises furent avisées des sept hypothèses définies par la firme Hydroconsult de Bratislava. Toutes ces solutions impliquaient un accord entre les parties, à l'exception d'une variante, dénommée par la suite «variante C», qui était présentée comme une solution provisoire pouvant être réalisée sans la coopération de la Hongrie. D'autres contacts entre les parties eurent lieu sans conduire à une solution du différend. En mars 1991, la Hongrie entra en possession d'informations selon lesquelles la mise au point de la planification de la variante C avait sensiblement progressé; elle fit aussitôt connaître les craintes que cela lui inspirait.

62. Des réunions intergouvernementales de négociation se tinrent le 22 avril et le 15 juillet 1991.

Le 22 avril 1991, la Hongrie proposa la suspension, jusqu'en septembre 1993, de tous les travaux commencés sur la base du traité de 1977, étant entendu que les parties s'engageraient à s'abstenir de toute action unilatérale et que des études communes seraient menées dans l'intervalle. La Tchécoslovaquie maintint sa position antérieure selon laquelle les études envisagées devraient avoir lieu dans le cadre du traité de 1977 et sans suspension des travaux.

Le 15 juillet 1991, la Tchécoslovaquie confirma son intention de mettre

Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

> "In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

> "Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.
>
> The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

> "the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the

en service la centrale de Gabčíkovo et indiqua que les données disponibles permettaient d'évaluer les effets de quatre scénarios d'exploitation possibles requérant chacun la coopération des deux gouvernements. En même temps, elle proposa la constitution d'un comité d'experts tripartite (Hongrie, Tchécoslovaquie, Communautés européennes) qui aiderait à trouver des solutions techniques aux problèmes résultant de la mise en exploitation du secteur de Gabčíkovo. La Hongrie, quant à elle, exposa que:

> «Dans le cas où on ne parviendrait absolument pas à s'entendre, la solution dite variante C ou «possibilité théorique», proposée par la partie tchécoslovaque en tant que solution unilatérale, constituerait une atteinte grave à l'intégrité territoriale de la Hongrie et au droit international dont il n'existe aucun précédent même dans la pratique des anciens pays socialistes au cours des trente dernières années»;

elle proposa par ailleurs de constituer un comité bipartite d'évaluation des incidences écologiques, sous réserve que les travaux soient suspendus en territoire tchécoslovaque.

63. Par lettre en date du 24 juillet 1991, le Gouvernement hongrois communiqua au premier ministre slovaque le message suivant:

> «L'opinion publique hongroise et le Gouvernement hongrois suivent avec inquiétude et attention les nouvelles publiées dans la presse [tchécoslovaque] sur les mesures unilatérales prises par le Gouvernement de la République slovaque concernant le système de barrage.
>
> Les travaux préparatoires entrepris au voisinage du barrage de Dunakiliti pour détourner unilatéralement les eaux du Danube ont également de quoi inquiéter. Ces mesures vont à l'encontre des dispositions du traité de 1977 et sont préjudiciables aux relations de bon voisinage entre nos pays.»

Le 30 juillet 1991, le premier ministre slovaque informa le premier ministre hongrois de

> «la décision du Gouvernement slovaque et du Gouvernement de la République fédérative tchèque et slovaque de poursuivre les travaux de construction de la centrale de Gabčíkovo, à titre de solution provisoire, en vue de permettre sa mise en service sur le territoire de la République fédérative tchèque et slovaque».

Le même jour, le Gouvernement hongrois protesta, par note verbale, contre la mise en eau du canal d'amenée réalisée par l'entreprise tchécoslovaque de construction en pompant de l'eau du Danube.

Par lettre du 9 août 1991, adressée au premier ministre slovaque, les autorités hongroises s'élevèrent vivement «contre toute mesure unilatérale allant à l'encontre des intérêts [des deux] pays ainsi que du droit international» et indiquèrent qu'elles considéraient «comme très important d'être informé[es] dès que possible des détails de la solution provi-

details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

> "Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

> "of [the Treaty of 1977] . . . and the convention ratified in 1976 regarding the water management of boundary waters.
>
> . . . . . .
>
> with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-

soire». Pour sa part, la Tchécoslovaquie, dans une note verbale en date du 27 août 1991, rejeta l'argument hongrois selon lequel la poursuite des travaux dans ces conditions constituait une violation du droit international et fit la proposition suivante:

> «Pourvu que la partie hongroise apporte une solution technique concrète en vue de la mise en service du système d'écluses de Gabčíkovo et une solution pour le système d'écluses fondée sur le traité de 1977 en vigueur et sur les actes conventionnels y afférents, la partie tchécoslovaque est prête à exécuter la solution arrêtée d'un commun accord.»

64. Le permis de construire de la variante C fut délivré le 30 octobre 1991. En novembre 1991, la construction d'un barrage commença à Čunovo, où les deux rives du Danube se trouvent en territoire tchécoslovaque (aujourd'hui slovaque).

Au cours d'une nouvelle réunion intergouvernementale de négociation, le 2 décembre 1991, les parties s'accordèrent pour confier l'étude de l'ensemble de la question du projet Gabčíkovo-Nagymaros à un comité mixte d'experts auquel la Hongrie accepta d'associer un expert des Communautés européennes. Mais alors que, pour la Hongrie, le travail dudit comité aurait été dépourvu de sens si la Tchécoslovaquie poursuivait la construction de la variante C, pour la Tchécoslovaquie, une interruption, même provisoire, des travaux était inacceptable.

Cette réunion fut suivie de nombreux échanges de correspondances entre les parties et de diverses rencontres entre leurs représentants à la fin de l'année 1991 et au début de 1992. Le 23 janvier 1992, la Tchécoslovaquie se dit prête «à arrêter ses travaux afférents à la solution provisoire et à poursuivre la construction [qui serait] convenue d'un commun accord» si le comité d'experts tripartite dont elle proposait la constitution et les résultats de l'essai d'exploitation de l'élément de Gabčíkovo «confirm[ai]ent que les effets écologiques défavorables dépass[ai]ent les avantages recueillis». Toutefois, les positions des parties étaient alors globalement arrêtées, et ne devaient plus guère évoluer. La Hongrie estimait, comme elle l'a indiqué dans une note verbale du 14 février 1992, que la variante C était contraire

> «aux dispositions du [traité de 1977] ... comme à celles de la convention ratifiée en 1976 sur la réglementation en matière d'eaux frontières.
>
> . . . . . .
>
> aux principes de souveraineté et d'intégrité territoriale, à l'inviolabilité des frontières d'Etat ainsi qu'aux règles coutumières générales relatives aux fleuves internationaux et à l'esprit de la convention de Belgrade de 1948 sur le Danube»;

et la suspension de l'exécution de la variante C était pour elle un préalable. Quant à la Tchécoslovaquie, elle considérait que le recours à la variante C avait été rendu inévitable, pour des raisons tant économiques

cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1,851.759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Čunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčíkovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b)*, of the Special Agreement, the one given in the aforementioned report of the Working Group

qu'écologiques et de navigation, du fait de la suspension et de l'abandon illicites, par la Hongrie, des travaux prévus par le traité de 1977; toute négociation devait, selon elle, se poursuivre dans le cadre du traité et sans que l'exécution de la variante C — qualifiée de «provisoire» — soit mise en cause.

65. Le 5 août 1992, le représentant tchécoslovaque à la commission du Danube informa celle-ci que «les travaux de fermeture du Danube commencer[aient] le 15 octobre 1992 au point kilométrique 1851,759» et indiqua les mesures qui seraient prises au moment de la fermeture. Le représentant hongrois à la commission protesta le 17 août 1992, en réclamant plus d'explications.

Pendant l'automne 1992, l'exécution de la variante C s'accéléra. Les opérations de barrage du Danube à Čunovo avaient été prévues par la Tchécoslovaquie pour la seconde moitié du mois d'octobre 1992, à un moment où les eaux du fleuve sont en général à leur niveau le plus bas. A l'initiative de la Commission des Communautés européennes, des négociations trilatérales eurent lieu à Bruxelles les 21 et 22 octobre 1992 en vue de mettre en place un comité d'experts et de définir son mandat. A cette date, la première phase des opérations de barrage du Danube (renforcement du lit du fleuve et réduction de la largeur du chenal principal) était achevée. La fermeture du lit fut amorcée le 23 octobre 1992 et la construction du barrage proprement dit se poursuivit du 24 au 27 octobre 1992: un pont flottant fut aménagé sur le Danube en territoire tchécoslovaque au moyen de péniches, de grosses pierres furent déversées dans le lit de la rivière et recouvertes de béton, tandis que quatre-vingts à quatre-vingt-dix pour cent des eaux du Danube étaient dirigées dans le canal destiné à l'alimentation de la centrale de Gabčíkovo. L'exécution de la variante C n'était cependant pas terminée avec le détournement des eaux car il restait encore à effectuer des travaux de consolidation du barrage et à construire certains ouvrages auxiliaires.

La Cour a déjà évoqué au paragraphe 24 la réunion tenue à Londres le 28 octobre 1992 sous les auspices des Communautés européennes, au cours de laquelle les parties aux négociations convinrent notamment de charger un groupe de travail tripartite d'experts indépendants (soit quatre experts désignés par la Commission européenne, un expert désigné par la Hongrie et un autre désigné par la Tchécoslovaquie) d'étudier la situation créée par la mise en œuvre de la variante C et de faire des propositions sur les mesures d'urgence à adopter. Après avoir travaillé une semaine à Bratislava et une semaine à Budapest, le groupe de travail déposa son rapport le 23 novembre 1992.

66. Il a été procédé à une description sommaire des éléments constitutifs de la variante C au paragraphe 23 du présent arrêt. Aux fins de la question posée à la Cour, la description officielle à retenir est, selon l'article 2, paragraphe 1, alinéa *b)*, du compromis, celle qu'en fait le rapport susmentionné du groupe de travail d'experts indépendants; il y a lieu de

of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

> "In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the
>
> (1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.
>
> Variant C consists of a complex of structures, located in Czecho-Slovakia . . . The construction of these are planned for two phases. The structures include . . .:
>
> (2) By-pass weir controlling the flow into the river Danube.
> (3) Dam closing the Danubian river bed.
> (4) Floodplain weir (weir in the inundation).
> (5) Intake structure for the Mosoni Danube.
> (6) Intake structure in the power canal.
> (7) Earth barrages/dykes connecting structures.
> (8) Ship lock for smaller ships (15 m × 80 m).
> (9) Spillway weir.
> (10) Hydropower station.
>
> The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed

souligner par ailleurs que, d'après le compromis, la «variante C» doit être comprise comme incluant les conséquences «pour l'écoulement des eaux et la navigation» qui résultent du barrage fermant le lit du Danube.

Sous le point intitulé «Ouvrages de la variante C et état d'avancement des travaux», on trouve, dans le rapport du groupe de travail, le passage suivant:

> «Dans les deux pays, les ouvrages prévus à l'origine dans le programme de Gabčíkovo sont achevés, à l'exception de la fermeture du Danube à Dunakiliti ainsi que:
>
> 1) les derniers travaux de la centrale hydro-électrique (installation et essais des turbines) de Gabčíkovo.
>
> La variante C est un ensemble complexe d'ouvrages, situé en Tchécoslovaquie ... La construction de ces ouvrages est prévue en deux phases. Les ouvrages comprennent ...:
>
> 2) les déversoirs de dérivation contrôlant l'écoulement dans le Danube;
> 3) le barrage fermant le lit du Danube;
> 4) le déversoir de la plaine d'inondation;
> 5) l'ouvrage de prise alimentant le bras Moson du Danube;
> 6) l'ouvrage de prise alimentant le canal usinier;
> 7) les barrages/digues en terre reliant les ouvrages;
> 8) l'écluse destinée aux navires de faible tonnage (15 m × 80 m);
> 9) l'évacuateur de crue;
> 10) la centrale hydro-électrique.
>
> La construction des ouvrages 1 à 7 est prévue pendant la phase 1, tandis que les ouvrages 8 à 10 relèvent de la phase 2 prévue pour 1993-1995.»

* *

67. La Tchécoslovaquie avait soutenu que le recours à la variante C et la mise en service de celle-ci ne constituaient pas des faits internationalement illicites; la Slovaquie a repris cette thèse. Au cours de la procédure devant la Cour, la Slovaquie a affirmé que la décision de la Hongrie de suspendre puis d'abandonner la construction des ouvrages à Dunakiliti avait mis la Tchécoslovaquie dans l'impossibilité d'effectuer les travaux tels qu'ils avaient initialement été envisagés par le traité de 1977 et que cette dernière était en conséquence en droit de recourir à une solution qui était aussi proche que possible du projet initial. La Slovaquie a invoqué ce qu'elle a décrit comme un «principe d'application par approximation» pour justifier la construction et la mise en service de la variante C. Elle a expliqué que c'était là la seule possibilité qui lui restait «non seulement d'atteindre les buts visés par le traité de 1977, mais encore de respecter l'obligation continue de mettre en œuvre ledit traité de bonne foi».

68. La Slovaquie a aussi soutenu que la Tchécoslovaquie avait l'obligation d'atténuer les dommages résultant des agissements illicites de la

that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have

Hongrie. Elle a allégué qu'un Etat qui se trouve confronté au fait illicite d'un autre Etat est tenu de limiter ses pertes au minimum, et de réduire ainsi les dommages et intérêts susceptibles d'être réclamés à l'Etat auteur du fait illicite. Elle a en outre exposé que: «L'atténuation des dommages est aussi un aspect de l'exécution des obligations de bonne foi.» Pour la Slovaquie, les dommages et intérêts auraient en l'occurrence été considérables, compte tenu des investissements effectués et des préjudices supplémentaires, tant de nature économique qu'écologique, qui auraient résulté de l'inachèvement des travaux à Dunakiliti/Gabčíkovo et du défaut de mise en service du système. C'est pourquoi la Tchécoslovaquie était non seulement en droit, mais encore dans l'obligation, de mettre en œuvre la variante C.

69. Bien que la Slovaquie affirme que le comportement de la Tchécoslovaquie était licite, elle a soutenu à titre subsidiaire que, même si la Cour devait conclure dans un autre sens, la mise en service de la variante C pourrait encore être justifiée en tant que contre-mesure.

70. La Hongrie, pour sa part, a soutenu que la variante C constitue une violation substantielle du traité de 1977. Elle considère que la variante C viole aussi les obligations de la Tchécoslovaquie en vertu d'autres traités, notamment la convention sur la réglementation en matière d'eaux frontières, conclue à Budapest le 31 mai 1976, et ses obligations au titre du droit international général.

71. La Hongrie a prétendu que l'argumentation slovaque reposait sur une présentation erronée des faits et du droit. La Hongrie nie notamment avoir commis la moindre violation de ses obligations conventionnelles qui aurait pu justifier la mise en œuvre de la variante C. Elle estime qu'il n'existe «aucune règle» d'«application par approximation» d'un traité en droit international; quant à l'argument tiré de «l'atténuation des dommages», elle fait valoir qu'il a trait à l'appréciation du préjudice et ne saurait servir à excuser un comportement illicite sur le fond. La Hongrie expose en outre que la variante C ne satisfait pas aux conditions requises par le droit international en matière de contre-mesures, et en particulier à la condition de proportionnalité.

* *

72. Avant d'examiner les arguments que les Parties ont ainsi avancés, la Cour souhaite indiquer clairement qu'elle est consciente des sérieux problèmes auxquels la Tchécoslovaquie a dû faire face à la suite de la décision prise par la Hongrie de renoncer à la plus grande partie de la construction du système d'écluses qui lui incombait en vertu du traité de 1977. Des investissements très importants avaient été effectués, la construction de l'ouvrage de Gabčíkovo était pratiquement achevée, le canal de dérivation était terminé, et la Hongrie elle-même, en 1991, s'était dûment acquittée de ses obligations à cet égard en achevant les travaux du canal de fuite. Il ressort du rapport, en date du 31 octobre 1992, de la mission d'enquête tripartite à laquelle la Cour s'est référée au paragraphe 24 du présent arrêt que la non-

led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried

utilisation du système aurait causé des pertes financières considérables et qu'elle aurait pu entraîner de graves problèmes pour l'environnement.

73. La Tchécoslovaquie a maintes fois indiqué que la suspension et l'abandon des travaux par la Hongrie constituaient une violation essentielle du traité de 1977 et elle aurait pu par conséquent invoquer celle-ci comme motif de mettre fin au traité; mais cela n'aurait en rien fait avancer le projet vers son achèvement. C'est pourquoi elle a préféré insister pour que la Hongrie mette en œuvre le traité et a demandé à de nombreuses reprises à celle-ci de reprendre l'exécution des obligations lui incombant en vertu du traité.

Lorsque la Hongrie a résolument refusé de s'exécuter — bien qu'elle eût exprimé sa volonté d'indemniser la Tchécoslovaquie pour les dommages subis — et lorsque les négociations sont arrivées au point mort du fait des positions diamétralement opposées des parties, la Tchécoslovaquie a décidé de mettre unilatéralement en service le système de Gabčíkovo, sous son contrôle et à son profit exclusifs.

74. Cette décision a comporté plusieurs étapes et, dans le compromis, les Parties ont demandé à la Cour de dire si la Tchécoslovaquie «était en droit de recourir, en novembre 1991», à la variante C et «de mettre en service [cette dernière], à partir d'octobre 1992».

75. En vue de justifier ces actions, la Slovaquie a invoqué ce qu'elle a décrit comme «le principe d'application par approximation» tel qu'exprimé par sir Hersch Lauterpacht dans les termes suivants:

> «C'est un principe sain de droit que si un instrument juridique de validité continue ne peut s'appliquer littéralement, du fait de la conduite de l'une des parties, il faut, sans permettre à celle-ci de se prévaloir de sa propre conduite, l'appliquer d'une manière s'approchant le plus possible de son but primitif. Agir ainsi est interpréter et donner effet à l'instrument et non le modifier.» (*Admissibilité de l'audition de pétitionnaires par le Comité du Sud-Ouest africain, C.I.J. Recueil 1956*, opinion individuelle de sir Hersch Lauterpacht, p. 46.)

Elle a prétendu qu'il s'agit d'un principe du droit international et d'un principe général de droit.

76. La Cour n'a pas à déterminer s'il existe un principe de droit international ou un principe général de droit d'«application par approximation» car, même si un tel principe existait, il ne pourrait par définition y être recouru que dans les limites du traité en cause. Or, de l'avis de la Cour, la variante C ne satisfait pas à cette condition primordiale au regard du traité de 1977.

77. Comme la Cour l'a déjà observé, la caractéristique fondamentale du traité de 1977 est, selon son article premier, de prévoir la construction du système d'écluses de Gabčíkovo-Nagymaros en tant qu'investissement conjoint constituant un système d'ouvrages opérationnel, unique et indivisible. Cet élément est également reflété aux articles 8 et 10 du traité, qui prévoient la propriété conjointe des ouvrages les plus importants du projet Gabčíkovo-Nagymaros et l'exploitation de cette propriété conjointe comme une entité unique et coordonnée. Par définition, tout cela ne pou-

out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, and *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14).

*

vait être réalisé par voie d'action unilatérale. En dépit d'une certaine ressemblance physique extérieure avec le projet initial, la variante C en diffère donc nettement quant à ses caractéristiques juridiques.

78. De plus, dans la pratique, la mise en service de la variante C a conduit la Tchécoslovaquie à s'approprier, essentiellement pour son usage et à son profit, entre quatre-vingts et quatre-vingt-dix pour cent des eaux du Danube avant de les restituer au lit principal du fleuve, en dépit du fait que le Danube est non seulement un cours d'eau international partagé mais aussi un fleuve frontière.

La Tchécoslovaquie a soutenu que la variante C, pour l'essentiel, n'est rien d'autre que ce à quoi la Hongrie avait déjà consenti et que seules ont été effectuées les modifications rendues nécessaires par suite de la décision de la Hongrie de ne pas exécuter ses obligations conventionnelles. Il est vrai que la Hongrie, en concluant le traité de 1977, avait accepté le barrage du Danube et le détournement de ses eaux dans le canal de dérivation. Mais c'était seulement dans le contexte d'une opération conjointe et d'un partage de ses bénéfices que la Hongrie avait donné son consentement. La suspension et le retrait de ce consentement ont constitué une violation par la Hongrie de ses obligations juridiques, montrant effectivement que celle-ci a refusé une exploitation conjointe; mais il ne saurait s'ensuivre que la Hongrie aurait perdu son droit fondamental à une part équitable et raisonnable des ressources d'un cours d'eau international.

La Cour conclut en conséquence que la Tchécoslovaquie, en mettant en service la variante C, n'a pas appliqué le traité de 1977 mais, au contraire, a violé certaines de ses dispositions expresses et, de ce fait, a commis un acte internationalement illicite.

79. La Cour note qu'entre novembre 1991 et octobre 1992 la Tchécoslovaquie s'est bornée à exécuter sur son propre territoire des travaux qui étaient certes nécessaires pour la mise en œuvre de la variante C, mais qui auraient pu être abandonnés si un accord était intervenu entre les parties et ne préjugeaient dès lors pas de la décision définitive à prendre. Tant que le Danube n'avait pas été barré unilatéralement, la variante C n'avait en fait pas été appliquée.

Une telle situation n'est pas rare en droit international, comme d'ailleurs en droit interne. Un fait illicite ou une infraction est fréquemment précédée d'actes préparatoires qui ne sauraient être confondus avec le fait ou l'infraction eux-mêmes. Il convient de distinguer entre la réalisation même d'un fait illicite (que celui-ci soit instantané ou continu) et le comportement antérieur à ce fait qui présente un caractère préparatoire et «qui ne saurait être traité comme un fait illicite» (voir par exemple le commentaire de l'article 41 du projet d'articles sur la responsabilité des Etats, «Rapport de la Commission du droit international sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996», *Documents officiels de l'Assemblée générale, cinquante et unième session, supplément n° 10* (A/51/10), p. 164, et *Annuaire de la Commission du droit international*, 1993, vol. II, deuxième partie, p. 59, par. 14).

*

80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

*

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-

80. La Slovaquie a aussi soutenu que son action était motivée par une obligation d'atténuer des dommages lorsqu'elle a réalisé la variante C. Elle a déclaré que «c'est un principe de droit international qu'une partie lésée du fait de la non-exécution d'un engagement pris par une autre partie doit s'employer à atténuer les dommages qu'elle a subis».

Il découlerait d'un tel principe qu'un Etat lésé qui n'a pas pris les mesures nécessaires à l'effet de limiter les dommages subis ne serait pas en droit de réclamer l'indemnisation de ceux qui auraient pu être évités. Si ledit principe pourrait ainsi fournir une base pour le calcul de dommages et intérêts, en revanche, il ne saurait justifier ce qui constitue par ailleurs un fait illicite.

81. La Cour ayant conclu que la mise en service de la variante C a constitué un fait internationalement illicite, l'obligation d'atténuer les dommages invoquée par la Slovaquie n'a pas à être examinée plus avant.

*

82. Bien qu'elle n'ait pas fait valoir à titre principal l'argumentation tirée des contre-mesures, puisqu'elle ne considère pas la variante C comme illicite, la Slovaquie a déclaré que «la variante C pourrait être considérée comme une contre-mesure justifiée en réponse aux actes illicites de la Hongrie».

La Cour, au paragraphe 78 ci-dessus, est parvenue à la conclusion que la Tchécoslovaquie a commis un acte internationalement illicite en mettant en service la variante C. Il lui faut donc à présent rechercher si cette illicéité peut être excusée au motif que la mesure ainsi adoptée l'aurait été en réaction au défaut préalable de la Hongrie de s'acquitter de ses obligations en vertu du droit international.

83. Pour pouvoir être justifiée, une contre-mesure doit satisfaire à certaines conditions (voir *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 127, par. 249. Voir aussi *Sentence arbitrale du 9 décembre 1978 en l'affaire concernant l'accord relatif aux services aériens du 27 mars 1946 entre les Etats-Unis d'Amérique et la France*, Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. XVIII, p. 483 et suiv., et articles 47 à 50 du projet d'articles sur la responsabilité des Etats adopté par la Commission du droit international en première lecture, «Rapport de la Commission du droit international sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996», *Documents officiels de l'Assemblée générale, cinquante et unième session, supplément n° 10* (A/51/10), p. 167-168.)

En premier lieu, elle doit être prise pour riposter à un fait internationalement illicite d'un autre Etat et doit être dirigée contre ledit Etat. Bien qu'elle n'ait pas été présentée à titre principal comme une contre-mesure, il est clair que la variante C a constitué une riposte à la suspension et à

ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23,* p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

l'abandon des travaux par la Hongrie et qu'elle était dirigée contre cet Etat; et il est tout aussi clair, de l'avis de la Cour, que les agissements de la Hongrie étaient internationalement illicites.

84. En second lieu, l'Etat lésé doit avoir invité l'Etat auteur du fait illicite à mettre fin à son comportement illicite ou à en fournir réparation. Il ressort clairement des faits de la cause, tels que rappelés ci-dessus par la Cour (voir paragraphes 61 et suivants), que la Tchécoslovaquie, à de nombreuses reprises, a prié la Hongrie de reprendre l'exécution de ses obligations conventionnelles.

85. De l'avis de la Cour, une condition importante est que les effets d'une contre-mesure doivent être proportionnés aux dommages subis compte tenu des droits en cause.

En 1929, la Cour permanente de Justice internationale, à propos de la navigation sur l'Oder, a déclaré ce qui suit:

> «[la] communauté d'intérêts sur un fleuve navigable devient la base d'une communauté de droit, dont les traits essentiels sont la parfaite égalité de tous les Etats riverains dans l'usage de tout le parcours du fleuve et l'exclusion de tout privilège d'un riverain quelconque par rapport aux autres» (*Juridiction territoriale de la Commission internationale de l'Oder, arrêt n° 16, 1929, C.P.J.I. série A n° 23*, p. 27).

Le développement moderne du droit international a renforcé ce principe également pour les utilisations des cours d'eau internationaux à des fins autres que la navigation, comme en témoigne l'adoption par l'Assemblée générale des Nations Unies, le 21 mai 1997, de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation.

La Cour considère que la Tchécoslovaquie, en prenant unilatéralement le contrôle d'une ressource partagée, et en privant ainsi la Hongrie de son droit à une part équitable et raisonnable des ressources naturelles du Danube — avec les effets continus que le détournement de ses eaux déploie sur l'écologie de la région riveraine du Szigetköz — n'a pas respecté la proportionnalité exigée par le droit international.

86. Par ailleurs, comme la Cour l'a déjà relevé ci-dessus (voir paragraphe 78), le fait que la Hongrie ait consenti, dans le cadre du projet initial, au détournement du Danube (et, dans le plan contractuel conjoint, à titre provisoire à des prélèvements d'eau dans le Danube) ne saurait s'interpréter comme ayant autorisé la Tchécoslovaquie à procéder à un détournement unilatéral de cette importance sans le consentement de la Hongrie.

87. La Cour estime donc que le détournement du Danube effectué par la Tchécoslovaquie n'était pas une contre-mesure licite, faute d'être proportionnée. Elle n'a dès lors pas à statuer sur une autre condition dont dépend la licéité d'une contre-mesure, à savoir que celle-ci doit avoir pour but d'inciter l'Etat auteur du fait illicite à exécuter les obligations

tions under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

qui lui incombent en droit international, et que la mesure doit partant être réversible.

* *

88. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *b)*, du compromis (voir paragraphe 60) que la Tchécoslovaquie était en droit de recourir, en novembre 1991, à la variante C, dans la mesure où elle se bornait alors à entamer des travaux qui ne préjugeaient pas de la décision définitive qu'elle devait prendre. En revanche, la Tchécoslovaquie n'était pas en droit de mettre en service cette variante à partir d'octobre 1992.

* * *

89. Aux termes de l'article 2, paragraphe 1, alinéa *c)*, du compromis, il est demandé à la Cour en troisième lieu de dire «quels sont les effets juridiques de la notification, le 19 mai 1992, de la terminaison du traité par la République de Hongrie».

La Cour relèvera qu'il lui a été demandé de déterminer les effets juridiques de la notification de terminaison du traité effectuée à la date du 19 mai 1992. Elle se bornera en conséquence à répondre à cette question.

90. La Cour rappellera que, début 1992, les parties au traité de 1977 avaient clairement fait connaître leurs positions respectives sur le recours par la Tchécoslovaquie à la variante C. Dans une note verbale du 14 février 1992, la Hongrie avait fait savoir qu'elle considérait que la variante C contrevenait au traité de 1977 (voir paragraphe 64 ci-dessus); la Tchécoslovaquie faisait de la mise en œuvre de la variante C une condition de toute nouvelle négociation. Le 26 février 1992, dans une lettre à son homologue tchécoslovaque, le premier ministre hongrois décrivit le détournement imminent du Danube comme «une grave violation du droit international» et affirma qu'à moins que les travaux ne soient suspendus pendant la réalisation de nouvelles études «le Gouvernement hongrois n'aura[it] d'autre choix, pour faire face à cette situation de nécessité, que de mettre fin au traité interétatique de 1977». Dans une note verbale du 18 mars 1992, la Tchécoslovaquie réaffirma que, tout en étant disposée à poursuivre les négociations «à tous les niveaux», elle ne pouvait pas accepter «d'arrêter les travaux afférents à la solution provisoire».

Le 24 mars 1992, le Parlement hongrois adopta une résolution par laquelle il autorisait le gouvernement à mettre fin au traité de 1977 si la Tchécoslovaquie n'avait pas cessé les travaux au 30 avril 1992. Le 13 avril 1992, le vice-président de la Commission des Communautés européennes écrivit aux deux parties pour leur confirmer que la Commission était disposée à présider un comité d'experts indépendants, comprenant des représentants des deux pays, en vue d'aider les deux gouvernements à dégager

ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the

une solution qu'ils puissent tous deux accepter. La participation de la Commission était subordonnée à la condition que les deux gouvernements s'abstiennent de prendre «des mesures susceptibles de porter atteinte aux actions qu'il pourrait y avoir lieu d'entreprendre sur la base des conclusions du rapport». Le premier ministre tchécoslovaque, dans une lettre du 23 avril 1992 adressée au premier ministre hongrois, fit savoir que son gouvernement était toujours intéressé, «sans conditions préalables», à la constitution du comité envisagé; critiquant l'attitude de la Hongrie, il refusait de suspendre les travaux relatifs à la solution provisoire, mais ajoutait: «selon moi, d'ici le barrage du Danube (c'est-à-dire d'ici au 31 octobre 1992), il reste du temps pour résoudre les questions litigieuses sur la base d'un accord entre les deux Etats».

Le 7 mai 1992, la Hongrie, dans la résolution même où elle prenait la décision de mettre fin au traité, proposa, cette fois au premier ministre slovaque, une suspension de six mois des travaux relatifs à la variante C. Le premier ministre slovaque répondit que le Gouvernement slovaque était toujours prêt à négocier, mais qu'il considérait «inapproprié» de poser des conditions préalables.

91. Le 19 mai 1992, le Gouvernement hongrois transmit au Gouvernement tchécoslovaque une déclaration portant notification de la terminaison, par la Hongrie, du traité de 1977, à compter du 25 mai 1992. Dans une lettre du même jour adressée au premier ministre tchécoslovaque, le premier ministre hongrois précisait que la cause immédiate de la terminaison était le refus de la Tchécoslovaquie, exprimé dans sa lettre du 23 avril 1992, de suspendre les travaux afférents à la variante C pendant les efforts de médiation de la Commission des Communautés européennes. Dans sa déclaration, la Hongrie disait qu'elle ne pouvait accepter les effets néfastes de la mise en œuvre de la variante C sur l'environnement et sur la protection de la nature, qui seraient pratiquement équivalents aux dangers créés par la réalisation du projet initial. Elle ajoutait que la variante C contrevenait à de nombreux accords internationaux et violait l'intégrité territoriale de la Hongrie en détournant le Danube de son cours naturel.

* *

92. Au cours de la procédure, la Hongrie a présenté cinq motifs en vue de démontrer que la notification de terminaison était licite, et par suite effective: l'existence d'un état de nécessité, l'impossibilité d'exécuter le traité, la survenance d'un changement fondamental de circonstances, la violation substantielle du traité par la Tchécoslovaquie et, enfin, l'apparition de nouvelles normes de droit international de l'environnement. La Slovaquie a contesté chacun de ces motifs.

93. Sur le premier point, la Hongrie a affirmé que, puisque la Tchécoslovaquie «était demeurée inflexible» et avait poursuivi la mise en œuvre de la variante C, «l'état provisoire de nécessité [était] finalement devenu permanent, justifiant ainsi la terminaison du traité de 1977».

Pour sa part, la Slovaquie, se fondant sur ce qu'elle estime être les don-

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

> "*Article 61*
>
> *Supervening Impossibility of Performance*
>
> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
>
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

> "By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

nées scientifiques, a contesté l'existence d'un état de nécessité et a fait valoir que, même si un tel état de nécessité avait existé, il n'aurait pu conférer le droit de mettre fin au traité en vertu de la convention de Vienne de 1969 sur le droit des traités.

94. Le deuxième argument de la Hongrie était tiré des termes de l'article 61 de la convention de Vienne, ainsi libellé:

«*Article 61*

*Survenance d'une situation rendant l'exécution impossible*

1. Une partie peut invoquer l'impossibilité d'exécuter un traité comme motif pour y mettre fin ou pour s'en retirer si cette impossibilité résulte de la disparition ou destruction définitives d'un objet indispensable à l'exécution de ce traité. Si l'impossibilité est temporaire, elle peut être invoquée seulement comme motif pour suspendre l'application du traité.

2. L'impossibilité d'exécution ne peut être invoquée par une partie comme motif pour mettre fin au traité, pour s'en retirer ou pour en suspendre l'application si cette impossibilité résulte d'une violation, par la partie qui l'invoque, soit d'une obligation du traité, soit de toute autre obligation internationale à l'égard de toute autre partie au traité.»

La Hongrie a déclaré qu'elle ne pouvait «être obligée d'accomplir une tâche pratiquement impossible, à savoir construire un système de barrage sur son propre territoire qui causerait des dommages irréparables à l'environnement». Elle a conclu que:

> «En mai 1992 l'objet essentiel du traité — un investissement économique conjoint qui était compatible avec la protection de l'environnement et qui était exploité par les deux parties conjointement — avait disparu de manière permanente, et [que] le traité était donc devenu impossible à exécuter.»

De l'avis de la Hongrie, il n'est pas nécessaire que la disparition ou la destruction de l'«objet indispensable à l'exécution de ce traité», qu'exige l'article 61 de la convention de Vienne, vise un objet physique; il peut aussi s'agir, suivant les termes utilisés par la Commission du droit international, d'«une situation juridique qui constituait la raison d'être des droits et obligations».

La Slovaquie a prétendu que la seule base sur laquelle l'impossibilité d'exécution puisse être invoquée comme motif de terminaison d'un traité est indiquée à l'article 61 de la convention de Vienne; que le paragraphe 1 de cet article envisage manifestement la «disparition ou destruction» matérielle de l'objet dont il s'agit; et que, en tout état de cause, selon le paragraphe 2, on ne peut invoquer l'impossibilité d'exécution «si cette impossibilité résulte d'une violation, par la partie qui l'invoque, ... d'une obligation aux termes du traité».

95. En ce qui concerne le «changement fondamental de circonstances», la Hongrie se fonde sur l'article 62 de la convention de Vienne sur le droit des traités, ainsi conçu:

"*Article 62*

*Fundamental Change of Circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

*(a)* the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

*(b)* the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

*(a)* if the treaty establishes a boundary; or

*(b)* if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

« *Article 62*

*Changement fondamental de circonstances*

1. Un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion d'un traité et qui n'avait pas été prévu par les parties ne peut pas être invoqué comme motif pour mettre fin au traité ou pour s'en retirer, à moins que:

*a)* l'existence de ces circonstances n'ait constitué une base essentielle du consentement des parties à être liées par le traité; et que

*b)* ce changement n'ait pour effet de transformer radicalement la portée des obligations qui restent à exécuter en vertu du traité.

2. Un changement fondamental de circonstances ne peut pas être invoqué comme motif pour mettre fin à un traité ou pour s'en retirer:

*a)* s'il s'agit d'un traité établissant une frontière; ou

*b)* si le changement fondamental résulte d'une violation, par la partie qui l'invoque, soit d'une obligation du traité, soit de toute autre obligation internationale à l'égard de toute autre partie au traité.

3. Si une partie peut, conformément aux paragraphes qui précèdent, invoquer un changement fondamental de circonstances comme motif pour mettre fin à un traité ou pour s'en retirer, elle peut également ne l'invoquer que pour suspendre l'application du traité.»

La Hongrie a énuméré divers «éléments de fond» présents lors de la conclusion du traité de 1977 qui, selon elle, avaient fondamentalement changé à la date à laquelle elle a notifié qu'elle mettait fin au traité. Parmi ces éléments, elle a évoqué la notion d'«intégration socialiste», dont le traité avait été initialement «le vecteur», mais qui avait par la suite disparu; le «système d'ouvrages opérationnel, unique et indivisible», auquel avait été substitué un projet unilatéral; le fait que la base de l'investissement conjoint prévu avait été radicalement transformée avec l'entrée soudaine des deux Etats dans l'économie de marché; l'attitude de la Tchécoslovaquie qui avait fait d'un «traité-cadre» une «norme immuable»; et enfin, la transformation d'un traité qui tenait compte de la protection de l'environnement en «traité porteur de catastrophes écologiques».

La Slovaquie, quant à elle, a soutenu que les changements signalés par la Hongrie n'avaient pas modifié la nature des obligations prévues initialement au traité, de sorte qu'aucun droit d'y mettre fin ne pouvait découler de ces changements.

96. La Hongrie a en outre fait valoir que la terminaison du traité était justifiée du fait des violations substantielles de ce traité commises par la Tchécoslovaquie, et elle a invoqué à cet égard l'article 60 de la convention de Vienne sur le droit des traités, qui dispose:

"*Article 60*

*Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

*(a)* the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

*(b)* a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

*(c)* any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

*(a)* a repudiation of the treaty not sanctioned by the present Convention; or

*(b)* the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

« *Article 60*

*Extinction d'un traité ou suspension de son application comme conséquence de sa violation*

1. Une violation substantielle d'un traité bilatéral par l'une des parties autorise l'autre partie à invoquer la violation comme motif pour mettre fin au traité ou suspendre son application en totalité ou en partie.

2. Une violation substantielle d'un traité multilatéral par l'une des parties autorise:

*a)* les autres parties, agissant par accord unanime, à suspendre l'application du traité en totalité ou en partie ou à mettre fin à celui-ci:

i) soit dans les relations entre elles-mêmes et l'Etat auteur de la violation,

ii) soit entre toutes les parties;

*b)* une partie spécialement atteinte par la violation à invoquer celle-ci comme motif de suspension de l'application du traité en totalité ou en partie dans les relations entre elle-même et l'Etat auteur de la violation;

*c)* toute partie autre que l'Etat auteur de la violation à invoquer la violation comme motif pour suspendre l'application du traité en totalité ou en partie en ce qui la concerne si ce traité est d'une nature telle qu'une violation substantielle de ses dispositions par une partie modifie radicalement la situation de chacune des parties quant à l'exécution ultérieure de ses obligations en vertu du traité.

3. Aux fins du présent article, une violation substantielle d'un traité est constituée par:

*a)* un rejet du traité non autorisé par la présente convention; ou

*b)* la violation d'une disposition essentielle pour la réalisation de l'objet ou du but du traité.

4. Les paragraphes qui précèdent ne portent atteinte à aucune disposition du traité applicable en cas de violation.

5. Les paragraphes 1 à 3 ne s'appliquent pas aux dispositions relatives à la protection de la personne humaine contenues dans des traités de caractère humanitaire, notamment aux dispositions excluant toute forme de représailles à l'égard des personnes protégées par lesdits traités.»

La Hongrie a prétendu en particulier que la Tchécoslovaquie avait violé le traité de 1977 en procédant à la construction et à la mise en service de la variante C, et en manquant à ses obligations au titre des articles 15 et 19 du traité. La Hongrie a par ailleurs soutenu que la Tchécoslovaquie avait méconnu d'autres conventions internationales (dont la convention sur la réglementation en matière d'eaux frontières du 31 mai 1976) et le droit international général.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 *(c)*, of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

La Slovaquie a nié qu'il y ait eu, de la part de la Tchécoslovaquie ou de sa propre part, une violation substantielle des obligations de protéger la qualité de l'eau et la nature, et a affirmé que la variante C, loin d'être une violation du traité, constituait en fait «la meilleure application possible [du traité] par approximation». Elle a en outre nié que la Tchécoslovaquie ait méconnu d'autres conventions internationales ou le droit international général.

97. La Hongrie a enfin soutenu que les normes du droit international qui se sont imposées par la suite en matière de protection de l'environnement rendaient impossible l'exécution du traité. L'obligation qui existait préalablement de ne pas causer de dommage substantiel au territoire d'un autre Etat était devenue avec le temps, au dire de la Hongrie, une obligation *erga omnes* de prévention des dommages conformément au «principe de précaution». Sur cette base, la Hongrie a fait valoir qu'elle avait été contrainte de mettre fin au traité «en raison du refus de l'autre partie de suspendre les travaux relatifs à la variante C».

La Slovaquie a exposé, en réponse, qu'aucun des nouveaux développements du droit international de l'environnement n'avait engendré de normes de *jus cogens* qui prévaudraient sur le traité. Elle a soutenu en outre que le droit à agir dont la Hongrie entend se prévaloir n'aurait pu en tout état de cause justifier légalement la terminaison du traité en vertu du droit des traités, mais relevait bien davantage «du vocabulaire de l'autoprotection ou des représailles».

* *

98. Telle qu'elle est formulée à l'article 2, paragraphe 1, alinéa *c)*, du compromis, la question posée relève du droit des traités puisque la Cour est priée de dire quels sont les effets juridiques de la notification de terminaison du traité. Il s'agit de savoir si la notification hongroise du 19 mai 1992 a mis fin au traité de 1977 ou n'a pas eu cet effet, faute d'être conforme aux exigences du droit international.

99. La Cour a déjà évoqué la question de l'applicabilité à la présente espèce de la convention de Vienne de 1969 sur le droit des traités. La convention de Vienne n'est pas directement applicable au traité de 1977 dans la mesure où les deux Etats n'ont ratifié cette convention qu'après avoir conclu le traité. En conséquence, seules les règles de la convention qui sont déclaratoires du droit coutumier sont applicables au traité de 1977. Comme la Cour l'a indiqué ci-dessus (voir paragraphe 46), tel est le cas, à bien des égards, des articles 60 à 62 de la convention de Vienne relatifs à l'extinction et à la suspension de l'application des traités. Les Parties en ont aussi largement convenu.

100. Le traité de 1977 ne contient pas de disposition concernant sa terminaison. Rien n'indique non plus que les parties entendaient admettre la possibilité de dénoncer le traité ou de s'en retirer. Au contraire, le traité établit un système durable d'investissement conjoint et d'exploitation

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

*

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

*

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it

conjointe. Par conséquent, les parties n'en ayant pas convenu autrement, le traité ne pouvait prendre fin que pour les motifs énumérés limitativement dans la convention de Vienne.

*

101. La Cour examinera maintenant le premier motif invoqué par la Hongrie, à savoir celui tiré de l'état de nécessité. A cet égard, la Cour se bornera à observer que même si l'existence d'un état de nécessité est établie, il ne peut être mis fin à un traité sur cette base. L'état de nécessité ne peut être invoqué que pour exonérer de sa responsabilité un Etat qui n'a pas exécuté un traité. Même si l'on considère que l'invocation de ce motif est justifiée, le traité ne prend pas fin pour autant; il peut être privé d'effet tant que l'état de nécessité persiste; il peut être inopérant en fait, mais il reste en vigueur, à moins que les parties n'y mettent fin d'un commun accord. Dès que l'état de nécessité disparaît, le devoir de s'acquitter des obligations découlant du traité renaît.

*

102. La Hongrie invoque aussi le principe de l'impossibilité d'exécution tel que traduit à l'article 61 de la convention de Vienne sur le droit des traités. Toutefois elle semble interpréter cette disposition d'une façon qui n'est conforme ni à son libellé ni aux intentions exprimées lors de la conférence diplomatique qui a adopté la convention. Le paragraphe 1 de l'article 61 exige qu'il y ait eu «disparition ou destruction définitives d'un objet indispensable à l'exécution» d'un traité, pour que l'impossibilité d'exécution puisse justifier la terminaison dudit traité. Au cours de la conférence, il a été proposé d'élargir la portée de cet article jusqu'à inclure des cas tels que l'impossibilité d'effectuer certains paiements en raison de difficultés financières graves (*Documents officiels de la conférence des Nations Unies sur le droit des traités, première session, Vienne, 26 mars-24 mai 1968*, doc. A/CONF.39/11, comptes rendus analytiques des séances plénières et des séances de la commission plénière, 62e séance de la commission plénière, p. 393-397). Bien qu'il ait été admis que de telles situations pourraient exclure l'illicéité de l'inexécution, par une partie, de ses obligations conventionnelles, les Etats participants n'ont pas été disposés à en faire un motif d'extinction ou de suspension d'un traité et ont préféré s'en tenir à une conception plus étroite.

103. La Hongrie a soutenu que l'objet essentiel du traité — un investissement économique conjoint compatible avec la protection de l'environnement et exploité conjointement par les deux parties contractantes — avait définitivement disparu, et que l'exécution du traité était ainsi devenue impossible. La Cour n'a pas à déterminer si le mot «objet» figurant à l'article 61 peut aussi être interprété comme visant un régime juridique car en tout état de cause, même si tel était le cas, elle aurait à

would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

*

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

> "Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

conclure qu'en l'espèce ce régime n'avait pas définitivement disparu. Le traité de 1977 — et en particulier ses articles 15, 19 et 20 — offrait en effet aux parties les moyens nécessaires pour procéder à tout moment, par voie de négociation, aux réajustements requis entre impératifs économiques et impératifs écologiques. La Cour ajoutera que, si l'exploitation conjointe de l'investissement n'a plus été possible, c'est, à l'origine, parce que la Hongrie n'a pas exécuté la plupart des travaux qui lui incombaient aux termes du traité de 1977; or le paragraphe 2 de l'article 61 de la convention de Vienne prévoit expressément que l'impossibilité d'exécution ne peut être invoquée pour la terminaison d'un traité par une partie à ce traité lorsque cette impossibilité résulte de la violation par la même partie d'une obligation découlant dudit traité.

*

104. La Hongrie soutient en outre qu'elle était en droit d'invoquer divers événements qui, en se cumulant, auraient constitué un changement fondamental de circonstances. A cet effet, elle a plus particulièrement mentionné des changements profonds de nature politique, le fait que le projet devenait de moins en moins rentable, les progrès des connaissances en matière d'environnement et le développement de nouvelles normes et prescriptions du droit international de l'environnement (voir paragraphe 95 ci-dessus).

La Cour rappellera que, dans l'affaire de la *Compétence en matière de pêcheries*, elle a dit que

> «l'article 62 de la convention de Vienne sur le droit des traités ... peut, à bien des égards, être considéré comme une codification du droit coutumier existant en ce qui concerne la cessation des relations conventionnelles en raison d'un changement de circonstances» (*C.I.J. Recueil 1973*, p. 63, par. 36).

Certes, la situation politique qui prévalait alors a certainement été pertinente au regard de la conclusion du traité de 1977. Mais la Cour rappellera que ce traité prévoyait un programme d'investissement conjoint pour la production d'énergie, la maîtrise des inondations et l'amélioration des conditions de navigation sur le Danube. De l'avis de la Cour, les conditions politiques de l'époque n'étaient donc pas liées à l'objet et au but du traité au point de constituer une base essentielle du consentement des parties et, en se modifiant, de transformer radicalement la portée des obligations qui restaient à exécuter. Il en va de même du système économique en vigueur au moment de la conclusion du traité de 1977. Par ailleurs, même si la rentabilité estimée du projet pouvait apparaître moins élevée en 1992 qu'en 1977, il ne ressort pas du dossier soumis à la Cour qu'elle était condamnée à chuter dans une proportion telle que les obligations conventionnelles des parties s'en fussent trouvées radicalement transformées.

La Cour ne saurait considérer que les nouvelles connaissances acquises

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

*

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

en matière d'environnement et les progrès du droit de l'environnement aient présenté un caractère complètement imprévu. Bien plus, le libellé des articles 15, 19 et 20, conçu dans une perspective d'évolution, a mis les parties en mesure de tenir compte de ces développements et de les appliquer lorsqu'elles exécuteraient ces dispositions conventionnelles.

De l'avis de la Cour, les changements de circonstances que la Hongrie invoque ne sont pas, pris séparément ou conjointement, d'une nature telle qu'ils aient pour effet de transformer radicalement la portée des obligations qui restent à exécuter pour réaliser le projet. Un changement fondamental de circonstances doit être imprévu; les circonstances existant à l'époque où le traité a été conclu doivent avoir constitué une base essentielle du consentement des parties à être liées par le traité. Le fait que l'article 62 de la convention de Vienne sur le droit des traités soit libellé en termes négatifs et conditionnels indique d'ailleurs clairement que la stabilité des relations conventionnelles exige que le moyen tiré d'un changement fondamental de circonstances ne trouve à s'appliquer que dans des cas exceptionnels.

*

105. La Cour examinera maintenant l'argument de la Hongrie selon lequel cet Etat était en droit de mettre fin au traité de 1977 au motif que la Tchécoslovaquie en avait violé les articles 15, 19 et 20 (ainsi que plusieurs autres conventions et règles du droit international général), et que la planification, la construction et la mise en service de la variante C constituaient aussi une violation substantielle du traité de 1977.

106. Pour ce qui est de la branche de l'argumentation de la Hongrie concernant d'autres conventions et règles générales du droit international, la Cour estime que seule une violation substantielle du traité lui-même par un Etat partie audit traité peut mettre l'autre partie en droit de s'en prévaloir pour mettre fin au traité. La violation d'autres règles conventionnelles ou d'autres règles du droit international général peut justifier l'adoption par l'Etat lésé de certaines mesures, y compris des contre-mesures, mais elle ne saurait justifier qu'il soit mis fin au traité sur la base du droit des traités.

107. La Hongrie a soutenu que la Tchécoslovaquie avait violé les articles 15, 19 et 20 du traité en refusant d'engager avec elle des négociations en vue d'adapter le plan contractuel conjoint pour tenir compte des nouveaux progrès scientifiques et juridiques en matière d'environnement. Les articles 15, 19 et 20 mettent à la charge des parties l'obligation de prendre conjointement et de façon continue des mesures appropriées pour assurer la protection de la qualité des eaux, de la nature et des intérêts en matière de pêcheries.

Les articles 15 et 19 prévoient expressément que les obligations qu'ils contiennent seront mises en œuvre selon les modalités prévues au plan contractuel conjoint. Que les parties n'aient pu se mettre d'accord sur ces modalités ne saurait, sur la base du dossier soumis à la Cour, être

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

> "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

attribué uniquement à une seule des parties. De l'avis de la Cour, il n'existe pas d'éléments de preuve suffisants pour conclure que la Tchécoslovaquie aurait constamment refusé de se concerter avec la Hongrie sur l'opportunité ou la nécessité de prendre des mesures de protection de l'environnement. Ce que le dossier fait apparaître, c'est qu'alors que les deux parties se montraient en principe disposées à entreprendre de nouvelles études, en pratique, la Tchécoslovaquie refusait d'envisager que les travaux à Dunakiliti et, plus tard, ceux relatifs à la variante C soient suspendus, cependant que la Hongrie demandait leur suspension comme condition préalable à des recherches sur l'environnement, en expliquant que la poursuite des travaux compromettrait l'issue des négociations. A cet égard, la Cour ne saurait perdre de vue que la Hongrie elle-même, en suspendant les travaux à Nagymaros et Dunakiliti, a contribué à la survenance d'une situation qui ne pouvait être favorable à la conduite de négociations fructueuses.

108. L'argument principal de la Hongrie lorsqu'elle invoque une violation substantielle du traité est la construction et la mise en service de la variante C. Comme la Cour l'a dit au paragraphe 79 ci-dessus, la Tchécoslovaquie n'a violé le traité que lorsqu'elle a détourné les eaux du Danube dans le canal de dérivation en octobre 1992. En construisant les ouvrages qui devaient conduire à la mise en service de la variante C, la Tchécoslovaquie n'a pas agi de façon illicite.

En conséquence, la Cour est d'avis que la notification par la Hongrie, le 19 mai 1992, de la terminaison du traité était prématurée. Il n'y avait pas encore eu de violation du traité par la Tchécoslovaquie; la Hongrie n'était donc pas en droit d'invoquer semblable violation du traité comme motif pour y mettre fin au moment où elle l'a fait.

109. A cet égard, il y a lieu de relever que, d'après la déclaration que la Hongrie a faite le 19 mai 1992, la terminaison du traité de 1977 devait prendre effet à compter du 25 mai 1992, soit six jours plus tard seulement. Les deux Parties s'accordent à reconnaître que les articles 65 à 67 de la convention de Vienne sur le droit des traités, s'ils ne codifient pas le droit coutumier, le reflètent du moins généralement et contiennent certains principes de procédure qui ont pour fondement l'obligation d'agir de bonne foi. Ainsi que la Cour l'a dit dans l'avis consultatif qu'elle a donné sur l'*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte* (affaire dans laquelle la convention de Vienne ne s'appliquait pas):

> « Les délais précis qui peuvent être nécessaires pour s'acquitter des obligations de consultation et de négociation et le préavis de dénonciation exact qui doit être donné varient forcément en fonction des nécessités de l'espèce. En principe, c'est donc aux parties qu'il appartient de déterminer dans chaque cas la durée de ces délais en procédant de bonne foi à des consultations et à des négociations. » (*C.I.J. Recueil 1980*, p. 96, par. 49.)

La terminaison du traité par la Hongrie devait prendre effet six jours

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

*

111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

après sa notification. Or, à aucune de ces deux dates, la Hongrie n'avait subi de préjudice du fait d'actes de la Tchécoslovaquie. La Cour est donc amenée à confirmer sa conclusion selon laquelle la terminaison du traité par la Hongrie était prématurée.

110. La Cour ne saurait pas non plus perdre de vue que la Tchécoslovaquie a commis l'acte internationalement illicite consistant à mettre en service la variante C, à la suite du comportement illicite préalable de la Hongrie elle-même. Comme l'a dit la Cour permanente de Justice internationale:

> «C'est, du reste, un principe généralement reconnu par la jurisprudence arbitrale internationale, aussi bien que par les juridictions nationales, qu'une Partie ne saurait opposer à l'autre le fait de ne pas avoir rempli une obligation ou de ne pas s'être servi d'un moyen de recours, si la première, par un acte contraire au droit, a empêché la seconde de remplir l'obligation en question, ou d'avoir recours à la juridiction qui lui aurait été ouverte.» (*Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 31.)

La Hongrie, par son comportement, avait porté atteinte à son droit de mettre fin au traité; il en serait demeuré ainsi même si la Tchécoslovaquie avait, au moment de la prétendue terminaison du traité, violé une disposition essentielle pour la réalisation de l'objet ou du but du traité.

*

111. La Cour examinera enfin la prétention de la Hongrie selon laquelle cette dernière était en droit de mettre fin au traité de 1977, parce que les nouvelles exigences du droit international relatif à la protection de l'environnement s'opposaient à l'exécution du traité.

112. Aucune des Parties n'a prétendu que des normes impératives du droit de l'environnement soient nées depuis la conclusion du traité de 1977 et la Cour n'aura par suite pas à s'interroger sur la portée de l'article 64 de la convention de Vienne sur le droit des traités. En revanche, la Cour tient à relever que de nouvelles normes du droit de l'environnement, récemment apparues, sont pertinentes pour l'exécution du traité et que les parties pouvaient, d'un commun accord, en tenir compte en appliquant les articles 15, 19 et 20 du traité. Ces articles ne contiennent pas d'obligations spécifiques de faire, mais ils imposent aux parties, en s'acquittant de leurs obligations de veiller à ce que la qualité des eaux du Danube ne soit pas compromise et à ce que la protection de la nature soit assurée, de tenir compte des nouvelles normes en matière d'environnement lorsque ces parties conviennent des moyens à préciser dans le plan contractuel conjoint.

En insérant dans le traité ces dispositions évolutives, les parties ont reconnu la nécessité d'adapter éventuellement le projet. En conséquence,

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* *

le traité n'est pas un instrument figé et est susceptible de s'adapter à de nouvelles normes du droit international. Au moyen des articles 15 et 19, de nouvelles normes en matière d'environnement peuvent être incorporées dans le plan contractuel conjoint.

La responsabilité d'agir de la sorte était une responsabilité conjointe. Les obligations énoncées aux articles 15, 19 et 20 sont, par définition, d'ordre général, et doivent être transformées en obligations spécifiques de faire, à l'issue d'un processus de consultation et de négociation. De ce fait leur mise en œuvre exige une disposition réciproque à discuter de bonne foi des risques réels et potentiels pour l'environnement.

Agir de la sorte est d'autant plus important que la Cour, dans son avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*, a rappelé que «l'environnement n'est pas une abstraction, mais bien l'espace où vivent les êtres humains et dont dépendent la qualité de leur vie et leur santé, y compris pour les générations à venir» (*C.I.J. Recueil 1996*, p. 241, par. 29; voir aussi le paragraphe 53 ci-dessus).

La conscience que l'environnement est vulnérable et la reconnaissance de ce qu'il faut continuellement évaluer les risques écologiques se sont affirmées de plus en plus dans les années qui ont suivi la conclusion du traité. Ces nouvelles préoccupations ont rendu les articles 15, 19 et 20 du traité d'autant plus pertinents.

113. La Cour reconnaît que les Parties s'accordent sur la nécessité de se soucier sérieusement de l'environnement et de prendre les mesures de précaution qui s'imposent, mais elles sont fondamentalement en désaccord sur les conséquences qui en découlent pour le projet conjoint. Dans ces conditions, le recours à une tierce partie pourrait se révéler utile et permettre de trouver une solution, à condition que chacune des Parties fasse preuve de souplesse dans ses positions.

114. Enfin, la Hongrie a soutenu que par leur comportement les deux parties avaient rejeté le traité et qu'un traité bilatéral ne saurait survivre à son rejet par les deux parties. Bien qu'elle ait constaté que tant la Hongrie que la Tchécoslovaquie avaient manqué à leurs obligations découlant du traité de 1977, la Cour estime que ces comportements illicites réciproques n'ont pas mis fin au traité ni justifié qu'il y fût mis fin. La Cour établirait un précédent aux effets perturbateurs pour les relations conventionnelles et l'intégrité de la règle *pacta sunt servanda* si elle devait conclure qu'il peut être unilatéralement mis fin, au motif de manquements réciproques, à un traité en vigueur entre Etats, que les parties ont exécuté dans une très large mesure et à un coût considérable pendant des années. Il en serait à l'évidence autrement si les parties décidaient de mettre fin au traité d'un commun accord. Mais, en l'espèce, si la Hongrie a prétendu mettre fin au traité, la Tchécoslovaquie s'est constamment opposée à cette terminaison, déclarant qu'un tel acte serait dénué de tout effet juridique.

* *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

> "the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-

115. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *c)*, du compromis (voir paragraphe 89) que la notification de terminaison faite par la Hongrie le 19 mai 1992 n'a pas eu pour effet juridique de mettre fin au traité de 1977 et aux instruments y afférents.

* * *

116. Au paragraphe 2 de l'article 2 du compromis, la Cour a été priée de déterminer les conséquences juridiques, y compris les droits et obligations pour les Parties, de l'arrêt qu'elle rendra sur les questions énoncées au paragraphe 1. A l'article 5 du compromis, les Parties sont convenues d'engager des négociations sur les modalités d'exécution de l'arrêt, dès que la Cour l'aura rendu.

117. La Cour doit tout d'abord examiner la question de savoir si la Slovaquie est devenue partie au traité de 1977 en tant qu'Etat successeur de la Tchécoslovaquie. A titre d'argument subsidiaire, la Hongrie a en effet soutenu que, même s'il avait survécu à la notification de terminaison, le traité aurait en tout état de cause cessé d'être en vigueur en tant que traité le 31 décembre 1992, à la suite de la «disparition de l'une des parties». A cette date, la Tchécoslovaquie a cessé d'exister comme entité juridique et, le 1er janvier 1993, la République tchèque et la République slovaque ont vu le jour.

118. De l'avis de la Hongrie: «Aucune règle de droit international ne prévoit la succession automatique à un traité bilatéral après disparition de l'une des parties»; un tel traité ne saurait survivre que si un autre Etat y succède par accord exprès entre ledit Etat et la partie qui s'est maintenue. Or, bien qu'il soit affirmé au deuxième paragraphe du préambule du compromis que

> «la République slovaque est l'un des deux Etats successeurs de la République fédérative tchèque et slovaque et l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros»,

la Hongrie a entendu distinguer entre, d'une part, les droits et obligations établis par le traité de 1977 qui, tels «les droits de propriété ..., perdurent» et, d'autre part, le traité lui-même. Elle a soutenu qu'au cours des négociations qui ont abouti à la signature du compromis la Slovaquie avait proposé un texte dans lequel elle aurait été expressément reconnue comme «Etat successeur de la République fédérative tchèque et slovaque» au regard du traité de 1977, mais que la Hongrie avait rejeté un tel libellé. Elle a fait observer qu'elle n'avait jamais accepté la Slovaquie comme successeur au traité de 1977. La Hongrie s'est référée à des échanges diplomatiques dans lesquels les deux Parties s'étaient mutuellement soumis, en vue d'une négociation au cas par cas, les listes des traités bilaté-

by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights . . . relating to the régime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

raux dont elles souhaitaient respectivement le maintien en vigueur entre elles; et la Hongrie de souligner qu'aucun accord n'était intervenu au sujet du traité de 1977.

119. La Hongrie a exposé qu'aucune règle de succession ne pouvait en l'espèce suppléer à ce défaut de consentement.

Se référant à l'article 34 de la convention de Vienne du 23 août 1978 sur la succession d'Etats en matière de traités qui prévoit «une règle de succession automatique à tous les traités» sur la base du principe de continuité, la Hongrie a fait valoir non seulement qu'elle n'avait jamais signé ou ratifié cette convention, mais aussi que «le principe de succession automatique» posé dans cet article n'était, ni alors ni aujourd'hui, l'énoncé du droit international général et qu'il n'avait jamais été reconnu comme tel.

La Hongrie a également soutenu que le traité de 1977 n'avait pas créé «[d']obligations et [de] droits ... se rapportant au régime d'une frontière» au sens de l'article 11 de cette convention et a relevé que le tracé actuel de la frontière n'a pas été modifié par le traité. Elle a aussi nié que le traité ait un caractère «local» ou qu'il crée des droits «considérés comme attachés [au] territoire», au sens de l'article 12 de la convention de 1978, et qui, en tant que tels, ne seraient pas affectés par une succession d'Etats. La Hongrie a soutenu que le traité de 1977 prévoyait simplement un investissement conjoint. Elle en a conclu qu'il n'existait aucune base sur laquelle le traité aurait pu survivre à la disparition de la Tchécoslovaquie et s'imposer ainsi dans les relations entre elle-même et la Slovaquie.

120. D'après la Slovaquie, le traité de 1977, qui n'a pas pris fin licitement avec la notification hongroise de mai 1992, demeure en vigueur entre elle-même, Etat successeur, et la Hongrie.

La Slovaquie a reconnu qu'aucun accord n'était intervenu entre elle et la Hongrie quant à la succession au traité. Mais elle a, en premier lieu, invoqué «la règle générale de continuité qui s'applique en cas de dissolution»; et elle a, en second lieu, prétendu que le traité était «attach[é] [au] territoire», au sens de l'article 12 de la convention de Vienne de 1978, et qu'il contenait des dispositions relatives à une frontière.

121. A l'appui de son premier argument, la Slovaquie a cité l'article 34 de la convention de Vienne de 1978, qui, d'après elle, est l'énoncé du droit international coutumier et fait de la succession automatique la règle applicable en cas de dissolution d'un Etat lorsque l'Etat prédécesseur a cessé d'exister. La Slovaquie a fait valoir que la pratique des Etats en cas de dissolution tendait à confirmer que la continuité était la règle à suivre en ce qui concerne les traités bilatéraux. La Slovaquie ayant succédé à une partie du territoire de l'ancienne Tchécoslovaquie, telle serait la règle applicable en l'espèce.

122. Le deuxième argument de la Slovaquie repose sur «le principe de la continuité *ipso jure* des traités de caractère territorial ou local». Selon la Slovaquie, cette règle est consacrée à l'article 12 de la convention de 1978 qui dispose notamment ce qui suit:

"*Article 12*
*Other Territorial Regimes*

. . . . . .

2. A succession of States does not as such affect:

*(a)* obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

*(b)* rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics . . . which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States, and as "a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the existence of a "special rule" whereby treaties "intended to establish an objective régime" must be considered as binding on a successor State (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

*

123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Dan-

«*Article 12*
*Autres régimes territoriaux*

. . . . . .

2. Une succession d'Etats n'affecte pas en tant que telle:

*a)* les obligations se rapportant à l'usage de tout territoire, ou aux restrictions à son usage, établies par un traité au bénéfice d'un groupe d'Etats ou de tous les Etats et considérées comme attachées à ce territoire;

*b)* les droits établis par un traité au bénéfice d'un groupe d'Etats ou de tous les Etats et se rapportant à l'usage de tout territoire, ou aux restrictions à son usage, et considérés comme attachés à ce territoire.»

Pour la Slovaquie: «On peut voir dans [cet] article [aussi] l'une de ces dispositions de la convention de Vienne qui codifient le droit international coutumier.» Le traité de 1977 entrerait dans le champ d'application de cette règle en raison de ses «caractéristiques particulières ..., qui le placent dans la catégorie des traités de caractère local ou territorial». La Slovaquie a également affirmé que le traité «cont[enait] des dispositions établissant une frontière et ... établi[ssai]t un régime territorial particulier» dans l'intérêt de tous les Etats riverains du Danube; il s'agirait d'un «traité dispositif créant des droits réels, indépendamment de la personnalité juridique des Etats qui l'ont signé à l'origine». A cet égard, la Slovaquie s'est fondée sur la reconnaissance, par la Commission du droit international, de l'existence d'une «règle spéciale», en vertu de laquelle les traités «qui visent à créer des régimes objectifs» devaient être considérés comme liant l'Etat successeur (*Documents officiels de la Conférence des Nations Unies sur la succession d'Etats en matière de traités*, vol. III, doc. A/CONF.80/16/Add.2, p. 35). Ainsi, de l'avis de la Slovaquie, le traité de 1977 n'était pas de ceux qui auraient pu prendre fin du fait de la disparition de l'une des parties d'origine.

*

123. La Cour ne juge pas nécessaire, aux fins de l'espèce, de discuter du point de savoir si l'article 34 de la convention de 1978 reflète ou non l'état du droit international coutumier. Pour son analyse actuelle, la nature et le caractère particuliers du traité de 1977 présentent davantage de pertinence. Un examen de ce traité confirme que ce dernier, outre qu'il prévoit incontestablement un investissement conjoint, porte principalement sur un projet de construction et d'exploitation conjointe d'un vaste complexe intégré et indivisible d'ouvrages et d'installations sur des parties bien définies des territoires respectifs de la Hongrie et de la Tchécoslovaquie, le long du Danube. Le traité a aussi établi le régime de navigation applicable à un tronçon important d'un cours d'eau international, notamment en faisant désormais passer le chenal principal de navigation internationale par le canal de dérivation. Ce faisant, il a inévitablement créé

ube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" (*ibid.*, p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (*ibid.*, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-

une situation qui a une incidence sur les intérêts des autres utilisateurs du Danube. De plus, les intérêts d'Etats tiers ont été expressément reconnus à son article 18, aux termes duquel les parties se sont engagées à veiller à ce que «la navigation puisse se poursuivre de façon ininterrompue et dans des conditions de sécurité dans le chenal international», conformément aux obligations qui sont les leurs en vertu de la convention relative au régime de la navigation sur le Danube du 18 août 1948.

Dans son commentaire sur le projet d'articles relatifs à la succession d'Etats en matière de traités, adopté à sa vingt-sixième session, la Commission du droit international a précisé que tant la doctrine traditionnelle que les auteurs modernes considéraient qu'une succession d'Etats était sans effet sur «les traités territoriaux» (*Documents officiels de la Conférence des Nations Unies sur la succession d'Etats en matière de traités*, vol. III, doc. A/CONF.80/16/Add.2, p. 30, par. 2). Le projet d'article 12, qui reflète ce principe, a par la suite été repris tel quel dans la convention de Vienne de 1978. La Cour considère que l'article 12 traduit une règle de droit international coutumier; elle prend note de ce qu'aucune des Parties ne le conteste. En outre, la Commission a indiqué que «les traités concernant les droits sur les eaux ou la navigation fluviale sont généralement considérés comme pouvant être compris dans la catégorie des traités territoriaux» (*ibid.*, p. 37, par. 26). La Cour fait observer que l'article 12, en prévoyant seulement, sans se référer au traité lui-même, que les droits et obligations de caractère territorial établis par un traité ne sont pas affectés par une succession d'Etats, pourrait sembler aller dans le sens de la position de la Hongrie plutôt que dans celui de la position slovaque. Néanmoins, la Cour conclut que ce libellé a en fait été retenu pour tenir compte de ce que, en de nombreux cas, les traités qui avaient établi des frontières ou des régimes territoriaux n'étaient plus en vigueur (*ibid.*, p. 29-42). Ceux qui demeuraient en vigueur n'en devaient pas moins lier l'Etat successeur.

Compte tenu de tous ces éléments, la Cour estime qu'au vu de son contenu le traité de 1977 doit être considéré comme établissant un régime territorial au sens de l'article 12 de la convention de Vienne de 1978. Il a créé des droits et obligations «attachés» aux secteurs du Danube auxquels il se rapporte; ainsi, une succession d'Etats ne saurait avoir d'incidence sur le traité lui-même. La Cour en conclut que le traité de 1977 lie la Slovaquie depuis le 1er janvier 1993.

124. Il peut être ajouté que la Slovaquie a également fait valoir que, étant encore une partie constituante de la Tchécoslovaquie, elle a joué un rôle aussi bien dans la mise au point du projet qu'ultérieurement dans la phase la plus critique des négociations avec la Hongrie sur le sort de celui-ci. Il résulte du dossier que le Gouvernement slovaque a adopté des résolutions avant la signature du traité de 1977, pour en préparer l'application, puis, après la signature, pour exprimer son attachement à celui-ci. C'est le premier ministre slovaque qui a pris part à la réunion tenue à Budapest le 22 avril 1991 en tant que plénipotentiaire du gouvernement fédéral pour discuter des questions afférentes au projet. C'est son successeur au poste de

garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo" and considers that the Parties

> "are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

> "Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting . . ., as well as electricity production since the diversion",

premier ministre qui a notifié à son homologue hongrois, par lettre du 30 juillet 1991, la décision du Gouvernement de la République slovaque et celle du Gouvernement de la République fédérative tchèque et slovaque de recourir à la «solution provisoire» (voir le paragraphe 63 ci-dessus); et c'est lui qui a de nouveau écrit, le 18 décembre 1991, au ministre hongrois sans portefeuille, pour réitérer la proposition de constituer, sous les auspices des Communautés européennes, un comité mixte chargé d'examiner les solutions possibles. Le premier ministre slovaque a également écrit au premier ministre hongrois en mai 1992 au sujet de la décision du Gouvernement hongrois de mettre fin au traité, l'informant des résolutions que le Gouvernement slovaque avait adoptées en réaction à cette décision.

Au vu des conclusions dégagées au paragraphe 123 ci-dessus, point n'est besoin pour la Cour de déterminer s'il y a lieu de tirer des conséquences juridiques du rôle marquant ainsi joué par la République slovaque. Il convenait toutefois de rappeler ce rôle.

* * *

125. La Cour en vient maintenant aux autres conséquences juridiques de son arrêt.

A cet égard, la Hongrie a fait valoir que les relations futures entre les Parties, en ce qui concerne la variante C, ne sont pas régies par le traité de 1977. Elle prétend avoir droit, en vertu de la convention de 1976 sur la réglementation en matière d'eaux frontières, à «cinquante pour cent du débit naturel du Danube au point où il traverse la frontière en aval de Čunovo» et considère que les Parties

> «sont tenues d'engager des négociations de façon à parvenir au résultat que les conditions concernant le régime des eaux de la zone en aval de Čunovo jusqu'à l'aval du confluent à Sap deviennent des conditions conjointement définies, comme le prescrit l'article 3 *a)* de la convention de 1976».

La Hongrie a en outre précisé qu'un régime de débit à long terme accepté d'un commun accord devait être «capable d'éviter des dommages, y compris en particulier des dommages à la biodiversité qu'interdit la [convention de Rio de 1992 sur la diversité biologique]». Elle a ajouté qu'une «évaluation conjointe de l'impact sur l'environnement ainsi que de l'avenir des ouvrages de la variante C dans le cadre du développement durable de la région» devrait être effectuée.

126. La Hongrie a également soulevé la question des responsabilités financières pour l'échec du projet initial et a indiqué que les deux Parties acceptent le fait que chacune a des «intérêts patrimoniaux et financiers dans ce qui reste du projet initial, et qu'il faudra procéder à une évaluation comptable». Elle a observé par ailleurs que:

> «D'autres éléments des dommages associés à la variante C en territoire hongrois devront également être pris en compte ..., de même que la production d'électricité depuis le détournement du fleuve»,

and that: "The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum*, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris)*, and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

> "whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.
>
> . . . . . .
>
> Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind."

It indicated that the Gabčíkovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It

et que: «La situation générale est une situation complexe, et la façon la plus simple d'y apporter une solution serait par le règlement d'une somme forfaitaire.»

127. La Hongrie a indiqué que la Slovaquie avait engagé sa responsabilité internationale et devait réparer les dommages subis par la Hongrie du fait de la mise en œuvre de la variante C. Elle s'est référée à cet égard, dans le contexte de la réparation du dommage à l'environnement, à la règle de la *restitutio in integrum*, et a demandé que soient rétablis le «contrôle conjoint des deux Etats sur les installations conservées», ainsi que le «débit des eaux au niveau qui était le sien avant le détournement illicite du fleuve». Elle a également évoqué la réparation des dommages causés à la faune, à la flore, aux sols, aux sous-sols, à la nappe phréatique et à l'aquifère, des dommages subis par la population hongroise du fait de l'accroissement des incertitudes pesant sur son avenir *(pretium doloris)*, ainsi que des dommages engendrés par l'utilisation illégale, aux fins de détournement du Danube, des installations sur lesquelles les deux Parties exerçaient une propriété conjointe.

La Hongrie a enfin demandé la «cessation des faits illicites continus» et la «garantie de non-répétition des mêmes faits», la Cour étant ainsi appelée à ordonner «l'interruption définitive du fonctionnement de la variante C».

128. La Slovaquie a fait valoir pour sa part que la Hongrie devait mettre un terme à son comportement illicite et cesser de faire obstacle à l'application du traité de 1977, compte tenu de la «flexibilité [du traité] et des importantes possibilités d'évolution qu'il ménage, voire des modifications qui pourraient lui être apportées par accord entre les Parties à la suite de négociations futures». Elle a indiqué que des opérations conjointes pourraient redémarrer sur une base convenue d'un commun accord et souligné ce qui suit:

> «que l'ouvrage de Nagymaros soit construit tel qu'il avait été initialement prévu, ou qu'il soit construit ailleurs sous une autre forme, ou même qu'il ne soit pas construit du tout, c'est une question dont les Parties doivent décider, à un moment donné dans l'avenir.
>
> . . . . . .
>
> Pourvu que le canal de dérivation et la centrale hydro-électrique de Gabčíkovo et ses écluses — qui font tous partie du traité d'origine, et non pas de la variante C — demeurent opérationnels et économiquement viables et efficaces, la Slovaquie est prête à négocier au sujet du rôle futur de Dunakiliti et de Čunovo, tout en tenant compte de Nagymaros.»

Elle a précisé que la centrale de Gabčíkovo ne serait pas exploitée en régime de pointe «si la preuve d'un dommage à l'environnement apparaissait clairement et était reconnue par les deux Parties. La Slovaquie a observé que les Parties semblaient s'accorder sur la nécessité de procéder à une évaluation comptable, «de sorte que, guidées par les conclusions de

added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum*. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time*, to its obligations under the Treaty" and that "For compensation to be 'full' . . ., to 'wipe out all the consequences of the illegal act' . . ., a payment of compensation must . . . *be added* to the *restitutio* . . ." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Čunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

*

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to

la Cour en matière de responsabilité, [elles] puissent s'efforcer de parvenir à un règlement global». Elle a ajouté que les Parties devraient s'entendre sur les modalités de paiement des sommes dues.

129. La Slovaquie a indiqué que la Hongrie devait réparer les conséquences dommageables de ses manquements, «qu'il s'agisse de ses suspensions et abandons illicites de travaux ou de sa répudiation formelle du traité à partir de mai 1992», et que la réparation devait prendre la forme d'une *restitutio in integrum*. Elle a précisé que cette dernière «devrait se traduire, sauf si les Parties en conviennent autrement par voie d'accord, par la *reprise* par la Hongrie, *à l'avenir*, de ses obligations conventionnelles», et dit que: «Pour que la réparation soit «intégrale» ..., pour qu'elle «efface toutes les conséquences de l'acte illicite» ..., une indemnisation doit ... *s'ajouter* à la *restitutio*...» L'indemnisation que la Slovaquie demande devrait inclure à la fois les intérêts et le manque à gagner et devrait couvrir les chefs de préjudice suivants, qu'elle a mentionnés à titre indicatif:

1) Pertes causées à la Slovaquie dans le secteur de Gabčíkovo: coûts encourus de 1990 à 1992 par la Tchécoslovaquie pour protéger les structures du projet G/N et des zones adjacentes; coût de l'entretien de l'ancien lit du Danube jusqu'à ce que l'on dispose du nouveau canal pour la navigation de 1990 à 1992; pertes encourues par les autorités tchécoslovaques de navigation en raison de l'impossibilité d'utiliser le canal de dérivation de 1990 à 1992; coûts de construction de la variante C (1990-1992).
2) Pertes causées à la Slovaquie dans le secteur de Nagymaros: pertes subies par la Slovaquie depuis 1992 dans le domaine de la navigation et de la protection contre les inondations du fait que la Hongrie n'a pas poursuivi les travaux.
3) Perte de la production d'électricité.

Selon la Slovaquie, la Hongrie doit en outre «donner des garanties appropriées de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système». Elle a fait valoir dans cette perspective qu'elle est en droit «d'obtenir l'assurance formelle que les faits internationalement illicites de la Hongrie ne se reproduiront pas», et a ajouté que «le maintien de la fermeture du Danube à Čunovo constitue une telle garantie», à moins qu'une assurance équivalente ne soit donnée par la Hongrie «dans le cadre des négociations à intervenir entre les Parties».

*

130. La Cour fait observer que la partie de l'arrêt où elle répond aux questions posées au paragraphe 1 de l'article 2 du compromis revêt un caractère déclaratoire. Elle y traite du comportement *passé* des parties et détermine la licéité ou l'illicéité de ce comportement de 1989 à 1992, ainsi que ses effets sur l'existence du traité.

131. Il revient maintenant à la Cour, sur la base de ses conclusions

determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of

précédentes, d'établir quel devrait être le comportement des Parties *à l'avenir*. La présente partie de l'arrêt est plus normative que déclaratoire, parce qu'elle définit les droits et obligations des Parties. C'est à la lumière de cette définition que les Parties devront rechercher un accord sur les modalités d'exécution de l'arrêt, ainsi qu'elles en sont convenues à l'article 5 du compromis.

* *

132. A cet égard, il est d'une importance primordiale que la Cour ait constaté que le traité de 1977 est toujours en vigueur et régit par conséquent les relations entre les Parties. Ces relations sont certes aussi soumises aux règles des autres conventions pertinentes auxquelles les deux Etats sont parties, aux règles du droit international général et, en l'espèce, aux règles de la responsabilité des Etats; mais elles sont gouvernées avant tout par les règles applicables du traité de 1977 en tant que *lex specialis*.

133. La Cour ne saurait toutefois ignorer qu'aucune des parties n'a pleinement exécuté le traité depuis des années, ni d'ailleurs que les parties, par leurs actes et leurs omissions, ont contribué à créer la situation de fait qui prévaut aujourd'hui. En se prononçant sur les exigences auxquelles le comportement à venir des Parties devra satisfaire en droit, la Cour ne peut négliger de tenir compte de cette situation de fait et des possibilités et impossibilités pratiques qui en résultent.

Cela ne signifie pas que les faits — en l'occurrence, des faits qui découlent de comportements illicites — déterminent le droit. La Cour fait droit au principe *ex injuria jus non oritur* lorsqu'elle conclut que les relations juridiques créées par le traité de 1977 subsistent et ne sauraient en l'espèce être considérées comme annulées par un comportement illicite.

C'est pourquoi il est essentiel de replacer la situation de fait, telle qu'elle s'est développée depuis 1989, dans le contexte de la relation conventionnelle qui s'est maintenue et qui est appelée à évoluer, afin de réaliser son objet et son but dans toute la mesure du possible. Car ce n'est qu'à cette condition qu'il pourra être porté remède à la situation irrégulière due aux manquements des deux Parties à leurs obligations conventionnelles.

134. Ce qui aurait pu être une application correcte du droit en 1989 ou 1992, si l'affaire avait été soumise à la Cour à l'époque, pourrait représenter un mal-jugé en 1997. La Cour ne saurait ignorer le fait que la centrale de Gabčíkovo fonctionne depuis près de cinq ans, que le canal de dérivation qui alimente la centrale reçoit ses eaux d'un réservoir nettement plus petit formé par un barrage qui n'a pas été construit à Dunakiliti mais à Čunovo, et que la centrale est exploitée au fil de l'eau et non en régime de pointe comme il était prévu à l'origine. La Cour ne saurait pas davantage ne pas tenir compte de ce que non seulement l'ouvrage de Nagymaros n'a pas été construit, mais qu'il n'y a plus aucune raison de le construire puisque les deux Parties ont, dans les faits, écarté l'hypothèse d'une exploitation en régime de pointe.

135. Comme la Cour a déjà eu l'occasion de le souligner, le traité de 1977 ne prévoyait pas seulement un plan d'investissement conjoint pour

energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of

la production d'énergie, mais servait également d'autres objectifs: l'amélioration de la navigation sur le Danube, la maîtrise des crues, la régulation de l'évacuation des glaces et la protection de l'environnement naturel. Aucun de ces objectifs ne s'est vu accorder de priorité absolue par rapport aux autres, bien que le traité mette l'accent sur la construction d'un système d'écluses en vue de la production d'énergie. Aucun d'entre eux n'a perdu de son importance. Pour les atteindre, les parties ont accepté d'assumer des obligations de comportement, des obligations de faire et des obligations de résultat.

136. On pourrait dire que parmi les obligations de faire, celles ayant trait à la construction du système d'écluses — dans la mesure où elles n'avaient pas encore été exécutées avant 1992 — ont été dépassées par les événements. La Cour appliquerait le droit en perdant entièrement de vue la réalité si elle devait ordonner le plein rétablissement de ces obligations et la démolition des ouvrages de Čunovo, alors que les structures existantes peuvent adéquatement servir la réalisation des objectifs du traité.

137. C'est d'abord et avant tout aux Parties de décider si tel est bien le cas. Le traité de 1977 prévoyait que ses différents objectifs devraient être atteints par l'effet d'un programme intégré et consolidé, qui devait être précisé dans le plan contractuel conjoint. Ce dernier a été, jusqu'en 1989, fréquemment adapté et amendé pour mieux tenir compte des souhaits des parties. Ce plan a aussi été explicitement décrit comme le moyen de réaliser les objectifs que sont le maintien de la qualité de l'eau et la protection de l'environnement.

138. Le traité de 1977 n'a jamais prévu un système rigide, bien qu'il ait lui-même prescrit la construction d'un système d'écluses à Gabčíkovo et à Nagymaros. A cet égard, toutefois, il convient de prendre en considération les positions adoptées ultérieurement par les parties. Non seulement la Hongrie a insisté pour mettre fin aux travaux de construction à Nagymaros, mais la Tchécoslovaquie a affirmé à différentes reprises au cours des négociations qu'elle était disposée à envisager une limitation, voire l'abandon, de l'exploitation en régime de pointe. Dans cette dernière hypothèse, la construction du barrage de Nagymaros serait devenue inutile. Les parties ont donc reconnu en pratique que les termes exprès du traité lui-même étaient négociables.

139. La Cour est d'avis que les Parties sont juridiquement tenues, au cours des négociations qu'elles mèneront en application de l'article 5 du compromis, d'envisager dans le contexte du traité de 1977 de quelle façon elles peuvent servir au mieux les objectifs multiples du traité, en gardant à l'esprit qu'ils devraient tous être atteints.

140. Il est clair que les incidences du projet sur l'environnement et ses implications pour celui-ci seront nécessairement une question clef. Les nombreux rapports scientifiques présentés à la Cour par les Parties, même si leurs conclusions sont souvent contradictoires, fournissent amplement la preuve que ces incidences et ces implications sont considérables.

Aux fins de l'évaluation des risques écologiques, ce sont les normes actuelles qui doivent être prises en considération. Non seulement le libellé

Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

> "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports 1969*, p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and

des articles 15 et 19 le permet, mais il le prescrit même dans la mesure où ces articles mettent à la charge des parties une obligation continue, et donc nécessairement évolutive, de maintenir la qualité de l'eau du Danube et de protéger la nature.

La Cour ne perd pas de vue que, dans le domaine de la protection de l'environnement, la vigilance et la prévention s'imposent en raison du caractère souvent irréversible des dommages causés à l'environnement et des limites inhérentes au mécanisme même de réparation de ce type de dommages.

Au cours des âges, l'homme n'a cessé d'intervenir dans la nature pour des raisons économiques et autres. Dans le passé, il l'a souvent fait sans tenir compte des effets sur l'environnement. Grâce aux nouvelles perspectives qu'offre la science et à une conscience croissante des risques que la poursuite de ces interventions à un rythme inconsidéré et soutenu représenterait pour l'humanité — qu'il s'agisse des générations actuelles ou futures —, de nouvelles normes et exigences ont été mises au point, qui ont été énoncées dans un grand nombre d'instruments au cours des deux dernières décennies. Ces normes nouvelles doivent être prises en considération et ces exigences nouvelles convenablement appréciées non seulement lorsque des Etats envisagent de nouvelles activités, mais aussi lorsqu'ils poursuivent des activités qu'ils ont engagées dans le passé. Le concept de développement durable traduit bien cette nécessité de concilier développement économique et protection de l'environnement.

Aux fins de la présente espèce, cela signifie que les Parties devraient, ensemble, examiner à nouveau les effets sur l'environnement de l'exploitation de la centrale de Gabčíkovo. En particulier, elles doivent trouver une solution satisfaisante en ce qui concerne le volume d'eau à déverser dans l'ancien lit du Danube et dans les bras situés de part et d'autre du fleuve.

141. Il n'appartient pas à la Cour de déterminer quel sera le résultat final des négociations à mener par les Parties. Ce sont les Parties elles-mêmes qui doivent trouver d'un commun accord une solution qui tienne compte des objectifs du traité — qui doivent être atteints de façon conjointe et intégrée — de même que des normes du droit international de l'environnement et des principes du droit relatif aux cours d'eau internationaux. La Cour rappellera dans ce contexte ce qu'elle a dit dans les affaires du *Plateau continental de la mer du Nord*:

> «les parties ont l'obligation de se comporter de telle manière que la négociation ait un sens, ce qui n'est pas le cas lorsque l'une d'elles insiste sur sa propre position sans envisager aucune modification» (*C.I.J. Recueil 1969*, p. 47, par. 85).

142. Ce que la règle *pacta sunt servanda*, telle que reflétée à l'article 26 de la convention de Vienne de 1969 sur le droit des traités, exige en l'espèce des Parties, c'est de trouver d'un commun accord une solution dans le cadre de coopération que prévoit le traité.

L'article 26 associe deux éléments, qui sont d'égale importance. Il dispose que: «Tout traité en vigueur lie les parties et doit être exécuté par

must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state

elles de bonne foi.» De l'avis de la Cour, ce dernier élément implique qu'au cas particulier c'est le but du traité, et l'intention dans laquelle les parties ont conclu celui-ci, qui doivent prévaloir sur son application littérale. Le principe de bonne foi oblige les Parties à l'appliquer de façon raisonnable et de telle sorte que son but puisse être atteint.

143. Au cours de ce différend, les deux Parties ont sollicité l'aide de la Commission des Communautés européennes. Du fait que les Parties ont adopté des positions diamétralement opposées sur le point de savoir ce que devait être le résultat des pourparlers trilatéraux qui étaient envisagés, ceux-ci ont échoué. Lorsque, une fois le présent arrêt rendu, les deux Parties engageront des négociations bilatérales sans conditions préalables, elles pourront bénéficier de l'assistance et de l'expertise d'une tierce partie. L'acceptation d'une telle aide par les Parties attesterait de la bonne foi marquant les négociations bilatérales qu'elles mèneront pour donner effet à l'arrêt de la Cour.

144. Le traité de 1977 ne prévoit pas seulement un programme d'investissement conjoint, il établit aussi un régime. Selon le traité, les principaux ouvrages du système d'écluses sont la propriété conjointe des parties; ils seront gérés en tant qu'unité unique coordonnée; et les bénéfices du projet seront partagés à parts égales.

Puisque la Cour a conclu que le traité est toujours en vigueur et qu'aux termes de celui-ci le régime conjoint en est un élément fondamental, elle est d'avis qu'à moins que les Parties n'en disposent autrement un tel régime devrait être rétabli.

145. Le paragraphe 1 de l'article 10 du traité dispose que les ouvrages du système d'écluses constituant la propriété commune des parties contractantes seront gérés, en tant qu'unité coordonnée et conformément aux procédures opérationnelles arrêtées d'un commun accord, par l'organisme de gestion agréé de la partie contractante sur le territoire de laquelle les ouvrages auront été construits. Le paragraphe 2 du même article énonce que les ouvrages du système d'écluses appartenant à l'une des parties contractantes seront gérés ou entretenus indépendamment par les organismes de cette partie selon des modalités arrêtées d'un commun accord.

La Cour estime que les ouvrages de Čunovo devraient devenir une unité exploitée conjointement au sens du paragraphe 1 de l'article 10, compte tenu de leur rôle central dans le fonctionnement de ce qui reste du projet et dans le régime de gestion des eaux. Le barrage de Čunovo a assumé le rôle qui avait été prévu à l'origine pour les ouvrages de Dunakiliti, et il devrait donc bénéficier d'un statut analogue.

146. La Cour conclut également que la variante C, qu'elle a estimé fonctionner d'une manière incompatible avec le traité, devrait être mise en conformité avec ce dernier. L'association de la Hongrie, sur un pied d'égalité, à l'exploitation, à la gestion et aux bénéfices de la variante C, aura pour effet que le statut de fait qui s'applique à cette dernière fera place à un régime conventionnel.

Il ressort des différents éléments du dossier qu'en l'état actuel des

of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly doc. A/51/869 of 11 April 1997.)

* *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

informations soumises à la Cour la variante C semble pouvoir fonctionner d'une façon qui permette à la fois l'exploitation économique du système de production d'électricité et la satisfaction des préoccupations écologiques essentielles.

Régulariser la variante C en en faisant une partie intégrante d'un système d'ouvrages opérationnel unique et indivisible apparaît également nécessaire pour donner de nouveau effet à l'article 9 du traité, qui prévoit que les parties contractantes participeront, à parts égales, à l'utilisation et aux avantages du système d'écluses.

147. Le rétablissement du régime conjoint reflétera aussi de façon optimale le concept d'une utilisation conjointe des ressources en eau partagées pour atteindre les différents objectifs mentionnés dans le traité et ce, conformément au paragraphe 2 de l'article 5 de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation, aux termes duquel:

> «Les Etats du cours d'eau participent à l'utilisation, à la mise en valeur et à la protection d'un cours d'eau international de manière équitable et raisonnable. Cette participation comporte à la fois le droit d'utiliser le cours d'eau et le devoir de coopérer à sa protection et à sa mise en valeur, comme prévu dans les présents articles.» (Assemblée générale, doc. A/51/869 du 11 avril 1997.)

* *

148. Jusqu'ici, la Cour a indiqué quels devraient être, d'après elle, les effets de sa décision suivant laquelle le traité de 1977 est toujours en vigueur. Elle en vient maintenant aux conséquences juridiques des actes internationalement illicites commis par les Parties.

149. Dans son arrêt du 13 septembre 1928 en l'affaire relative à l'*Usine de Chorzów*, la Cour permanente de Justice internationale a dit:

> «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis» (*C.P.J.I. série A n° 17*, p. 47).

150. La réparation doit «autant que possible» effacer toutes les conséquences de l'acte illicite. En l'espèce, les conséquences des actes illicites commis par les deux Parties seront effacées «autant que possible» si ces dernières reprennent leur coopération pour l'utilisation des ressources en eau partagées du Danube et si le programme pluridimensionnel d'utilisation, de mise en valeur et de protection du cours d'eau, en tant qu'unité unique coordonnée, est réalisé de manière équitable et raisonnable. Ce que peuvent faire les Parties, c'est rétablir une gestion conjointe de ce qui reste du projet. A cette fin, il leur est loisible, d'un commun accord, de conserver les ouvrages de Čunovo, en apportant des changements dans le mode d'exploitation du système pour ce qui est de la répartition de l'eau et de l'électricité, et de ne pas construire les ouvrages de Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

151. La Cour a été priée par les deux Parties de déterminer les conséquences de son arrêt en ce qui est du paiement de dommages et intérêts. Aux termes du préambule du compromis, les Parties sont convenues que la Slovaquie est l'unique Etat successeur de la Tchécoslovaquie en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros. La Slovaquie peut donc être tenue de verser des indemnités, non seulement pour ses propres faits illicites, mais aussi pour ceux de la Tchécoslovaquie, et elle a le droit d'être indemnisée des dommages subis tant par la Tchécoslovaquie que par elle-même en raison du comportement illicite de la Hongrie.

152. La Cour n'a pas été priée à ce stade de déterminer le montant des dommages et intérêts dus, mais d'indiquer sur quelle base ils doivent être versés. Les deux Parties ont prétendu avoir subi des pertes financières considérables et elles demandent toutes deux à en être indemnisées.

Il est une règle bien établie du droit international, qu'un Etat lésé est en droit d'être indemnisé, par l'Etat auteur d'un fait internationalement illicite, des dommages résultant de celui-ci. Dans le présent arrêt, la Cour a conclu que les deux Parties avaient commis des actes internationalement illicites et elle a constaté que ceux-ci sont à l'origine des dommages subis par les Parties; en conséquence, la Hongrie et la Slovaquie sont toutes deux tenues de verser des indemnités et sont toutes deux en droit d'en recevoir.

La Slovaquie est donc en droit d'être indemnisée des dommages subis tant par la Tchécoslovaquie que par elle-même du fait de la décision hongroise de suspendre puis d'abandonner les travaux à Nagymaros et à Dunakiliti, car ces agissements ont occasionné le report de la mise en service de la centrale de Gabčíkovo et, une fois celle-ci mise en service, des changements dans son mode de fonctionnement.

La Hongrie est en droit d'être indemnisée des dommages qu'elle a subis du fait du détournement du Danube car la Tchécoslovaquie, en mettant en service la variante C, et la Slovaquie, en la maintenant en service, ont privé la Hongrie de sa part légitime de ressources en eau partagées et ont exploité ces ressources essentiellement à leur profit.

153. Toutefois, compte tenu de ce que les Parties ont commis des actes illicites croisés, la Cour tient à faire observer que la question de l'indemnisation pourrait être résolue de façon satisfaisante, dans le cadre d'un règlement d'ensemble, si chacune des Parties renonçait à toutes ses demandes et contre-demandes d'ordre financier ou les annulait.

154. La Cour tient en même temps à souligner que le règlement des comptes concernant la construction des ouvrages est une question distincte de celle de l'indemnisation et doit être effectué conformément au traité de 1977 et aux instruments y afférents. Si la Hongrie participe à l'exploitation du complexe de Čunovo et reçoit sa part de bénéfices, elle devra payer une part proportionnelle des coûts de construction et de fonctionnement.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

*Finds* that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judge* Herczegh;

B. By nine votes to six,

*Finds* that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

*Finds* that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,

*Finds* that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

155. Par ces motifs,

LA COUR,

1) Vu le paragraphe 1 de l'article 2 du compromis,

A. Par quatorze voix contre une,

*Dit* que la Hongrie n'était pas en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont elle était responsable aux termes du traité du 16 septembre 1977 et des instruments y afférents;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Herczegh, *juge*;

B. Par neuf voix contre six,

*Dit* que la Tchécoslovaquie était en droit de recourir, en novembre 1991, à la «solution provisoire» telle que décrite aux termes du compromis;

POUR: M. Weeramantry, *Vice-Président*; MM. Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Schwebel, *Président*; MM. Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek, *juges*;

C. Par dix voix contre cinq,

*Dit* que la Tchécoslovaquie n'était pas en droit de mettre en service, à partir d'octobre 1992, cette «solution provisoire»;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek, *juges*;

CONTRE: MM. Oda, Koroma, Vereshchetin, Parra-Aranguren, *juges*; M. Skubiszewski, *juge* ad hoc;

D. Par onze voix contre quatre,

*Dit* que la notification, le 19 mai 1992, de la terminaison du traité du 16 septembre 1977 et des instruments y afférents par la Hongrie n'a pas eu pour effet juridique d'y mettre fin;

POUR: M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Schwebel, *Président*; MM. Herczegh, Fleischhauer, Rezek, *juges*;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

*Finds* that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

*Finds* that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,

*Finds* that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

D. By twelve votes to three,

*Finds* that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Oda, Koroma, Vereshchetin;

2) Vu le paragraphe 2 de l'article 2 et l'article 5 du compromis,

A. Par douze voix contre trois,

*Dit* que la Slovaquie, en tant que successeur de la Tchécoslovaquie, est devenue partie au traité du 16 septembre 1977 à compter du 1er janvier 1993;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, Rezek, *juges*;

B. Par treize voix contre deux,

*Dit* que la Hongrie et la Slovaquie doivent négocier de bonne foi en tenant compte de la situation existante et doivent prendre toutes mesures nécessaires à l'effet d'assurer la réalisation des objectifs du traité du 16 septembre 1977, selon des modalités dont elles conviendront;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*;

C. Par treize voix contre deux,

*Dit* que, sauf si les Parties en conviennent autrement, un régime opérationnel conjoint doit être établi conformément au traité du 16 septembre 1977;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*;

D. Par douze voix contre trois,

*Dit* que, sauf si les Parties en conviennent autrement, la Hongrie devra indemniser la Slovaquie pour les dommages subis par la Tchécoslovaquie et par la Slovaquie du fait de la suspension et de l'abandon par la Hongrie de travaux qui lui incombaient; et la Slovaquie devra indemniser la Hongrie pour les dommages subis par cette dernière du fait de la mise en service de la «solution provisoire» par la Tchécoslovaquie et de son maintien en service par la Slovaquie;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Oda, Koroma, Vereshchetin, *juges*;

E. By thirteen votes to two,

*Finds* that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

*(Signed)* Stephen M. SCHWEBEL,
President.

*(Signed)* Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOUI and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

*(Initialled)* S.M.S.

*(Initialled)* E.V.O.

---

E. Par treize voix contre deux,

*Dit* que le règlement des comptes concernant la construction et le fonctionnement des ouvrages doit être effectué conformément aux dispositions pertinentes du traité du 16 septembre 1977 et des instruments y afférents, compte dûment tenu des mesures qui auront été prises par les Parties en application des points 2 B et 2 C du présent dispositif.

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*.

Fait en anglais et en français, le texte anglais faisant foi, au Palais de la Paix, à La Haye, le vingt-cinq septembre mil neuf cent quatre-vingt-dix-sept, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République de Hongrie et au Gouvernement de la République slovaque.

Le Président,
*(Signé)* Stephen M. SCHWEBEL.

Le Greffier,
*(Signé)* Eduardo VALENCIA-OSPINA.

M. SCHWEBEL, Président, et M. REZEK, juge, joignent des déclarations à l'arrêt.

M. WEERAMANTRY, Vice-Président, et MM. BEDJAOUI et KOROMA, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN et PARRA-ARANGUREN, juges, et M. SKUBISZEWSKI, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

*(Paraphé)* S.M.S.
*(Paraphé)* E.V.O.

# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

# RECUEIL DES SENTENCES ARBITRALES

**Trail smelter case (United States, Canada)**

16 April 1938 and 11 March 1941

VOLUME III pp. 1905-1982

NATIONS UNIES - UNITED NATIONS
Copyright (c) 2006

## LX.

## TRAIL SMELTER CASE [1].

**PARTIES: United States of America, Canada.**

**SPECIAL AGREEMENT: Convention of Ottawa, April 15, 1935.**

**ARBITRATORS: Charles Warren (U.S.A.), Robert A. E. Greenshields (Canada), Jan Frans Hostie (Belgium).**

**AWARD: April 16, 1938, and March 11, 1941.**

Canadian company.—Smelter operated in Canada.—Fumes.—Damages caused on United States territory.—Recourse to arbitration.—Date of damages.—Evidence.—Cause.—Effect.—Indirect and remote damage.—Violation of Sovereignty.—Interpretation of Special Agreement as to scope.—Preliminary correspondence.—Interest.—Future régime applicable.—Appointment of technical consultants.—Law applicable.—National law.—Matters of procedure.—Convention, Article IV.—Reference to American law.—Provisional decision.—Certain questions finally settled.—*Res judicata*.—Error in law.—Admissibility of revision.—Powers of tribunal.—Discovery of new facts.—Denial.—Costs of investigation.—Claim for indemnity.—Such costs no part of damage.—Claim for request to stop the nuisance.—Law applicable.—Coincidence of national and international laws.—Responsibility of States.—Air and water pollution.—Protection of sovereignty.—Institution of régime to prevent future damages.—Indemnity or compensation on account of decision or decisions rendered.

[1] For bibliography, index and tables, see end of this volume.

## Special agreement.

CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C. [1]

*Signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 1935*

The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and

Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and

Recognizing the desirability and necessity of effecting a permanent settlement,

Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America:

PIERRE DE L. BOAL, Chargé d'Affaires ad interim of the United States of America at Ottawa;

His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada:

The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

### ARTICLE I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.

### ARTICLE II.

The Governments of the United States and of Canada, hereinafter referred to as "the Governments", mutually agree to constitute a tribunal hereinafter referred to as "the Tribunal", for the purpose of deciding the questions

[1] U. S. Treaty Series No. 893.

referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907.

The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments.

The Governments may each designate a scientist to assist the Tribunal.

ARTICLE III.

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

ARTICLE IV.

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

ARTICLE V.

The procedure in this adjudication shall be as follows:

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been com-

pleted, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

ARTICLE VI.

When the development of the record is completed in accordance with Article V hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

ARTICLE VII.

After the delivery of the record to the members of the Tribunal in accordance with Article VI the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will consider the individual or joint requests of the Agents of the two Governments.

ARTICLE VIII.

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths. The Tribunal shall have authority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

ARTICLE IX.

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure. In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

ARTICLE X.

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years.

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions

ARTICLE XI.

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusions in respect to the Questions, and within a period of three months after the conclusions of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Upon receiving such report, the Governments may make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report.

ARTICLE XII.

The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal.

ARTICLE XIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal and the expenses of its national member and scientific assistant.

All other expenses, which by their nature are a charge on both Governments, including the honorarium of the neutral member of the Tribunal, shall be borne by the two Governments in equal moieties.

ARTICLE XIV.

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Ottawa as soon as possible.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

Done in duplicate at Ottawa this fifteenth day of April, in the year of our Lord, one thousand, nine hundred and thirty-five.

[*seal*] PIERRE DE L. BOAL.
[*seal*] R. B. BENNETT.

# TRAIL SMELTER ARBITRAL TRIBUNAL.

## DECISION

REPORTED ON APRIL 16, 1938, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal, "a jurist of repute", and the two Governments were to choose jointly a Chairman who should be a "jurist of repute and neither a British subject nor a citizen of the United States".

The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the District of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the Tribunal "to report to the Governments its final decisions .... and within a period of three months after the conclusion of the proceedings", *i.e.*, on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of the two Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

The Tribunal is prepared now to decide finally Question No. 1, propounded to it in Article III of the Convention; and it hereby reports its final decision on Question No. 1, its temporary decision on Questions No. 2 and No. 3, and provides for a temporary régime thereunder and for a final decision on these questions and on Question No. 4, within three months from October 1, 1940.

Wherever, in this decision, the Tribunal has referred to decisions of American courts or has followed American law, it has acted pursuant to Article IV as follows: "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America ...."

In all the consideration which the Tribunal has given to the problems presented to it, and in all the conclusions which it has reached, it has been guided by that primary purpose of the Convention expressed in the words of Article IV, that the Tribunal "shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned", and further expressed in the opening paragraph of the Convention as to the "desirability and necessity of effecting a permanent settlement" of the controversy.

The controversy is between two Governments involving damage occurring in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada), for which damage the latter has assumed by the Convention an international responsibility. In this controversy, the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of

"interested parties", in Article VIII of the Convention and although the damage suffered by individuals may, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Jugdment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28).

## PART ONE.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the International Boundary Line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary on the American side of the line and on the east side of the river, is a place known as Boundary; and four or five miles south of the boundary on the east bank of the river is a farm named after its owner, Stroh farm. These three places are specially noted since they are the locations of automatic sulphur dioxide recorders installed by one or other of the Governments. The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies, and automatic sulphur dioxide recorders have been installed here and at a point on the west bank northerly of Northport. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southwest to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side—Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1936 inclusive averaged slightly below seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The average crop-year precipitation over the same period is slightly over sixteen inches, with a variation from a minimum of 10.10 inches in 1929 to a maximum of 24.01 in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1932, 5.43 inches; in 1933, 3.03 inches; in 1934, 2.74 inches; in 1933, 2.02 inches; in 1929, 4.44 inches. The average snowfall was reported in 1915 by United States Government agents as fifty-eight inches at Northport. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74 per cent at 5 a.m. and an average minimum of 26 per cent at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934, 1935, and 1936, at Northport was as follows: In the months of November, December, January and February, the lowest temperature was 1° (in January, 1936), and the highest was 60° (in November 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935), and the highest was 102° (in August, 1934).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is treated in detail in a later part of this decision and need not be considered further at this point.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. The population of Northport, according to the United States Census in 1900, was 787; in 1910, it was 476; in 1920, it was 906; and in 1930, it was 391. The population of the area which may be termed, in general, the "Northport Area", according to the United States Census in 1910, was 1,448; in 1920, it was 2,142; and in 1930, it was 1,121. The population of this area as divided into the Census Precincts was as follows:

| | *1900* | *1910* | *1920* | *1930* |
|---|---|---|---|---|
| Boundary | 74 | 91 | 73 | 87 |
| Northport | 845 | 692 | 1,093 | 510 |
| Nigger Creek | . . . | 27 | 97 | 29 |
| Frontier | . . . | 103 | 71 | 22 |
| Cummins | . . . | . . . | 244 | 89 |
| Doyle | . . . | 187 | 280 | 195 |
| Deep Creek | 65 | 119 | 87 | 81 |
| Flat Creek | 52 | 126 | 137 | 71 |
| Williams | 71 | 103 | 60 | 37 |

(It is to be noted that the precincts immediately adjacent to the boundary line were Frontier, Nigger Creek and Boundary; and that Frontier and Nigger Creek Precincts are at the present time included in the Northport Precinct.)

The area of all land in farms in the above precincts, according to the United States Census of Agriculture in 1925 was 21,551 acres; in 1930, 28,641 acres; and in 1935, 24,772 acres. The area in crop land in 1925 was 3,474 acres; in 1930, 4,285 acres; and in 1933, 4,568 acres. The farm population in 1925 was 496; in 1930, 603; and in 1935, 466.

In the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek prior to 1935 Census), the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; and in 1935, 5,666 acres. The area in crop land in 1925 was 798 acres; in 1930, 1,227 acres; and in 1935, 963 acres. The farm population in 1925 was 149; in 1930, 193; and in 1935, 145.

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although, as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, during the Great War, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

The record and evidence placed before the Tribunal does not disclose in detail claims for damage on account of fumigations which were made between 1896 and 1908, but it does appear that there was considerable litigation in Stevens County courts based on such claims. It also appears in evidence that prior to 1908, the company had purchased smoke easements from sixteen owners of land in the vicinity covering 2,330 acres. It further appears that from 1916 to 1921, claims for damages were made and suits

were brought in the courts, and additional smoke easements were purchased from thirty-four owners of land covering 5,556.7 acres. These various smoke easements extended to lands lying four or five miles north and three miles south and three miles east of Northport and on both sides of the river, and they extended as far as the boundary line.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

The most important industry in the area in the past has been the lumber industry. It had its beginning with the building of the Spokane & Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. It appears from the record in 1929 that, within a radius covering some thirty-five thousand acres surrounding Northport, fifteen out of eighteen sawmills had been abandoned and only three of the small type were in operation. The causes of this condition are in dispute. A detailed description of the forest conditions is given in a later part of this decision and need not be further discussed here.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year (with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying

business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early as 1917, proved a failure.

In 1896, a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or $SO_2$.)

From 1925, at least, to the end of 1931, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter.

As early as 1925 (and there is some evidence earlier) suggestions were made to the Trail Smelter that damage was being done to property in the northern part of Stevens County. The first formal complaint was made, in 1926, by one J. H. Stroh, whose farm (mentioned above) was located a few miles south of the boundary line. He was followed by others, and the Smelter Company took the matter up seriously and made a more or less thorough and complete investigation. This investigation convinced the Trail Smelter that damage had been and was being done, and it proceeded to negotiate with the property owners who had made complaints or claims with a view to settlement. Settlements were made with a number of farmers by the payment to them of different amounts. This condition of affairs seems to have lasted during a period of about two years. In June, 1928, the County Commissioners of Stevens County adopted a resolution relative to the fumigations; and on August 25, 1928, there was brought into existence an association known as the "Citizens' Protective Association". Due to the creation of this association or to other causes, no settlements were made thereafter between the Trail Smelter and individual claimants, as the articles of association contained a provision that "no member herein shall make any settlement for damages sought to be secured herein, unless the written consent of the majority of the Board of Directors shall have been first obtained".

It has been contended that either by virtue of the Constitution of the State of Washington or of a statute of that State, the Trail Smelter (a Canadian corporation) was unable to acquire ownership or smoke easements over real estate, in the State of Washington, in any manner. In regard to this statement, either as to the fact or as to the law, the Tribunal expresses no opinion and makes no ruling.

The subject of fumigations and damage claimed to result from them was first taken up officially by the Government of the United States in June, 1927, in a communication from the Consul General of the United States at Ottawa, addressed to the Government of the Dominion of Canada.

In December, 1927, the United States Government proposed to the Canadian Government that problems growing out of the operation of the Smelter at Trail should be referred to the International Joint Commission, United States and Canada, for investigation and report, pursuant to Article IX of the Convention of January 11, 1909, between the United States and Great Britain. Following an extensive correspondence between the two Governments, they joined in a reference of the matter to that Commission under date of August 7, 1928. It may be noted that Article IX of the Convention of January 11, 1909, provides that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. . . . Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: First, the extent to which property in the State of Washington has been damaged by fumes from Smelter at Trail, B.C.; second, the amount of indemnity which would compensate United States interests in the State of Washington for past damages.

The International Joint Commission sat at Northport to take evidence and to hear interested parties in October, 1928; in Washington, D.C., in April, 1929; at Nelson in British Columbia in November, 1929; and final sittings were held in Washington, D.C., on January 22 and February 12, 1930. Witnesses were heard; reports of the investigations made by scientists were put in evidence; counsel for both the United States and Canada were heard, and briefs submitted; and the whole matter was taken under advisement by the Commission. On February 28, 1931, the Report of the Commission was signed and delivered to the proper authorities. The report was unanimous and need not be considered in detail.

Paragraph 2 of the report, in part, reads as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the Smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect of such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

In paragraph 4 of the report, the Commission recommended a method of indemnifying persons in Washington State for damage which might be caused by operations of the Trail Smelter after the first of January, 1932, as follows:

> Upon the complaint of any persons claiming to have suffered damage by the operations of the company after the first of January, 1932, it is recommended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith.

This recommendation, apparently, did not commend itself to the interested parties. In any event, it does not appear that any claims were made after the first of January, 1932, as contemplated in paragraph 4 of the report.

In paragraph 5 of the report, the Commission recommended that the Consolidated Mining and Smelting Company of Canada, Limited, should proceed to erect and put in operation certain sulphuric acid units for the purpose of reducing the amount of sulphur discharged from the stacks. It appears, from the evidence in the present case, that the General Manager of the company had made certain representations before the Commission as to the intentions of the company in this respect. There is a conflict of testimony as to the exact scope of these representations, but it is unnecessary now to consider the matter further, since, whatever they were, the company proceeded after 1930 to make certain changes and additions. With the intention and purpose of lessening the sulphur contents in the smoke emissions at the stacks, the following installations (amongst others) have been made in the plant since 1931; three 112 tons sulphuric acid plants in 1931; ammonia and ammonium sulphate plant in 1931; two units for reduction and absorption of sulphur in the zinc smelter, in 1936 and 1937, and an absorption plant for gases from the lead roasters in June, 1937. In addition, in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop-growing season has been in operation, particularly since May, 1934. It is to be noted that the chief sulphur contents are in the gases from the lead smelter, but that there is still a certain amount of sulphur content in the fumes from the zinc smelter. As a result of the above, as well as of depressed business conditions, the tons of sulphur emitted into the air from the plants fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931, and to 3,400 tons in 1932. The emission of sulphur rose in 1933 to 4,000 tons, and in 1934 to nearly 6,300 tons, and in 1935 to 6,800 tons. In 1936, it fell to 5,600 tons; and in January to July, 1937 inclusive, it was 4,750 tons.

Two years after the signing of the International Joint Commission's Report of February 28, 1931, the United States Government on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring, and diplomatic negotiations were renewed. Correspondence was exchanged between the two countries, and although that correspondence has its importance, it is sufficient here to say, that it resulted in the signing of the present Convention.

Consideration of the terms of that Convention is given more in detail in the later parts of the Tribunal's decision.

## PART TWO.

The first question under Article III of the Convention which the Tribunal is required to decide is as follows:

> (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor.

In the determination of the first part of this question, the Tribunal has been obliged to consider three points, *viz.*, the existence of injury, the cause of the injury, and the damage due to the injury.

The Tribunal has interpreted the word "occurred" as applicable to damage caused prior to January 1, 1932, in so far as the effect of the injury made itself felt after that date. The words "Trail Smelter" are interpreted as meaning the Consolidated Mining and Smelting Company of Canada, Limited, its successors and assigns.

In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in Story Parchment Company *v.* Paterson Parchment Paper Company (1931), 282 U. S. 555 as follows: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (See also the decision of the Supreme Court of Michigan in Allison *v.* Chandler, 11 Michigan 542, quoted with approval by the United States Supreme Court, as follows: "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. . . . Juries are allowed to act upon probable and inferential, as well as direct and positive proof.")

The Tribunal has first considered the items of indemnity claimed by the United States in its Statement (p. 52) "on account of damage occurring since January 1, 1932, covering: (a) Damages in respect of cleared land and improvements thereon; (b) Damages in respect of uncleared land and improvements thereon; (c) Damages in respect of livestock; (d) Damages in respect of property in the town of Northport; (g) Damages in respect of business enterprises".

With respect to Item (a) and to Item (b), *viz.*, "Damages in respect of cleared land and improvements thereon", and "Damages in respect of uncleared land and improvements thereon", the Tribunal has reached the conclusion that damage due to fumigations has been proved to have occurred since January 1, 1932, and to the extent set forth hereafter.

Since the Tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of injury. This question resolves itself into two parts—first, the actual caus-

ing factor, and second, the manner in which the causing factor has operated. With reference to causation, the Tribunal desires to make the following preliminary general observations, as to some of the evidence produced before it.

(1) The very satisfactory data from the automatic sulphur dioxide recorders installed by each of the Governments, covering large portions of each year from 1931 to 1937, have been of great value in this controversy. These records have thrown much light upon the nature, the durations, and the concentrations of the fumigations involved; and they will prove of scientific value in any future controversy which may arise on the subject of fumigations.

(2) The experiments conducted by the United States at Wenatchee in the State of Washington and by Canada at Summerland in British Columbia, and the experiments conducted by scientists elsewhere, the results of which have been testified to at length before the Tribunal, have been of value with respect to the effects of sulphur dioxide fumigations on plant life and on the yield of crops. While the Canadian experiments were more extensive than the American, and were carried out under more satisfactory conditions, the Tribunal feels that the number of experiments was still too limited to warrant in all cases so positive conclusions as witnesses were inclined to draw from them; and on the question of the effect of fumigations on the yield of crops, it seems probable that more extensive experimentation would have been desirable, especially since, while the total number of experiments was large, the number devoted to establishing each type of result was in most cases rather small. Moreover, conditions in experimental fumigation plots can rarely exactly reproduce conditions in the field; and there was some evidence that injury occurred on various occasions to plant life in the field, under durations and degrees of concentration which never produced injury to plant life in the experimental plots.

(3) Valuable evidence as to the actual condition of crops in the field was given by experts on both sides, and by certain non-expert witnesses. Unfortunately, such field observations were not made continuously in any crop season or in all parts of the area of probable damage; and, even more unfortunately, they were not made simultaneously by the experts for the two countries, who acted separately and without comparing their conclusions with each other contemporaneously.

(4) The effects of sulphur dioxide fumigations upon the forest trees, especially upon the conifers, were testified to at great length by able experts, and their studies in the field and in the experimental plots, with reference to mortality, deterioration, retardation of ring growth and shoot growth, sulphur content of needles, production of cones and reproduction in general, have been of great value. As is usual in this type of case, though the poor condition of the trees was not controverted, experts were in disagreement as to the cause—witnesses for the United States generally finding the principal cause of injury to be sulphur dioxide fumigations, and witnesses for Canada generally attributing the injury principally to ravages of insects, diseases, winter and summer droughts, unwise methods of logging, and forest and ground fires. It is possible that each side laid somewhat too great emphasis on the causes for which it contended.

(5) Evidence was produced by both sides as to experimental tests of the sulphur contents of the soils and of the waters in the area. These tests, however, were, for the most part, too limited in number and in location to afford a satisfactory basis from which to draw absolutely positive conclusions.

In general, it may be said that the witnesses expressed contrary views and arrived at opposite conclusions, on most of the questions relating to cause of injury.

The Tribunal is of opinion that the witnesses were completely honest and sincere in their views and that the expert witnesses arrived at their conclusions as the integral result of their high technical skill. At the same time, it is apparent that remarks are very pertinent, such as were made by Judge Johnson in the United States District Court (Anderson *v.* American Smelting & Refining Co., 265 Federal Reporter 928) in 1919:

> Plaintiff's witnesses give it as their opinion and best judgment that $SO_2$ was the cause of the injuries appearing upon the plants in the field; defendants' witnesses in like manner express the opinion and give it as their best judgment that the injury observed was caused by something else other than $SO_2$. It must not be overlooked that witnesses who give opinion evidence are sometimes unconsciously influenced by their environment, and their evidence colored, if not determined, by their point of view. The weight to be given to such evidence must be determined in the light of the knowledge, the training, the power of observation and analysis, and in general the mental equipment, of each witness, assuming, as I do, that the witnesses of the respective parties were honest and intended to testify to the truth as they perceived it. . . . The expert witnesses called by plaintiffs, who made a survey of the affected area, made valuable observations; but seem to have assumed as a basis for their conclusions that leaf markings having the appearance of $SO_2$ injury were in fact $SO_2$ injury—an unwarranted generalization. . . . It is quite evident that the testimony of witnesses whose mental attitude is to account for every injury as produced by some other cause is no more convincing than the testimony of witnesses who attribute every injury similar in appearance to $SO_2$ injury to $SO_2$ as the sole and only cause. The expert witnesses of defendants manifested the same general mental attitude; that is to say, they were able to find a sufficient cause operating in any particular case other than $SO_2$, and therefore gave it as their opinion that such other cause was the real cause of the injury, or markings observed. The real value I find in the testimony of these opinion witnesses of the parties lies in their description of appearances and statement of the surrounding circumstances, rather than in their ultimate expressed opinions. I have no doubt of the accuracy of the experiments made by the expert and scientific witnesses called by the parties.

On the basis of the evidence, the United States contended that damage had been caused by the emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, which fumes, proceeding down the valley of the Columbia River and otherwise, entered the United States. The Dominion of Canada contended that even if such fumes had entered the United States, they had caused no damage after January 1, 1932. The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the Smelter by means of surface winds, and they based their views on this theory of the mechanism of gas distribution. The Tribunal finds itself unable to accept this theory. It has, therefore, looked for a more probable theory, and has adopted the following as permitting a more adequate correlation and interpretation of the facts which have been placed before it.

It appears from a careful study and comparison of recorder data furnished by the two Governments, that on numerous occasions fumigations occur practically simultaneously at points down the valley many miles apart—this being especially the fact during the growing season from April to October. It also appears from the data furnished by the different recorders, that the rate of gas attenuation down the river does not show a constant trend, but is more rapid in the first few miles below the boundary and more gradual further down the river. The Tribunal finds it impossible satisfactorily to account for the above conditions, on the basis of the theory presented to it. The Tribunal finds it further difficult to explain the times and durations of the fumigations on the basis of any probable surface-wind conditions.

The Tribunal is of opinion that the gases emerging from the stacks of the Trail Smelter find their way into the upper air currents, and are carried by these currents in a fairly continuous stream down the valley so long as the prevailing wind at that level is in that direction. The upper air conditions at Northport, as stated by the United States Weather Bureau in 1929 (quoted in Canadian Document A 1, page 9) are as follows :

> The 5 a.m. balloon runs show the prevailing direction, since the Weather Bureau was established in Northport, to be northeast to an altitude of 600 metres above the surface. The average velocity, up to 600 metres level, is from 2 to 5 miles per hour. Above the 600 metres level the prevailing direction is southwest and gradually shifts into the west-southwest and west. The average velocities gradually increase from 5 miles per hour to about 30 miles per hour at the highest elevation, about 700 metres.

It thus appears that the velocity and persistence of the upper air currents is greater than that of the surface winds. The Tribunal is of opinion that the fumigations which occur at various points along the valley are caused by the mixing with the surface atmosphere of this upper air stream, of which the height has yet to be ascertained more fully. This mixing follows well-recognized meteorological laws and is controlled mainly by two factors of major importance. These are: (a) differences in temperature between the air near the surface and that at higher levels—in other words, the temperature gradient of the atmosphere of the region; and (b) differences in the velocity of the upper air currents and of those near the ground.

A careful study of the time, duration, and intensity of the fumigations recorded at the various stations down the valley reveals a number of striking and significant facts. The first of these is the coincidence in point of time of the fumigations. The most frequent fumigations in the late spring, summer, and early autumn are diurnal, and occur during the early morning hours. These usually are of short duration. A characteristic curve expressing graphically this type of fumigation, rises rapidly to a maximum and then falls less rapidly but fairly sharply to a concentration below the sensitivity of the recorder. The dominant influence here is evidently the heating action of the rising sun on the atmosphere at the surface of the earth. This gives rise to temperature differences which may and often do lead to a mixing of the gas-carrying atmosphere with that near the surface. When this occurs with sufficient intensity, a fumigation is recorded at all stations at which the sulphur dioxide reaches a concentration that is not too low to be determined by the recorder. Obviously this effect of the rising sun may be

different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

Another type of fumigation occurs with especial frequency during the winter months. These fumigations are not so definitely diurnal in character and are usually of longer duration. The Tribunal is of the opinion that these are due to the existence for a considerable period of a sufficient velocity of the gas-carrying air current to cause a mixing of this with the surface atmosphere. Whether or not this mixing is of sufficient extent to produce a fumigation will depend upon the rate at which the surface air is diluted by surface winds which serve to bring in air from outside the contaminated area. The fact that fumigations of this type are more common during the night, when the surface winds often subside completely, bears out this opinion. A fumigation with a lower velocity of the gas-carrying air current would then be possible.

The conclusions above together with a detailed study of the intensity of the fumigations at the various stations from Columbia Gardens down the valley, have led to deductions in regard to the rate of attenuation of concentration of sulphur dioxide with increasing distance from the Smelter which seem to be in accord both with the known facts and the present theory. The conclusion of the Tribunal on this phase of the question is that the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur dioxide is lower and falls off more gradually and less rapidly.

The attention of the Tribunal has been called to the fact that fumigations in the area of probable damage sometimes occur during rainy weather or other periods of high atmospheric humidity. It is possible that this is more than a mere coincidence and that such weather conditions are, in general, more favorable to a fumigation, but the Tribunal is not prepared at present to offer an opinion on this subject.

The above conclusions have a bearing both upon the cause and upon the degree of damage as well as upon the area of probable damage.

The Tribunal will now proceed to consider the different classes of damage to cleared and to uncleared land.

(1) With regard to cleared land used for crops, the Tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years, 1932 to 1936; and it has found no proof of damage in the year 1937.

It has found that damage has been confined to an area which differed from year to year but which did not (with the possible exception of a very small number of farms in particularly unfavorable locations) exceed in the year of most extensive damage the following limits: the two precincts of Boundary and Northport, with the possible exclusion of some properties located at the eastern end of Boundary Precinct and at the western end of Northport Precinct; those parts of Cummins and Doyle Precincts on or close to the benches of the river; the part of Marble Precinct, north of the southern limit of Sections 22, 23 and 24 of T. 39, R. 39, and the part of Flat Creek Precinct, located on or close to the benches of the river (all precints being as defined by the United States Census of Agriculture of 1935).

The properties owned by individual farmers alleged by the United States to have suffered damage are divided by the United States in its itemized schedule of damages, into three classes: (a) properties of "farmers residing

on their farms"; (b) properties of "farmers who do not reside on their farms"; (ab) properties of "farmers who were driven from their farms"; (c) properties of large owners of land. The Tribunal has not adopted this division.

The Tribunal has adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops, the measure of damage which the American courts apply in cases of nuisance or trespass of the type here involved, *viz.*, the amount of reduction in the value of use or rental value of the land caused by the fumigations. In the case of farm land, such reduction in the value of the use is, in general, the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same, the latter factor being under the circumstances of this case of negligible importance. (See Ralston *v.* United Verde Copper Co., 37 Federal Reporter 2d, 180, and 46 Federal Reporter 2d, 1.) Failure of farmers to increase their seeded land in proportion to such increase in other localities, may also be taken into consideration.

The difference between probable yield in the absence of any fumigation and actual crop yield, varying as it does from year to year and from place to place, is necessarily a somewhat uncertain amount, incapable of absolute proof; and the Tribunal has been obliged to base its estimate of damage largely on the fumigation records, meteorological data, statistical data as to crop yields inside and outside the area of probable damage, and other Census records.

As regards the problems arising out of abandonment of properties by their owners, it is to be noted that practically all of such properties, listed in the questionnaire sent out by the former Agent for the United States, Mr. Metzger, appear to have been abandoned prior to the year 1932. However, in order to deal both with this problem and with the problem arising out of failure of farmers to increase their seeded land, the Tribunal, not having to adjudicate on individual claims, estimated, on the basis of the statistical data available, the average acreage on which it is reasonable to say that crops would have been seeded and harvested during the period under consideration but for the fumigations.

As regards the special category of cleared lands used for orchards, the Tribunal is of opinion that no damage to orchards by sulphur dioxide fumigation within the damaged area during the years in question has been proved.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, it may be contended that special damage has occurred for which indemnity should be awarded by reason of impairment of the soil contents through increased acidity caused by sulphur dioxide fumigations acting directly on the soil or indirectly through increased sulphur content of the streams and other waters. Evidence has been given in support of this contention. The Tribunal is of opinion that such injury to the soil up to this date, due to increased acidity and affecting harmfully the production of crops or otherwise, has not been proved—with one exception, as follows: There is a small area of farming property adjacent to the boundary, west of the river, that was injured by serious increase of acidity of soil due to fumigations. Such injury, though caused, in part, prior to January 1, 1932, may have produced a continuing condition which cannot be considered as a loss for a limited time—in other words, in this respect the nuisance may be considered to have a more permanent effect, in which case, under American law (*Sedgwick on Damages* 9th Ed. (1920) Sections 932, 947), the measure of damage was not the mere reduction in the value of the use of the land but

the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, the Tribunal, having in mind, within the area as determined above, a group of about forty farms in the vicinity of the boundary line, has awarded indemnity for special damage for reduction in value of the use or rental value by reason of the location of the farmers in respect to the fumigations. (See Baltimore and Potomac R. R. *v.* Fifth Baptist Church (1883), 108 U.S. 317.)

The Tribunal is of opinion that there is no justification, under doctrines of American law, for assessing damages to improvements separately from the land in the manner contended for by the United States. Any injury to improvements (other than physical injury) is to be compensated in the award of indemnity for general reduction in the value of the use or rental value of the property.

There is a contention, however, that special damage has been sustained by some owners of improvements on cleared land, in the way of rust and destruction of metal work. There was some slight evidence of such damage, and the Tribunal has included indemnity therefor in its final award; but since there is an entire absence of any evidence as to the extent or monetary amount of such injury, the indemnity cannot be considered as more than a nominal amount for each of such owners.

(2) With respect to damage to cleared land not used for crops and to all uncleared (other than uncleared land used for timber), the Tribunal has adopted as the measure of indemnity, the measure of damages applied by American courts, *viz.*, the amount of reduction in the value of the use or rental value of the land. The Tribunal is of opinion that the basis of estimate of damages contended for by the United States, *viz.*, applying to the value of uncleared land a ratio of loss measured by the reduced crop yield on cleared land, has no sanction in any decisions of American courts.

(A) As regards these lands in their use as pasture lands, the Tribunal is of opinion that there is no evidence of any marked susceptibility of wild grasses to fumigations, and very little evidence to prove the respective amounts of uncleared land devoted to wild grazing grass and barren or shrub land, or to prove the value thereof, which would be necessary in order to estimate the value of the reduction of the use of such land. The Tribunal, however, has awarded a small indemnity for damage to about 200 acres of such lands in the immediate neighborhood of the boundary.

It has been contended that the death of trees and shrubs due to fumigation has had an injurious effect on the water storage capacity of the soil and has even created some soil erosion. The Tribunal is of opinion that while there may have been some erosion of soil and impairment of water storage capacity in a limited area near the boundary, it is impossible to determine whether such damage has been due to fires or to mortality of trees and shrubs caused by fumigation.

(B) As regards uncleared land in its use as timberland, the Tribunal has found that damage due to fumigation has occurred to trees during the years 1932 to 1937 inclusive, in varying degrees, over areas varying not only from year to year but also from species to species. It has not seemed feasible to give a determination of the geographical extent of the damage except in so far as it may be stated broadly, that a territory coinciding in extent with the

Bayle cruises (hereinafter described) may be considered as an average area, although the contours of the actually damaged area do not coincide for any given species in any given year with that area and the intensity of the damage in a given year and for a given species varies, of course, greatly, according to location.

In comparing the area covered by the Bayle cruises with the Hedgcock maps of injury to conifers for the years under consideration, the Tribunal is of opinion that damage near the boundary line has occurred in a somewhat broader area than that covered by the Bayle cruises, but that on the other hand, injury, except to larch in 1936, seems to have been confined below Marble to the immediate vicinity of the river.

It is evident that for many years prior to January 1, 1932, much of the forests in the area included in the present Northport and Boundary Precincts had been in a poor condition. West and east of the Columbia River, there had been the scene of a number of serious fires; and the operations of the Northport Smelting and Refining Company and its predecessor from 1898 to 1901, from 1901 to 1908, and from 1916 to 1921, had undoubtedly had an effect, as is apparent from the decisions in suits in the courts of the State of Washington on claims for damages from fumigations in this area [1]. It is uncontroverted that heavy fumigations from the Trail Smelter which destroyed and injured trees occurred in 1930 and 1931; and there were also serious fumigations in earlier years. In the Canadian Document A 1, termed "The Deans' Report", being a report made to the International Joint Commission in September, 1929, it is stated (pp. 29, 31):

> Since a cruise of the timber in the Northport area has not been made by a forest engineer of either Government, this report does not make any recommendations for settlements of timber damage. However, a brief statement as to the timber situation is submitted.
>
> *Present condition.* Practically the entire region was covered with timber when it was first settled. Probably 90 per cent of the merchantable timber has now been removed. The timber on about one-third of the area has been cut only in part, that is to say only the more valuable species have been logged, and on a large part of the rest of the area that has been cut-over are stands too small to cut at time of logging. These so-called residual stands, together with the remaining virgin timber, make up the timber resources of the Northport area at the present time. Heavy toll of these has been taken this season by two large forest fires still smouldering as this report is being written. . . . Government forest pathologists are working to determine the zone of economic injury to timber, but their task, a difficult one at best, is incomplete. Much additional data must be collected and after that all must be compiled and analyzed, hence no attempt is made to submit a map with this report delimiting the zone of injury to forest trees. Admittedly, however, serious damage to timber has already taken place and reproduction is impaired.

---

[1] See Henry W. Sterrett *v.* Northport Smelting and Refining Co. (1902), 30 Washington Reports 164; Edwin J. Rowe *v.* Northport Smelting and Refining Co. (1904), 35 Washington Reports 101; Charles N. Park *v.* Northport Smelting and Refining Co. (1907), 47 Washington Reports 597; John O. Johnson *v.* Northport Smelting and Refining Co. (1908), 50 Washington Reports 507. These cases were not cited by counsel for either side.

"The Deans' Report" further mentioned a cruise of timber made by the Consolidated Mining and Smelting Co., in 1927 and 1928, "by a forest engineer from British Columbia", and that "it is our opinion that the timber estimate and evaluation are quite satisfactory. However, before settlements are made for such smoke damage, the work should be checked by a forest engineer, preferably of the American Government since it was first done by a Canadian. . . . It is believed, however, that a satisfactory check can be made by one man and an assistant in about three months. . . . The check cruise should be made not later than the summer of 1930."

It is to be further noted that in the official document of the State of Washington entitled *Forest Statistics, Stevens County, Washington, Forest Survey Release No.* 5, *A June,* 1937. *Progress Release,* there appears a map entitled *Forest Survey, Stevens County, Washington,* 1935, on which four types of forest lands are depicted by varied colorings and linings, and most of the lands in the area now in question are described as—"Principally Non-Restocked Old Burns and Cut-Overs; Rocky and Subalpine Areas" and "Principally Immature Forest—Recent Burns and Cut-Overs". And these terms are defined as follows (page 23): "Woodland—that portion of the forest land neither immediately or potentially productive of commercial timber. Included in this classification are: subalpine—stands above the altitude range of merchantability; rocky, non-commercial—area too steep, sterile, or rocky to produce merchantable timber." This description of timber as inaccessible, from the standpoint of logging, is further confirmed by the report made by G. J. Bayle (the forest engineer referred to in "The Deans' Report") of cruises made by him prior to 1932 (Canadian Document C 4, pp. 5,6) to the effect that much of the timber is "far away from transportation", "of very little, if any, commercial value", "sale price would not bring the cost of operating", "scattered", "located on steep slopes". On page 9 of the *Forest Survey Release No.* 5, above referred to, it is further stated:

> As a consequence of the recent serious fires principally in the north portion of the county, 52,402 acres of timberland have recently been deforested, many of which are restocking. Also concentrated in the north end of the county are 77,650 deforested acres representing approximately 6 per cent of the timberland area on which the possibilities of natural regeneration are slight. Much of this latter deforestation is thought to be the effect of alleged smelter fume damage.

(a) The Tribunal has adopted as the measure of indemnity, to be applied on account of damage in respect of uncleared land used for merchantable timber, the measure of damages applied by American courts, *viz.*, that since the destruction of merchantable timber will generally impair the value of the land itself, the measure of damage should be the reduction in the value of the land itself due to such destruction of timber; but under the leading American decisions, however, the value of the merchantable timber destroyed is, in general, deemed to be substantially the equivalent of the reduction in the value of the land (see *Sedgwick on Damages,* 9th Ed. 1920, Section 937a). The Tribunal is unable to accept the method contended for by the United States of estimating damage to uncleared timberland by applying to the value of such land as stated by the farmers (after deducting value of the timber) a ratio of loss measured by the reduced crop yield on cleared land. The Tribunal is of opinion, here as elsewhere in this decision, that, in accordance with American law, it is not restricted to the method proposed by the

United States in the determination of amount of damages, so long as its findings remain within the amount of the claim presented to it.

As, in estimating damage to timberland which occurred since January 1, 1932, it was essential to establish the amount of timber in existence on January 1, 1932, an unnecessarily difficult task has been placed upon the Tribunal, owing to the fact that the United States did not make a timber cruise in 1930 (as recommended by "The Deans' Report"); and neither the United States nor the Dominion of Canada caused any timber cruise to be made as of January 1, 1932. The cruises by witnesses supporting the claim of the United States in respect of lands owned by the State of Washington were made in 1927-1928 and in 1937. The cruises by Bayle (a witness for the Dominion of Canada) were made, partially in 1927-1928 and partially in 1936 and 1937. The affidavits of landowners filed by United States claimants in 1929 contain only figures for a date prior to such filing. Since the Bayle cruise of 1927-1928 appears to be the most detailed and comprehensive evidence of timber in the area of probable damage, the Tribunal has used it as a basis for estimate of the amount and value of timber existing January 1, 1932, after making due allowance for the heavy destruction of timber by fire, fumigation, insects, and otherwise, which occurred between the making of such cruise of 1927-1928 and January 1, 1932, and after making allowance for trees which became of merchantable size between said dates. The Tribunal has also used the Bayle cruises of 1936 and 1937 as a basis for estimates of the amount and value of timber existing on January 1, 1932.

(b) With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, *viz.*, the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc., as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on January 1, 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.

(c) With respect to damage due to the alleged lack of reproduction, the Tribunal has carefully considered the contentions presented. The contention made by the United States that fumigation prevents germination of seed is, in the opinion of the Tribunal, not sustained by the evidence. Although the experiments were far from conclusive, Hedgcock's studies tend to show, on the contrary, that, while seedlings were injured after germination owing to drought or to fumes, the actual germination did take place.

With regard to the contention made by the United States of damage due to failure of trees to produce seed as a result of fumigation, the Tribunal is of opinion that it is not proved that fumigation prevents trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves. This view is confirmed by the Hedgcock studies on cone production of yellow pine. There is a rather striking correlation between the percentage of good, fair, and poor trees found in the Hedgcock Census studies and the percentages of trees bearing a normal amount of cones, trees bearing few cones, and trees bearing no cones in the Hedgcock cone

production studies. In so far, however, as lack of cone production since January 1, 1932, is due to death or impairment of the parent-trees occurring before that date, the Tribunal is of opinion that such failure of reproduction both was caused and occurred prior to January 1, 1932, with one possible exception as follows: From standard American writings on forestry, it appears that seeds of Douglas fir and yellow pine rarely germinate more than one year after they are shed [1], but if a tree was killed by fumigation in 1931, germination from its seeds might occur in 1932. It appears, however, that Douglas fir and yellow pine only produce a good crop of seeds once in a number of years. Hence, the Tribunal concludes that the loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation in 1931 is too speculative a matter to justify any award of indemnity.

It is fairly obvious from the evidence produced by both sides that there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But, with the data at hand, it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same area or destruction by logging of the cone-bearing trees. It is further impossible to ascertain to what extent lack of reproduction due to fumigations can be traced to mortality or deterioration of the parent-trees which occurred since the first of January, 1932. It may be stated, in general terms, that the loss of reproduction due to the forest being depleted will only become effective when the amount of these trees per acre falls below a certain minimum [2]. But the data at hand do not enable the Tribunal to say where and to what extent a depletion below this minimum occurred through fumigations in the years under consideration. An even approximate appraisal of the damage is further complicated by the fact that there is evidence of reproduction of lodgepole pine, cedar, and larch, even close to the boundary and in the Columbia River Valley, at least in some locations. This substitution may not be due entirely to fumigations, as it appears from standard American works on conifers that reproduction of yellow pine is often patchy; that when yellow pine is substantially destroyed in a given area, it is generally supplanted by another species of trees; and that lodgepole pine in particular has a tendency to invade and take full possession of yellow pine territory when a fire has occurred. While the other species are inferior, their reproduction is, nevertheless, a factor which has to be taken into account; but here again quantitative data are entirely lacking. It is further to be noted that the amount of rainfall is an important factor in the reproduction of yellow pine, and that where the normal annual rainfall is but little more than eighteen inches, yellow pine does not appear to thrive. It appears in evidence that the annual precipitation at Northport, in a period of fourteen years from 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the

[1] See "Life of Douglas Fir Seed in the Forest Floor", by Leo A. Isaac, Journal of Forestry. Vol. 23 (1935), pp. 61-66; "The Pine Trees in the Rocky Mountain Region", by G. B. Sudworth, United States Department of Agriculture Bulletin (1917); "Timber Growing and Logging Practice in the Douglas Fir Region", by T. T. Munger and W. B. Greely, United States Department of Agriculture Technical Bulletin (1927). As to yellow pine and rainfall, see "Western Yellow Pine in Oregon", by T. T. Munger, United States Department of Agriculture Technical Bulletin (1917).

[2] Applied Silviculture in the United States, by R. H. Westveld (1935).

Tribunal has, however, taken lack of reproduction into account to some extent in awarding indemnity for damage to uncleared land in use for timber.

On the basis of the foregoing statements as to damage and as to indemnity for damage with respect to cleared land and uncleared land, the Tribunal has awarded with respect to damage to cleared land and to uncleared land (other than uncleared land used for timber), an indemnity of sixty-two thousand dollars ($62,000); and with respect to damage to uncleared land used for timber an indemnity of sixteen thousand dollars ($16,000) —being a total indemnity of seventy-eight thousand dollars ($78,000). Such indemnity is for the period from January 1, 1932, to October 1, 1937.

There remain for consideration three others items of damage claimed in the United States Statement: (Item c) "Damages in respect of livestock"; (Item d) "Damages in respect of property in the town of Northport"; (Item g) "Damages in respect of business enterprises".

(3) With regard to "damages in respect of livestock", claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

(4) With regard to "damages in respect of property in the town of Northport", the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

(5) With regard to "damages in respect of business enterprises", the counsel for the United States in his Answer and Argument (p. 412) stated: "The business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area." The Tribunal is of opinion that damage of this nature "due to reduced economic status" of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded. None of the cases cited by counsel (pp. 412-423) sustain the proposition that indemnity can be obtained for an injury to or reduction in a man's business due to inability of his customers or clients to buy, which inability or impoverishment is caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity. The Tribunal is also of opinion that if damage to business enterprises has occurred since January 1, 1932, the burden of proof that such damages was due to fumes from the Trail Smelter has not been sustained and that an award of indemnity would be purely speculative.

(6) The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of "smoke, sulphurous fumes, gases", but

also of "waste materials", and says that "the Trail Smelter disposes of slag in such a manner that it reaches the Columbia River and enters the United States in that stream", with the result that the "waters of the Columbia River in Stevens County are injuriously affected", thereby. No evidence was produced on which the Tribunal could base any findings as regards damage, if any, of this nature. The Dominion of Canada has contended that this item of damage was not within the meaning of the words "damage caused by the Trail Smelter", as used in Article III of the Convention. It would seem that this contention is based on the fact that the preamble of the Convention refers exclusively to a complaint of the Government of the United States to the Government of Canada "that fumes discharged from the Smelter .... have been causing damage in the State of Washington" (see Answer of Canada, p. 8). Upon this contention and its legal validity, the Tribunal does not feel that it is incumbent upon it to pass at the present time.

(7) The United States in its Statement (p. 52) presents two further items of damages claimed by it, as follows: (Item e) which the United States terms "damages in respect of the wrong done the United States in violation of sovereignty"; and (Item f) which the United States terms "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935".

With respect to (Item e), the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention, for the following reason: By the Convention, the high contracting parties have submitted to this Tribunal the questions of the existence of damage caused by the Trail Smelter in the State of Washington, and of the indemnity to be paid therefor, and the Dominion of Canada has assumed under Article XII, such undertakings as will ensure due compliance with the decision of this Tribunal. The Tribunal finds that the only question to be decided on this point is the interpretation of the Convention itself. The United States in its Statement (p. 59) itemizes under the claim of damage for "violation of sovereignty" only money expended "for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail". The Tribunal is of opinion that it was not within the intention of the parties, as expressed in the words "damage caused by the Trail Smelter" in Article III of the Convention, to include such moneys expended. This interpretation is confirmed by a consideration of the proceedings and of the diplomatic correspondence leading up to the making of the Convention. Since the United States has not specified any other damage based on an alleged violation of its sovereignty, the Tribunal does not feel that it is incumbent upon it to decide whether, in law and in fact, indemnity for such damage could have been awarded if specifically alleged. Certainly, the present controversy does not involve any such type of facts as the persons appointed under the Convention of January 23, 1934, between the United States of America and the Dominion of Canada felt to justify them in awarding to Canada damages for violation of sovereignty in the *I'm Alone* award of January 5, 1935. And in other cases of international arbitration cited by the United States, damages awarded for expenses were awarded, not as compensation

for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government.

In his oral argument, the Agent for the United States, Mr. Sherley, claimed repayment of the aforesaid expenses of investigations on a further and separate ground, *viz.*, as an incident to damages, saying (Transcript, p. 5157): "Costs and interest are incident to the damage, the proof of the damage which occurs through a given act complained of", and again (Transcript, p. 5158): "The point is this, that it goes as an incident to the award of damage." The Tribunal is unable to accept this view. While in cases involving merely the question of damage to individual claimants, it may be appropriate for an international tribunal to award costs and expenses as an incident to other damages proven (see cases cited by the Agent for the United States in the Answer and Argument, pp. 431, 437, 453-465, and at the oral argument in Transcript, p. 5153), the Tribunal is of opinion that such costs and expenses should not be allowed in a case of arbitration and final settlement of a long pending controversy between two independent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

The Agent for the United States also cited cases of litigation in courts of the United States (Answer and Argument, p. 439, and Transcript, p. 5152), in which expenses incurred were ordered by the court to be paid. Such cases, the Tribunal is of opinion, are inapplicable here.

The Tribunal is, therefore, of opinion that neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms "violation of sovereignty".

(8) With respect to (Item f), "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935", the Tribunal is of opinion that no payment of such interest was contemplated by the Convention and that by payment within the term provided by Article I thereof, the Dominion of Canada has completely fulfilled all obligations with respect to the payment of the sum of $350,000. Hence, such interest cannot be allowed.

In conclusion, the Tribunal answers Question 1 in Article III, as follows: Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter.

The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision.

PART THREE.

As to Question No. 2, in Article III of the Convention, which is as follows:

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

the Tribunal decides that until the date of the final decision provided for in Part Four of this present decision, the Trail Smelter shall refrain from causing damage in the State of Washington in the future to the extent set forth in such Part Four until October 1, 1940, and thereafter to such extent as the Tribunal shall require in the final decision provided for in Part Four.

PART FOUR.

As to Question No. 3, in Article III of the Convention, which is as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

the Tribunal is unable at the present time, with the information that has been placed before it, to determine upon a permanent régime, for the operation of the Trail Smelter. On the other hand, in view of the conclusions at which the Tribunal has arrived (as stated in an earlier part of this decision) with respect to the nature, the cause, and the course of the fumigations, and in view of the mass of data relative to sulphur emissions at the Trail Smelter, and relative to meteorological conditions and fumigations at various points down the Columbia River Valley, the Tribunal feels that the information now available does enable it to predict, with some degree of assurance, that a permanent régime based on a more adequate and intensive study and knowledge of meteorological conditions in the valley, and an extension and improvement of the methods of operation of the plant and its control in closer relation to such meteorological conditions, will effectively prevent future significant fumigations in the United States, without unreasonably restricting the output of the plant.

To enable it to establish a permanent régime based on the more adequate and intensive study and knowledge above referred to, the Tribunal establishes the following temporary régime.

(1) For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, the Tribunal will appoint two Technical Consultants, and in case of vacancy will appoint the successor. Such Technical Consultants to be appointed in the first place shall be Reginald S. Dean and Robert E. Swain, and they shall cease to act as Advisers to the Tribunal under the Convention during such trial period.

(2) The Tribunal directs that, before May 1, 1938, a consulting meteorologist, adequately trained in the installation and operation of the necessary type of equipment, be employed by the Trail Smelter, the appointment to be subject to the approval of the Technical Consultants. The Tribunal directs that, beginning May 1, 1938, such meteorological observations as may be deemed necessary by the Technical Consultants shall be made, under

their direction, by the meteorologist, the scientific staff of the Trail Smelter, or otherwise. The purpose of such observations shall be to determine, by means of captive balloons and otherwise, the weather conditions and the height, velocity, temperature, and other characteristics of the gas-carrying and other air currents and of the gas emissions from the stacks.

(3) The Tribunal further directs that beginning May 1, 1938, there shall be installed and put in operation and maintained by the Trail Smelter, for the purpose of providing information which can be used in determining present and prospective wind and other atmospheric conditions, and in making a prompt application of those observations to the control of the Trail Smelter plant operation:

(a) Such observation stations as the Technical Consultants deem necessary.

(b) Such equipment at the stacks as the Technical Consultants may find necessary to give adequate information of gas conditions and in connection with the stacks and stack effluents.

(c) Sulphur dioxide recorders, stationary and portable (the stationary recorders not to exceed three in number).

(d) The Technical Consultants shall have the direction of and authority over the location in both the United States and the Dominion of Canada, and over the installation, maintenance and operation of all apparatus provided for in Paragraph 2 and Paragraph 3. They may require from the meteorologist and from the Trail Smelter regular reports as to the operation of all such apparatus.

(e) The Technical Consultants may require regular reports from the Trail Smelter as to the methods of operation of its plant in such form and at such times as they shall direct; and the Trail Smelter shall conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal, based on the result of the data obtained during the period hereinafter named; and the Technical Consultants and the Tribunal may change or modify at any time its or their instructions as to such operations.

(f) It is the intent and purpose of the Tribunal that the administration of the observations, experiments, and operations above provided for shall be as flexible as possible, and subject to change or modification by the Technical Consultants and by the Tribunal, to the end that conditions as they at any time may exist, may be changed as circumstances require.

(4) The Technical Consultants shall make report to the Tribunal at such dates and in such manner as it shall prescribe as to the results obtained and conclusions formed from the observations, experiments, and operations above provided for.

(5) The observations, experiments, and operations above provided for shall continue on a trial basis through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940, and the winter seasons of 1938-1939 and 1939-1940 and until October 1, 1940, unless the Tribunal shall find it practicable or necessary to terminate such trial period at an earlier date.

(6) At the end of the trial period above provided for, or at the end of such shorter trial period as the Tribunal may find to be practicable or necessary, the Tribunal in a final decision will determine upon a permanent régime and upon the indemnity and compensation, if any, to be paid under the Convention. Such final decision, under the agreements for extension,

heretofore entered into by the two Governments under Article XI of the Convention, shall be reported to the Governments within three months after the date of the end of the trial period.

(7) The Tribunal shall meet at least once in the year 1939, to consider reports and to take such action as it may deem necessary.

(8) In case of disagreement between the Technical Consultants, they shall refer the matter to the Tribunal for its decision, and all persons and the Trail Smelter affected hereunder shall act in conformity with such decision.

(9) In order to lessen, as far as possible, the fumigations during the interval of time extending from May 1, 1938, to October 1, 1938 (during which time or during part of which time, it is possible that the observations and experiments above provided for may not be in full operation), the Tribunal directs that the Trail Smelter shall be operated with the following limitations on the sulphur emissions—it being understood that the Tribunal is not at present ready to make such limitations permanent, but feels that they will for the present probably reduce the chance or possibility of injury in the area of probable damage.

(a) For the periods April 25 to May 10 and June 22 to July 6, which are periods of greater sensitivity to sulphur dioxide for certain crops and trees in that area, not more than 100 tons per day of sulphur shall be emitted from the stacks of the Trail Smelter.

(b) As a further precaution, and for the entire period until October 1, 1938, the sulphur dioxide recorder at Columbia Gardens and the sulphur dioxide recorder at the Stroh farm (or any other point approved by the Technical Consultants) shall be continuously operated, and observations of relative humidity shall also be taken at both recorder stations. When, between the hours of sunrise and sunset, the sulphur dioxide concentration at Columbia Gardens exceeds one part per million for three consecutive 20-minute periods, and the relative humidity is 60 per cent or higher, the Trail Smelter shall be notified immediately; and the sulphur emission from the stacks of the plant maintained at 5 tons of sulphur per hour or less until the sulphur dioxide concentration at the Columbia Gardens recorder station falls to 0.5 part per million.

(c) This regulation may be suspended temporarily at any time by order of the Technical Consultants or of the Tribunal, if in its operation it shall interfere with any particular program of investigation which is in progress.

(10) For the carrying out of the temporary régime herein prescribed by the Tribunal, the Dominion of Canada shall undertake to provide for the payment of the following expenses thereof: (a) the Tribunal will fix the compensation of the Technical Consultants and of such clerical or other assistants as it may find necessary to employ; (b) statements of account shall be rendered by the Technical Consultants to the Tribunal and approved by the Chairman in writing; (c) the Dominion of Canada shall deposit to the credit of the Tribunal from time to time in a financial institution to be designated by the Chairman of the Tribunal, such sums as the Tribunal may find to be necessary for the payment of the compensation, travel, and other expenses of the Technical Consultants and of the clerical or other assistants; (d) written report will be made by the Tribunal to the Dominion of Canada of all the sums received and expended by it, and any sum not expended shall be refunded by the Tribunal to the Dominion of Canada at the conclusion of the trial period.

(11) The terms "Tribunal", and "Chairman", as used herein, shall be deemed to mean the Tribunal, and the Chairman, as it or they respectively may be constituted at any future time under the Convention.

The term "Trail Smelter", as used herein, shall be deemed to mean the Consolidated Mining and Smelting Company of Canada, Limited, or its successors and assigns.

Nothing in the above paragraphs of Part Four of this decision shall relieve the Dominion of Canada from any obligation now existing under the Convention with reference to indemnity or compensation, if any, which the Tribunal may find to be due for damage, if any, occurring during the period from October 1, 1937 (the date to which indemnity for damage is now awarded) to October 1, 1940, or to such earlier date at which the Tribunal may render its final decision.

(*Signed*)
JAN HOSTIE.

(*Signed*)
CHARLES WARREN.

(*Signed*)
R. A. E. GREENSHIELDS.

# DECISION

REPORTED ON MARCH 11, 1941, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA, UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April, 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal and the two Governments were to choose jointly a chairman who should be neither a British subject nor a citizen of the United States. The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A.E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. In November, 1940, Victor H. Gottschalk of Washington, D.C., was designated by the United States as alternate to Reginald S. Dean. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The Tribunal herewith reports its final decisions.

The controversy is between two Governments involving damage occurring, or having occurred, in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada). In this controversy, the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of "interested parties", in Article VIII of the Convention and although the damage suffered by individuals did, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28). (*Cf.* what was said by the Tribunal in the decision reported on April 16, 1938, as regards the problems arising out of abandonment of properties, Part Two, Clause (1).)

As between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian

interests might be claimed to be injured by an American corporation. As has well been said: "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

Considerations like the above are reflected in the provisions of the Convention in Article IV, that "the desire of the high contracting parties" is "to reach a solution just to all parties concerned". And the phraseology of the questions submitted to the Tribunal clearly evinces a desire and an intention that, to some extent, in making its answers to the questions, the Tribunal should endeavor to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.

In arriving at its decision, the Tribunal has had always to bear in mind the further fact that in the preamble to the Convention, it is stated that it is concluded with the recognition of "the desirability and necessity of effecting a permanent settlement".

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the district of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the

Tribunal "to report to the Governments its final decisions . . . . within a period of three months after the conclusion of the proceedings", *i.e.* on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of two the Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

On April 16, 1938, the Tribunal reported its "final decision" on Question No. 1, as well as its temporary decisions on Questions No. 2 and No. 3, and provided for a temporary régime thereunder. The decision reported on April 16, 1938, will be referred to hereinafter as the "previous decision".

Concerning Question No. 1, in the statement presented by the Agent for the Government of the United States, claims for damages of $1,849,156.16 with interest of $250,855.01—total $2,100,011.17—were presented, divided into seven categories, in respect of (*a*) cleared land and improvements; (*b*) of uncleared land and improvements; (*c*) live stock; (*d*) property in the town of Northport; (*e*) wrong done the United States in violation of sovereignty, measured by cost of investigation from January 1, 1932, to June 30, 1936; (*f*) interest on $350,000 accepted in satisfaction of damage to January 1, 1932, but not paid on that date; (*g*) business enterprises. The area claimed to be damaged contained "more than 140,000 acres", including the town of Northport.

The Tribunal disallowed the claims of the United States with reference to items (*c*), (*d*), (*e*), (*f*) and (*g*) but allowed them, in part, with respect to the remaining items (*a*) and (*b*).

In conclusion (end of Part Two of the previous decision), the Tribunal answered Question No. 1 as follows:

> Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter. The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision

Answering Questions No. 2 and No. 3, the Tribunal decided that, until a final decision should be made, the Trail Smelter should be subject to a temporary régime (described more in detail in Part Four of the present decision) and a trial period was established to a date not later than October 1, 1940, in order to enable the Tribunal to establish a permanent régime based on a "more adequate and intensive study", since the Tribunal felt that the information that had been placed before it did not enable it to determine at that time with sufficient certainty upon a permanent régime.

In order to supervise the conduct of the temporary régime and in accordance with Part Four, Clause (1) of the previous decision, the Tribunal appointed two Technical Consultants, Dr. R. S. Dean and Professor R. E. Swain. As further provided in said Part Four (Clause 7), the Tribunal met at Washington, D.C., with these Technical Consultants from April 24, 1939, to May 1, 1939, to consider reports of the latter and determine the further course to be followed during the trial period (see Part Four of the present decision).

It had been provided in the previous decision that a final decision on the outstanding questions would be rendered within three months from the termination of the trial period therein prescribed, *i.e.*, from October 1, 1940, unless the trial period was ended sooner. The trial period was not terminated before October 1, 1940. As the Tribunal deemed it necessary after the intervening period of two and a half years to receive supplementary statements from the Governments and to hear counsel again before determining upon a permanent régime, a hearing was set for October 1, 1940. Owing, however, to disruption of postal communications and other circumstances, the supplementary statement of the United States was not transmitted to the Dominion of Canada until September 25, 1940, and the public meeting was, in consequence, postponed.

The Tribunal met at Boston, Massachusetts, on September 26 and 27, 1940, for adoption of additional rules of procedure. It met at Montreal, P.Q., with its scientific advisers, from December 5 to December 8, 1940, to consider the Final Report they had rendered in their capacity as Technical Consultants (see Part Four of this decision). It held its public meeting and heard arguments of counsel in Montreal, from December 9 to December 12, 1940.

The period within which the Tribunal shall report its final decisions was extended by agreement of the two Governments until March 12, 1941.

## I.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the international boundary line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary, on the east side of the river and on the south side of its affluent, the Pend-d'Oreille,

are two places respectively known as Waneta and Boundary; the former is on the Canadian side of the boundary, the latter on the American side; four or five miles south of the boundary, and on the west side of the river, is a farm, named after its owner, Fowler Farm (Section 22, T. 40, R. 40), and on the east side of the river, another farm, Stroh Farm, about five miles south of the boundary.

The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southeast to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side--Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward, the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1940 inclusive averaged somewhat above seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1938, 2.30 inches; in 1939, 3.78 inches, and in 1940, 3.24 inches. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74% at 5 a.m. and an average minimum of 26% at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934 to 1940 inclusive, at Northport was as follows: in the months of November, December, January and February, the lowest temperature was -19° (in January, 1937), and the highest was 60° (in November, 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935 and March, 1939), and the highest was 104° (in September, 1938).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is further treated in Part Four of this decision and, in detail, in the Final Report of the Technical Consultants.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. In 1900, the population of this town was 787. It fell in 1910 to 476 but rose again, in 1920, to 906. In 1930, it had fallen to 391. The population of the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek Precincts prior to 1931) was 919 in 1900; 913 in 1910; 1,304 in 1920; 648 in 1930 and 651 in 1940. In these precincts, the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; in 1935, 5,666 acres and in 1940, 7,175 acres. The area in crop-land in 1925 was 798 acres; in 1930, 1,227 acres; in 1935, 963 acres and in 1940, about 900 acres[1]. In two other precincts east of the river and south of the boundary, Cummins and Doyle, the population in 1940 was 293, the area in farms was 6,884 acres and the area in crop-land was about 1,738 acres [2].

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

---

[1] For the Precinct of Boundary, the acreage of crop-land, idle or fallow, was omitted from the reports received by the Tribunal of the 1940 Census figures, the statement being made that it was "omitted to avoid disclosure of individual operations".

[2] For the Precinct of Cummins, the acreage of crop failure and of crop-land, idle or fallow, is only approximately correct, the census figures making similar omissions and for the same reason.

The most important industry in the area formerly was the lumber industry. It had its beginning with the building of the Spokane and Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. On about 57,000 acres on which timber cruises were made in 1927-1928 and in 1936 in the general area, it may be doubtful whether there is today more than 40,000 thousands of board feet of merchantable timber.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year(with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early 1917, proved a failure.

## II.

In 1896, a smelter was started under American auspices near the locality known as Trail, B.C. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on the American continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased production resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1930. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or $SO_2$.)

From 1925, at least, to 1937, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter as stated in the previous decision.

The subject of fumigations and damage claimed to result from them was referred by the two Governments on August 7, 1928, to the International Joint Commission, United States and Canada, under Article IX of the Convention of January 11, 1909, between the United States and Great Britain, providing that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: first, the extent to which property in the State of Washington has been damaged by fumes from the Smelter at Trail B.C.; second, the amount of indemnity which would compensate United States' interests in the State of Washington for past damages.

The International Joint Commission sat at Northport, at Nelson, B.C., and in Washington, D.C., in 1928, 1929 and 1930, and on February 28, 1931, rendered a unanimous report which need not be considered in detail.

After outlining the plans of the Trail Smelter for extracting sulphur from the fumes, the report recommended (Part I, Paragraphs (*a*) and (*c*)) that "the company be required to proceed as expeditiously as may be reasonably possible with the works above referred to and also to erect with due dispatch such further sulphuric acid units and take such further or other action as may be necessary, if any, to reduce the amount and concentration of $SO_2$ fumes drifting from its said plant into the United States until it has reduced the amount by some means to a point where it will do no damage in the United States".

The same Part I, Paragraph (*g*) gave a definition of "damage":

> The word "damage", as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (*a*) and (*c*) hereof, shall not include occasional damage that may be caused by $SO_2$ fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on or after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged. . . .

Paragraph 2 read, in part, as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect to such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

This report failed to secure the acceptance of both Governments. A sum of $350,000 has, however, been paid by the Dominion of Canada to the United States.

Two years after the filing of the above report, the United States Government, on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring and diplomatic negotiations were entered into which resulted in the signing of the present Convention.

The Consolidated Mining and Smelting Company of Canada, Limited, proceeded after 1930 to make certain changes and additions in its plant, with the intention and purpose of lessening the sulphur contents of the fumes, and in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop growing season came into operation about 1934. To the three sulphuric acid plants in operation since 1932, two others have recently been added. The total capacity is now of 600 tons of sulphuric acid per day, permitting, if these units could run continually at capacity, the fixing of approximately 200 tons of sulphur per day. In addition, from 1936, units for the production of elemental sulphur have been put into operation. There are at present three such units with a total capacity of 140 tons of sulphur per day. The capacity of absorption of sulphur dioxide is now 600 tons of sulphur dioxide per day (300 tons from the zinc plant gases and 300 tons from the lead plant gases). As a result, the maximum possible recovery of sulphur dioxide, with all units in full operation has been brought to a figure which is about equal to the amount of that gas produced by smelting operations at the plant in 1939. However, the normal shutdown of operating units for repairs, the power supply, ammonia available, and the general market situation are factors which influence the amount of sulphur dioxide treated.

In 1939, 360 tons, and in 1940, 416 tons, of sulphur per day were oxidized to sulphur dioxide in the metallurgical processes at the plant. Of the above,

for 1939, 253 tons, and for 1940, 289 tons per day, of the sulphur which was oxidized to sulphur dioxide was utilized. One hundred and seven tons

## NORTHPORT

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

| 1938 | April | | May | | June | | July | | August | | Sept. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Concentrations p.p.m. | h. | m. | h. | m. | h. | m. | h. | m. | h. | m. | h. | m. |
| .11-.25 | 6 | 0 | 0 | 0 | 0 | 20 | 5 | 50 | 10 | 40 | 28 | 20 |
| .26-.50 | 0 | 50 | 0 | 0 | 0 | 0 | 1 | 40 | 3 | 0 | 6 | 0 |
| above .50 | 0 | 10 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 20 |
| Maximum p.p.m. | .66 | | .08 | | .15 | | .33 | | .61 | | .51 | |
| 1939 | | | | | | | | | | | | |
| .11-.25 | 1 | 40 | 10 | 0 | 9 | 20 | 5 | 20 | 5 | 0 | 25 | 0 |
| .26-.50 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 | 0 | 3 | 40 |
| above .50 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Maximum p.p.m. | .16 | | .21 | | .30 | | .24 | | .33 | | .36 | |
| 1940 | | | | | | | | | | | | |
| .11-.25 | 16 | 20 | 32 | 40 | 5 | 40 | 9 | 20 | 10 | 0 | 23 | 10 |
| .26-.50 | 2 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| above .50 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Maximum p.p.m. | .37 | | .23 | | .22 | | .19 | | .17 | | .23 | |

## WANETA

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

| 1938 | June | | July | | August | | September | |
|---|---|---|---|---|---|---|---|---|
| Concentrations p.p.m. | h. | m. | h. | m. | h. | m. | h. | m. |
| .11-.25 | 13 | 0 | 18 | 40 | 20 | 40 | 56 | 30 |
| .26-.50 | 0 | 50 | 1 | 20 | 3 | 20 | 5 | 20 |
| above .50 | 0 | 20 | 0 | 0 | 5 | 0 | 0 | 20 |
| Maximum p.p.m. | .52 | | .30 | | 1.63 | | .75 | |

| 1939 | April | | May | | June | | July | | August | | Sept. | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | h. | m. | h. | m. | h. | m. | h. | m. | h. | m. | h. | m. |
| .11-.25 | 11 | 55 | 10 | 0 | 20 | 20 | 10 | 40 | 13 | 20 | 16 | 50 |
| .26-.50 | 4 | 40 | 5 | 40 | 8 | 20 | 5 | 0 | 6 | 20 | 9 | 20 |
| above .50 | 0 | 20 | 0 | 0 | 1 | 20 | 0 | 0 | 0 | 40 | 1 | 40 |
| Maximum p.p.m. | .52 | | .46 | | .79 | | .39 | | .56 | | .59 | |

| 1940 | June | | July | | August | | September | |
|---|---|---|---|---|---|---|---|---|
| | h. | m. | h. | m. | h. | m. | h. | m. |
| .11-.25 | 5 | 20 | 18 | 20 | 27 | 20 | 28 | 0 |
| .26-.50 | 0 | 0 | 6 | 40 | 4 | 40 | 8 | 40 |
| above .50 | 0 | 0 | 0 | 0 | 0 | 40 | 0 | 0 |
| Maximum p.p.m. | .15 | | .49 | | .64 | | .42 | |

and 127 tons of sulphur per day for those two years, respectively, were emitted as sulphur dioxide to the atmosphere.

The tons of sulphur emitted into the air from the Trail Smelter fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931 and 3,400 tons in 1932 as a result both of sulphur dioxide beginning to be absorbed and of depressed business conditions. As depression receded, this monthly average rose in 1933 to 4,000 tons, in 1934 to nearly 6,300 tons and in 1935 to 6,800 tons. In 1936, however, it had fallen to 5,600 tons; in 1937, it further fell to 4,850 tons; in 1938, still further to 4,230 tons to reach 3,250 tons in 1939. It rose again, however, to 3,875 tons in 1940.

During the period since January 1, 1932, automatic recorders for registering the presence of sulphur dioxide in the air, as well as the length of fumigations and the maximum concentration in parts per million (p.p.m.) and one hundredth of parts per million, were maintained by the United States on the east side of the river at Northport from 1932 to 1937; and at Boundary in 1932, 1933, and in parts of 1934 and 1935; at Evans, south of Northport, from 1932 to 1934 and parts of 1935; and at Marble, in 1932 and 1933 and part of 1934; and the United States had at various times in 1939 and 1940 a portable recorder at Fowler Farm. The Dominion of Canada maintained recorders at Stroh Farm from 1932 to 1937 and from January to May 1938, and at a point opposite Northport on the west side of the River from 1937 to 1940—both of these recorders being in United States territory; and in Canadian territory, at Waneta, June to December, 1938, January to March, 1939, and June to December 1940, and at Columbia Gardens from May 1937 to December 1940.

Data compiled from the Northport recorder during the growing seasons from April to September, 1938, 1939, and 1940, and from the Waneta recorder during the growing seasons while it was operated from June to September 1938 and 1940, and April to September, 1939, show the number of hours and minutes in each month during which fumes were present at the various concentrations of .11 to .25, .26 to .50, and above .50.

## PART TWO.

The first question under Article III of the Convention is: "(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor."

This question has been answered by the Tribunal in its previous decision, as to the period from January 1, 1932 to October 1, 1937, as set forth above.

Concerning this question, three claims are now propounded by the United States.

### I.

The Tribunal is requested to "reconsider its decision with respect to expenditures incurred by the United States during the period January 1, 1932, to June 30, 1936". It is claimed that "in this respect the United States is entitled to be indemnified in the sum of $89,655, with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision".

This claim was dealt with in the previous decision (Part Two, Clause (7)) and was disallowed.

The indemnity found by the Tribunal to be due for damage which had occurred since the first day of January, 1932, up to October 1, 1937, *i.e.*, $78,000, was paid by the Dominion of Canada to the United States and received by the latter without reservations. (Record, Vol. 56, p. 6468.) The decision of the Tribunal in respect of damage up to October 1, 1937, was thus complied with in conformity with Article XII of the Convention. If it were not, in itself, final in this respect, the decision would have assumed a character of finality through this action of the parties.

But this finality was inherent in the decision. Article XI of the Convention says: "The Tribunal shall report to the Governments its final decisions .... as soon as it has reached its conclusions in respect to the questions...." and Article XII of the Convention, "The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal."

There can be no doubt that the Tribunal intended to give a final answer to Question I for the period up to October 1, 1937. This is made abundantly clear by the passage quoted above, in particular by the words: "This decision is not subject to alteration or modification by the Tribunal hereafter."

It might be argued that the words "as soon as it reached its conclusions in respect to the questions" show that the "final decisions" mentioned in Article XI of the Convention were not to be final until all the questions should have been answered.

In proceeding as it did the Tribunal did not act exclusively on its own interpretation of the Convention. It stated to the Governments its intention of granting damages for the period down to October 1, 1937, whilst ordering further investigations before establishing a permanent régime. It is with this understanding that both Governments, by an exchange of letters between the Minister of the United States at Ottawa and the Secretary of State of the Dominion of Canada (March 14, 1938, March 22, 1938), concurred in the extension of time requested.

This interpretation of Article XI of the Convention, moreover, is not in contradiction with the intention of the parties as expressed in the Convention. It was not foreseen at the time that further investigations might be needed, after the hearings had been ended, as proved to be the case. But the duty was imposed upon the Tribunal to reach a solution just to all parties concerned. This result could not have been achieved if the Tribunal had been forced to give a permanent decision as to a régime on the basis of data which it and both its scientific advisers considered inadequate and unsatisfactory. And, on the other hand, it is obvious that equity would not have been served if the Tribunal, having come to the conclusion that damage had occurred after January 1, 1937, had withheld its decision granting damages for more than two and one half years.

The Tribunal will now consider whether its decision concerning Question No. 1, up to October 1, 1937, constitutes *res judicata*.

As Dr. James Brown Scott (*Hague Court Reports*, p. XXI) expressed it: ".... in the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an international tribunal". In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law; but an international tribunal will not depart from the rules of international law in favor of divergent rules of

national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based. This would particularly seem to be the case in matters of procedure. In this respect attention should be paid to the rules of procedure adopted by this Tribunal with the concurrence of both Agents on June 22, 1937, wherein it is said (Article 16): "With regard to any matter as to which express provision is not made in these rules, the Tribunal shall proceed as international law, justice and equity may require." Undoubtedly such provisions could not prevail against the Convention, but they show, at least, how, in the common opinion of the Tribunal and of the Agents, Article IV of the Convention was understood at the time. According to the latter, the Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice. This text does not bind the Tribunal to apply national law and practice to the exclusion of international law and practice.

It is further to be noted that the words "the law and practice followed in the United States" are qualified by "in dealing with cognate questions". Unless these latter words are disregarded, they mean a limitation of the reference to national law. What this limitation is, becomes apparent when one refers to the questions set forth in the previous article. These questions are questions of damage caused by smelter fumes, of indemnity therefor, of measures or régime to be adopted or maintained by the Smelter with or without indemnity or compensation. They may be questions of law or questions of practice. The practice followed, for instance, in injunctions dealing with problems of smelter fumes may be followed in so far as the nature of an arbitral tribunal permits. But general questions of law and practice, such as the authority of the *res judicata* and the exceptions thereto, are not "cognate questions" to those of Article III.

This interpretation is confirmed by the correspondence exchanged between parties, as far as it is part of the record. On February 22, 1934, the Canadian Government declared (letter of the Secretary of State for External Affairs to the Minister of the United States at Ottawa) that it "would be entirely satisfied to refer the Tribunal to the principles of law as recognized and applied by the courts of the United States of America in such matters". Now, the matters referred to in that sentence are determined by the preceding sentences:

> The use of the word "injury" is likely to cause misunderstanding which should be removed when the actual terms of the issue are settled for inclusion in the Convention. In order to avoid such misunderstanding, it would seem to be desirable to use the word "damage" in place of "injury" and further, either to define the word actually used by a definition to be incorporated in the Convention or else by reference to the general principles of the law which are applied by the courts in the two countries in dealing with cognate matters.

This passage shows that the "cognate questions" parties had in mind in drafting the Convention were primarily those questions which in cases between private parties, find their answer in the law of nuisances.

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.

If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true

that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.

Numerous and important decisions of arbitral tribunals and of the Permanent Court of International Justice show that this is, in effect, a principle of international law. It will be sufficient, at this stage, to refer to some of the more recent decisions.

In the decisions of an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration concerning the Pious Funds of California (October 14, 1902, *Hague Court Reports*, 1916, p. 3) the question was whether the claim of the United States on behalf of the Archbishop of San Francisco and the Bishop of Monterey was governed by the principle of *res judicata* by virtue of the arbitral award of Sir Edward Thornton. This question was answered in the affirmative.

The Fabiani case (French-Venezuelan Claims Commission, Ralston's Report, Decision of Umpire Plumley, p. 110) is of particular interest for the present case.

There had been an award by the President of the Swiss Confederation allowing part of a claim by France on behalf of Fabiani against Venezuela and disallowing the rest. As the terms of reference to the second arbitral tribunal were broader than to the first, it was contended by the claimants "that of the sums denied allowance by the honorable Arbitrator of Bern there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this Commission". The first Arbitrator had eliminated all claims based on alleged arbitrary acts (*faits du prince*) of executive authorities as not being included in the matter submitted to his jurisdiction which he found limited by treaty to "denial of justice", a concept which he interpreted as confined to acts and omissions of judicial authorities. It was argued, on behalf of claimants, that "the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law". Umpire Plumley rejected these contentions. "In the interest of peace", a limitation had been imposed upon diplomatic action by a treaty the meaning whereof had been "finally and conclusively" settled "as applied to the Fabiani controversy" by the first award. The definition of denial of justice and the determination of the responsibility of the respondent Government were not questions of jurisdiction. And the Umpire concluded that "the compromise arranged between the honorable Governments . . . . followed by the award of the honorable President of the Swiss Confederation . . . . were 'acting together' a complete, final and conclusive disposition of the entire controversy on behalf of Fabiani".

Again in the case of the claim of the Orinoco Steamship Company between the United States and Venezuela, an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration (October 25, 1910, *American Journal of International Law*, V, p. 230) emphasized the importance in international disputes of the principle of *res judicata*. The first question for the arbitral tribunal to decide was whether the decision previously rendered by an umpire in this case "in view of all the circumstances and under the principles of international law" was "not void, and whether it must be considered to be so conclusive as to preclude a re-examination of the case on its merits". As we will presently see, the tribunal held that the decision was partially void for excess of power. This, however, was rigidly limited and the principle affirmed as follows: ". . . . it is assuredly in the interest of peace

and the development of the institution of international arbitration so essential to the well-being of nations, that, in principle, such a decision be accepted, respected and carried out by the parties without reservation".

In three successive advisory opinions, regarding the delimitation of the Polish Czechoslovak frontier (Question of Jaworzina, No. 8, Series B, p. 38), the delimitation of the Albanian frontier at the Monastery of Saint Naoum (No. 9, Series B, p. 21, 22), and the Polish Postal service in the Free City of Danzig (No. 11, Series B, p. 24), the Permanent Court of International Justice based its appreciation of the legal effects of international decisions of an arbitral character on the underlying principle of *res judicata*.

This principle was affirmed in the judgment of the Court on the claim of Belgium against Greece on behalf of the *Société Commerciale de Belgique* (Series A/B, No. 78, p. 174), wherein the Court said: ". . . . since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the parties in regard to them, it can neither confirm nor annul them either wholly or in part".

In the well-known case of Frelinghuysen *v.* Key (110 U.S. 63, 71, 72), the Supreme Court of the United States, speaking of an award of the United States Mexican Claims Commission, under the Convention of July 4, 1868, whereby (Art. V) parties agreed, *inter alia*, to consider the result of the proceedings as a "full, perfect, and final settlement of every claim", said: "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object and cause (Permanent Court of International Justice, Judgment 11, Series A, No. 13, Dissenting Opinion by M. Anzilotti, p. 23) are the same. (*Cf.* Permanent Court of International Justice, Series B, No. 11, p. 30.)

Under the Statute of the Permanent Court of International Justice whereby (Article 59) "The decision of the Court has no binding force except between the parties and in respect of that particular case", the Permanent Court of International Justice, in an interpretative judgment (Judgment No. 11, Series A, No. 13, pp. 18, 20—Chorzów Case), expressed the opinion that the force of *res judicata* was inherent even in what was an incidental decision on a preliminary point, the ownership of the Oberschlesische Company. The minority judge, M. Anzilotti, pointed out that "under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in another case" (same decision, p. 26). Later on, in the same case (Judgment 13, Series A, No. 17, Dissenting Opinion of M. Ehrlich, pp. 75, 76), M. Ehrlich, the dissenting national judge appointed by Poland, adopted this statement. But M. Anzilotti (Judgment 11, Series A, No. 13, Dissenting Opinion, p. 27) did not expressly answer in the negative the question which he formulated, namely: "Does this general rule also cover the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided?" It is true that, when the case came up again on the question of indemnity (Judgment 13, Series A, No. 17, pp. 31, 32), the Court seems to have avoided—as M. Ehrlich pointed out—the assertion that there was *res judicata* and reserved the effect of its incidental decision "as regards the right of ownership

under municipal law". But the Court said: ". . . . it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment (the previous Judgment No. 7 wherein it was decided that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with international law) and in relation to the claim for reparation based on the same judgment", thus admitting in effect (M. Anzilotti now concurring) that it was bound by its previous decision.

In the present case, the decision was not preliminary or incidental. Neither was it a decision on a question of jurisdiction. There is some authority (Tiedemann *v.* Poland, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, Tome VII (1928), p. 702), in support of the contention that a decision upon the question of jurisdiction only, may, under certain circumstances, be reversed by the same court; and it might be argued, as, in fact, was done by France in the Fabiani case, that a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue. But assuming the first contention to be correct as the second undoubtedly is, that would not affect the issue in the present case. Here, as in the Fabiani case, the decision was not one denying jurisdiction.

The United States does not contend that the previous decision is void for excess of power, but asks for reconsideration and revision, as far as the costs of investigation are concerned, on account of a material error of law (Record, p. 6540).

In the absence of agreement between parties, the first question concerning a request tending to revision of a decision constituting *res judicata*, is: can such a request ever be granted in international law, unless special powers to do so have been expressly given to the tribunal?

The Convention for the Pacific Settlement of Disputes signed at The Hague, October 18, 1907 (Article 83) says: "The parties can reserve in the compromis the right to demand the revision of the award." In that case only, does the article apply. But, on the other hand, the Statute of the Permanent Court of International Justice (Article 61) does not require the grant of such special powers to the Court.

In the Jaworzina case (Advisory Opinions, Series B, No. 8, p. 37), the Permanent Court of International Justice expressed the opinion that the Conference of Ambassadors, which had acted in a quasi-arbitral capacity, did not retain the power to modify its decision, as it had fulfilled the task entrusted to it by giving the latter. In the case of Saint Naoum Monastery, however (Advisory Opinions, Series B, No. 9, p. 21), the Court seemed less positive as to the possibility of a revision in the absence of an express reservation to that effect.

Arbitral decisions do not give to the question an unanimous answer. Thus, in the United States Mexican Mixed Claims Commission of 1868, whilst Umpire Lieber, on a motion for rehearing, re-examined the case, Umpire Thornton, in the Weil, LaAbra, and other cases, refused a rehearing, *inter alia* on the ground that the provisions of the Convention in effect debarred him from rehearing cases which he had already decided (Moore, *International Arbitrations*, 1329, 1357). In the single case of Schreck, however, he granted a request of one of the Agents to reconsider his decision. The case also of A. A. Green (Moore, *International Arbitrations*, 1358) was reconsidered by the Umpire and that of G. Moore (Moore, *International Arbitrations*, 1357) by the two Commissioners. In the Lazare case (Haiti *v.* United States), the Arbitrator, Mr. Justice Strong, refused a rehearing, "solely for

the reason", that in his opinion, his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department". (Moore, *International Arbitrations*, 1793.) In the Sabotage cases, before the American-German Mixed Claims Commission, the Umpire, Mr. Justice Roberts, granted a rehearing, although there was no express provision in the agreement empowering the Commission to do so (December 15, 1933, Documents, p. 1122, *American Journal of International Law*, 1940, pp. 154, 164).

Whether final, in part, or not, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become *functus officio*. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision.

The Tribunal, therefore, decides that, at this stage, at least, the Convention does not deny it the power to grant a revision. (*Cf.* D. V. Sandifer, *Evidence before International Tribunals*, 1939, p. 299.)

The second question is whether revision should be granted; and this question subdivides itself into two separate parts: first, whether the petition for revision should be entertained, and second, if entertained, whether the previous decision should be revised in view of the considerations presented by the United States.

It is the rule under the Hague Convention for the Pacific Settlement of Disputes (Article 83) that the question whether a revision should be entertained must be dealt with separately. Such is also the rule according to Article 61 of the Statute of the Permanent Court of International Justice. It is true that, in the case of the Orinoco Steamship Company, the arbitral tribunal did not consider separately the question whether the previous award was void and the question of the merits; but the decision, in that respect, does not seem to conform to the compromis which clearly separated the two questions.

In the Sabotage cases and in other cases before the Mixed Claims Commission, United States and Germany, a contrary practice had prevailed. But when the question of revision came to a head, the Umpire, Mr. Justice Roberts (decision of December 15, 1933, Documents, p. 1115; *American Journal of International Law*, 1940, pp. 157-158), said: "I am convinced as the matter is now viewed in retrospect that it would have been fairer to both the parties, definitely to pass in the first instance upon the question of the Commission's power. . . . Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence. The American Agent has . . . . filed a very large quantity of evidence which . . . . I have thought it improper to examine." As the position apparently required further elucidation, a motion was presented to determine "whether the next hearing shall be merely of a preliminary nature" (Documents, p. 1159). The Umpire decided that it should, saying: "Germany insists that the preliminary question be determined separately. I am of opinion this is her right."

The Tribunal is of opinion that this procedure should be followed.

As said above, the petition is founded upon an alleged error in law. It is contended by the United States that the Tribunal erred in the interpretation of the Convention when it decided that the monies expended for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail could not be

included within the "damage caused by the Trail Smelter" (Article III (1) of the Convention, Record, p. 6030). Statements by the Tribunal that the controversy did not involve "any such type of facts as the persons appointed" in the *I'm Alone* case "felt to justify them in awarding to Canada damages for violation of sovereignty" and that in cases where a private claim was espoused "damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government" were also challenged, although petitioner added that possibly these further statements might be regarded as dicta. (Record, p. 6040.) It was further argued that the solution adopted by the Tribunal was not a "solution just to all parties concerned", as required by Article IV of the Convention.

According to the Hague Convention (Article 83), a request tending to the revision of an award can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which at the time the discussion was closed was unknown to the Tribunal and to the party demanding the revision.

It is noteworthy that, at the first Hague Conference, the United States Delegation submitted a proposal whereby every party was entitled to a second hearing before the same judges within a certain period of time "if it declares that it can call new witnesses or raise questions of law not raised or decided at the first hearing". This proposal was, however, considered as weakening unduly the principle of *res judicata*. The text, as it now stands, was adopted as a compromise between the American view and the views of those who, such as de Martens, were opposed to any revision. The Statute of the Permanent Court of International Justice (Article 61) substantially coincides with the Hague Convention: "An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence." In presenting this text, the report of the Advisory Committee of Jurists (*Procès-Verbaux*, p. 744) said very aptly: "The right of revision is a very important right and affects adversely in the matter of *res judicata* a point which for the sake of international peace should be considered as finally settled. Justice, however, has certain legitimate requirements." These requirements were provided for in the text which enables the court to bring its decision in harmony with justice in cases where, through no fault of the claimant, essential facts remained undisclosed or where fraud was subsequently discovered. No error of law is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice.

The Permanent Court of International Justice left open, in the Saint Naoum case (Series B, p. 21), the question whether, in the absence of express provision, an award could be revised "in the event of the existence of an essential error being proved or of new facts being relied on".

Except for those cases where a second hearing before the same or another Tribunal was agreed upon between the Governments or their Agents in the case, there are few cases of awards where rehearing or revision was granted.

In the Green case, quoted above (Moore, *International Arbitrations*, 1358), the Umpire granted a rehearing because certain evidence which was before the Commissioners was not transmitted to him. In the case of George

Moore, also quoted above (Moore, *International Arbitrations*, 1357), a new document was produced. In the latter case, the Commissioners stated that it was their practice to grant revision where new evidence was such as ought undoubtedly to produce a change in the minds of the Commission except where there might be some gross laches or injustice would probably be done to the defendant Government. In the single case of Schreck, also quoted above (Moore, *International Arbitrations*, 1357), Umpire Thornton reconsidered his decision at the request of the Agent of the claimant Government and, in this case, the revision was granted because he found that he had clearly committed an error in law. Because a claimant was born in Mexico, he had taken for granted that he had Mexican nationality. "The Agent of the United States produced the appropriate law of Mexico, by which it appeared that the assumption was clearly erroneous."

In the case of the Orinoco S. S. Company where, it will be remembered, the question before the arbitral tribunal was whether the award in a previous arbitration was void, the defendant State, Venezuela, argued that the decision was not void as the compromis was valid, there had been no excess of power, nor alleged corruption of the judges, nor any "essential error" in the decision.

There were several claims the rejection of which by the Umpire in the first arbitration, Mr. Barge, was considered separately. The main claim had been disallowed on three grounds: the first was the interpretation of a contract between the Venezuelan Government and a concessionaire; the second was a so-called Calvo clause and the third was lack of compliance both with the contract and with Venezuelan law in omitting to notify to the Venezuelan Government the cession of the contract.

Under the terms of reference, the first arbitrators were to decide "on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislations". It was clearly apparent from the circumstances of the case that the second and third grounds were entirely irreconcilable with these terms. Nevertheless, the second arbitral tribunal did not upset the findings of Umpire Barge as regards the main claim. The second award said: .

> Whereas the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and, as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is, not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule.

Other and much smaller claims, however, had been disallowed exclusively on grounds two and three. Here the decision was considered void for excess of power.

The Sabotage cases were re-opened on the allegation that the decisions had been induced by fraud and the decisions were revised when this was proved. This obviously falls within the limits set up both by the Hague Convention and by the Statute of the Permanent Court of International Justice. The following passage of the decision of the Umpire, Mr. Justice Roberts, relied upon by the petitioner in this case, is therefore in the nature of a dictum:

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does

not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to re-open and correct a decision to accord with the facts and the applicable legal rules.

This statement may be entirely justified by circumstances special to the Mixed Claims Commission, in particular by the practice followed *ab initio* by this Commission, apparently with the concurrence, until the Sabotage cases reached their last stages, of the Umpire, the Commissioners and the Agents, but in so far as it does not refer to the correction of possible errors arising from a slip or accidental omission, it does not express the opinion generally prevailing as to the position in international law, stated for instance in the following passage of a recent decision: ".... in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment" (de Neuflize *v.* Disconto Gesellschaft, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, t. VII, 1928, 629) [1].

A mere error in law is no sufficient ground for a petition tending to revision.

The formula "essential error" originated in a text voted by the International Law Institute in 1876. From its inception, its very authors were divided as to its meaning. It is thought significant that the arbitral tribunal in the Orinoco case avoided it; the Permanent Court in the Saint Naoum case alluded to it. The Government of the Kingdom of the Serbs, Croats and Slovenes alleged essential error both in law and in fact (Series C, No. 5, II, p. 57, Pleadings by Mr. Spalaikovitch), but what the Court had in mind in the passage quoted above (see p. 36 of the present decision), was only a possible error in fact. The paragraph where this passage appears begins with the words: "This decision has also been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts."

The Tribunal is of opinion that the proper criterion lies in a distinction not between "essential" errors in law and other such errors, but between "manifest" errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law. At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a "manifest" error. Further criticisms need not be considered. The assumption that they are justified would not suffice to upset the decision.

For these reasons, the Tribunal is of opinion that the petition must be denied.

II (*a*).

The Tribunal is requested to say that damage has occurred in the State of Washington since October 1, 1937, as a consequence of the emission of sulphur dioxide by the smelters of the Consolidated Mining and Smelting

[1] This decision refers to the rules of procedure of the Franco-German Mixed Arbitral Tribunals but these rules themselves are expressive of the opinion generally prevailing as to the position in international law.

Company at Trail, B.C., and that an indemnity in the sum of $34,807 should be paid therefor.

It is alleged that acute damage has been suffered, in 1938-1940, in an area of approximately 6,000 acres and secondary damage, during the same period, in an area of approximately 27,000 acres. It is also alleged that damage has been suffered in the town of Northport, situated in the latter area. On the basis of investigations made in 1939 and 1940, the area of acute damage is claimed to extend on the western bank of the Columbia River to a point approximately due north of the mouth of Deep Creek, the average width of this area on this bank being about 1½ miles, and on the eastern bank of the river, to a point somewhat to the south of the northern limit of Section 20, T. 40, R. 41, the width of this area on that bank varying from approximately 1¼ miles at the border to ¼ mile at its lower end. The area of secondary damage is claimed to extend on both banks of the river to about one mile below Northport; it extends laterally, at the boundary, westward to the western limit of Section 2, T. 40, R. 40, and eastward to the eastern limit of Section 1, T. 40, R. 41; it extends along Cedar Creek above Section 14, T. 40, R. 41, along Nigger Creek to the middle of Section 9, T. 40, R. 40, along Little Sheep Creek to the middle of Section 10, T. 40, R. 39, along Big Sheep Creek to the western limit of Section 15, T. 40, R. 39, and along Deep Creek, to the southeastern corner of Section 14, T. 39, R. 40. It is to be noted that the area of damage alleged by the United States in its original statement of case was about 144,000 acres.

Damage is claimed, as to the area of acute damage, on the basis of $0.8525 per acre, on all lands whether cleared or not cleared and whether used for crops, timber or other purposes. It is equally claimed, as to the area of secondary damage, on the basis of $1.0511, on all lands. It is alleged that damage occurred, in 1932-1937, in the area of acute damage to the extent of $17,050; in the area of secondary damage, to the extent of $189,200 and in the town of Northport, to the extent of $8,750. The damage for 1938-1940 is supposed to be 0.3 of the first amount in the area of acute damage, and 0.15 of the second and the third amount, respectively, in the area of secondary damage and in the town of Northport.

The request for an indemnity in the sum of $34,807 is based on the final paragraph of Part Two of the previous decision, quoted above, where it is said that the Tribunal would determine in its final decision the fact of the existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor.

The present report covers the period until October 1, 1940.

The Tribunal has considered not only the pertinent evidence (including data from the recorders located by the United States and by Canada) introduced at the hearings at Washington, D.C., Spokane and Ottawa in 1937, but also the following: (*a*) the Reports of the Technical Consultants appointed by the Tribunal to superintend the experimental period from April 16, 1938, to October 1, 1940, as well as their reports of the personal investigations in the area at various times within that period; (*b*) the candid reports of his investigations in the area in 1939 and 1940 by the scientist for the United States, Mr. Griffin; (*c*) the monthly sulphur balance sheets of the operations of the Smelter; (*d*) all data from the recorders located at Columbia Gardens, Waneta, Northport, and Fowler's Farm; (*e*) the census data and all other evidence produced before it.

The Tribunal has examined carefully the records of all fumigations specifically alleged by the United States as having caused or been likely to cause

damage, as well as the records of all other fumigations which may be considered likely to have caused damage. In connection with each such instance, it has taken into detailed consideration, with a view of determining the fact or probability of damage, the length of the fumigation, the intensity of concentration, the combination of length and intensity, the frequency of fumigation, the time of day of occurrence, the conditions of humidity or drouth, the season of the year, the altitude and geographical locations of place subjected to fumigation, the reports as to personal surveys and investigations and all other pertinent factors.

As a result, it has come to the conclusion that the United States has failed to prove that any fumigation between October 1, 1937, and October 1, 1940, has caused injury to crops, trees or otherwise.

II (*b*).

The Tribunal is finally requested as to Question I to find with respect to expenditures incurred by the United States during the period July 1, 1936, to September 1, 1940, that the United States is entitled to be indemnified in the sum of $38,657.79 with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision.

So far as claim is made for indemnity for costs of investigations undertaken between July 1, 1936, and October 1, 1937, it cannot be allowed for the reasons stated above with reference to costs of investigations from January 1, 1932, to June 30, 1936. The Tribunal, therefore, will now consider the question of the costs of investigations made since October 1, 1937.

Under Article XIV, the Convention took effect immediately upon exchange of ratifications. Ratifications were exchanged at Ottawa on August 3, 1935. Thus, the Convention was in force at the beginning of the period covered by this claim. Under the Convention (Article XIII) each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal. Whatever may have been the nature of the expenditures previously incurred, the Tribunal finds that monies expended by the United States in the investigation, preparation and proof of its case after the Convention providing for arbitral adjudication, including the aforesaid provision of Article XIII, had been concluded and had entered into force, were in the nature of expenses of the presentation of the case. An indemnity cannot be granted without reasonable proof of the existence of an injury, of its cause and of the damage due to it. The presentation of a claim for damages includes, by necessary implication, the collection in the field of the data and the preparation required for their presentation as evidence in support of the statement of facts provided for in Article V of the Convention.

It is argued that where injury has been caused and the continuance of this injury is reasonably feared, investigation is needed and that the cost of this investigation is as much damageable consequence of the injury as damage to crops and trees. It is argued that the indemnity provided for in Question No. 1 necessarily comprises monies spent on such investigation.

There is a fundamental difference between expenditure incurred in mending the damageable consequences of an injury and monies spent in ascertaining the existence, the cause and the extent of the latter.

These are not part of the damage, any more than other costs involved in seeking and obtaining a judicial or arbitral remedy, such as the fees of

counsel, the travelling expenses of witnesses, etc. In effect, it would be quite impossible to frame a logical distinction between the costs of preparing expert reports and the cost of preparing the statements and answers provided for in the procedure. Obviously, the fact that these expenditures may be incurred by different agencies of the same government does not constitute a basis for such a logical distinction.

The Convention does not warrant the inclusion of the cost of investigations under the heading of damage. On the contrary, apart from Article XIII, both the text of the Convention and the history of its conclusion disprove any intention of including them therein.

The damage for which indemnity should be paid is the damage caused by the Trail Smelter in the State of Washington. Investigations in the field took place there and it happens that experiments were conducted in that State. But these investigations were conducted by Federal agencies. The "damage"—assuming *ex hypothesi* that monies spent on the salaries and expenditures of the investigators should be so termed—was therefore caused, not in one State in particular, but in the entire territory of the Union.

The word "damage" is used in several passages of the Convention. It may not have everywhere the same meaning but different meanings should not be given to it in different passages without some foundation either in the text itself or on its history. It first occurs in the preamble where it is said that "fumes discharged from the Smelter .... have been causing damage in the State of Washington". It then appears in Article I, where it is said that the $350,000 to be paid to the United States will be "in payment of all damage which occurred in the United States .... as a result of the operation of the Trail Smelter". In Article III itself, the word appears twice. The Tribunal is asked "whether damage caused by the Trail Smelter in the State of Washington has occurred" and "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent". Article X secures to qualified investigators access to the properties "upon which damage is claimed to have occurred or to be occurring". Finally, Article XI deals with "indemnity for damage .... which may occur subsequently to the period of time covered by the report of the Tribunal".

The underlying trend of thought strongly suggests that, in all these passages, the word "damage" has the same meaning, although in Article X, its scope is limited to damage to property by the context.

The preamble states that the damage complained of is damage caused by fumes in the State of Washington and there is every reason to admit that this, and this alone, is what is meant by the same word when it is used again in the text of the Convention.

Although no part of the report of the Joint Commission was formally adopted by both Governments, there is no doubt that, when the sum of $350,000 mentioned in Article I was agreed upon, parties had in mind the indemnity suggested by that Commission. It was, at least, in fact, a partial acceptance of the latter's suggestions. (See letters of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934, and of the latter to the former of February 17, 1934.) There is also no doubt that, in the sum of $350,000 suggested by the Commission, no costs of investigation were included. This is conclusively proved by Paragraphs 2 and 3 of the Report of the International Joint Commission where it is recommended that this sum should be held by the Treasury of the United States as a trust fund to be distributed to the persons

"damaged by.... fumes" by an appointee of the Governor of the State of Washington and where it is said that no allowance was included for indemnity for damage to the lands of the Government of the United States. If, with that report before them, parties intended to include costs of investigations in the word "damage", as used in Article III, they would no doubt have expressed their intention more precisely.

It was argued in this connection on behalf of the United States that, whilst the terms of reference to the International Joint Commission spoke of the "extent to which property in the State of Washington has been damaged", the terms of reference to the arbitral Tribunal do not contain the same limitation to property. It is, however, to be noted that, whilst no indemnity was actually claimed for damage to the health of the inhabitants, the existence of such damage was asserted by interested parties at the time. (See letter of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934.) The difference in the terms of reference may further be accounted for by the circumstance that the case was presented to this Tribunal, not as a sum of individual claims for damage to private properties, espoused by the Government, but as a single claim for damage to the national territory.

If, under the Convention, the monies spent by the United States on investigations cannot be looked upon as damage, no indemnity can be claimed therefor, under the latter, even if such expenses could not properly be included in the "expenses of the presentation and conduct" of the case. If there were a gap in the Convention, the claim ought to be disallowed, as it is unsupported by international practice.

When a State espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in prosecuting or endeavoring to establish his claim prior to the espousal are sometimes included and, under appropriate conditions, may legitimately be included in the claim. They are costs, incidental to damage, incurred by the national in seeking local remedy or redress, as it is, as a rule, his duty to do, if, on account of injury suffered abroad, he wants to avail himself of the diplomatic protection of his State. The Tribunal, however, has not been informed of any case in which a Government has sought before an international jurisdiction or been allowed by an international award or judgment indemnity for expenses by it in preparing the proof for presenting a national claim or private claims which it had espoused; and counsel for the United States, on being requested to cite any precedent for such an adjudication, have stated that they know of no precedent. Cases cited were instances in which expenses allowed had been incurred by the injured national, and all except one prior to the presentation of the claim by the Government [1].

---

[1] Santa Clara Estates Company, British Venezuelan Commission of 1903 (Ralston's Report, pp. 397, 402); Orinoco Steamship Company (United States) *v.* Venezuela (Ralston's Report, p. 107); United States-Venezuelan Arbitration at The Hague, 1909, p. 249 (Foreign Relations of the United States, 1911, p. 752); Compagnie Générale des Asphaltes de France, British-Venezuelan Arbitration (Ralston's Report, pp. 331, 340); H. J. Randolph Hemming under the Special Agreement of August 18, 1910 (Nielsen's Report, pp. 620, 622); Shufeldt (United States *v.* Guatemala), Department of State Arbitration Series No. 3, p. 881; Mather and Glover *v.* Mexico (Moore, International Arbitrations, pp. 3231-3232); Patrick H. Cootey *v.* Mexico (Moore, International Arbitrations, pp. 2769-2970); The Louisa (Moore, International Arbitrations,

In the absence of authority established by settled precedents, the Tribunal is of opinion that, where an arbitral tribunal is requested to award the expenses of a Government incurred in preparing proof to support its claim, particularly a claim for damage to the national territory, the intent to enable the Tribunal to do so should appear, either from the express language of the instrument which sets up the arbitral tribunal or as a necessary implication from its provision. Neither such express language nor implication is present in this case.

It is to be noted from the above, that even if the Tribunal had the power to re-open the case as to the expenditures by the United States from January 1, 1932, to October 1, 1937, the Tribunal would have reached the same conclusion as to such expenditures and would have been obliged to affirm its decision made in the Report filed on April 16, 1938.

Since the Tribunal has, in its previous decision, answered Question No. 1 with respect to the period from the first day of January, 1932, to the first day of October, 1937, it now anwers Question No. 1 with respect to the period from the first day of October, 1937, to the first day of October, 1940, as follows:

(1) No damage caused by the Trail Smelter in the State of Washington has occurred since the first day of October, 1937, and prior to the first day of October, 1940, and hence no indemnity shall be paid therefor.

## PART THREE.

The second question under Article III of the Convention is as follows:

> In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

Damage has occurred since January 1, 1932, as fully set forth in the previous decision. To that extent, the first part of the preceding question has thus been answered in the affirmative.

As has been said above, the report of the International Joint Commission (1 (*g*)) contained a definition of the word "damage" excluding "occasional damage that may be caused by $SO_2$ fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions", as far, at least, as the duty of the Smelter to reduce the presence of that gas in the air was concerned.

The correspondence between the two Governments during the interval between that report and the conclusion of the Convention shows that the problem thus raised was what parties had primarily in mind in drafting Question No. 2. Whilst Canada wished for the adoption of the report, the United States stated that it could not acquiesce in the proposal to limit consideration of damage to damage as defined in the report (letter of the Minister of the United States of America at Ottawa to the Secretary of State for External Affairs of the Dominion of Canada, January 30, 1934). The view was expressed that "so long as fumigations occur in the State of Wash-

---

p. 4325); Dr. John Baldwin *v.* Mexico (Moore, International Arbitrations, pp. 3235-3240); Robert H. May *v.* Guatemala (Foreign Relations of the United States, 1900, p. 674); Salvador Commercial Company *v.* Guatemala (Foreign Relations of the United States, 1902. pp. 859-873).

ington with such frequency, duration and intensity as to cause injury", the conditions afforded "grounds of complaint on the part of the United States, regardless of the remedial works.... and regardless of the effect of those works" (same letter).

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.

Particularly in reaching its conclusions as regards this question as well as the next, the Tribunal has given consideration to the desire of the high contracting parties "to reach a solution just to all parties concerned".

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act.

A case concerning, as the present one does, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, may serve to illustrate the relativity of the rule. Soleure brought a suit against her sister State to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: "This right (sovereignty) excludes.... not only the usurpation and exercise of sovereign rights (of another State).... but also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants." As a result of the decision, Argovia made plans for the improvement of the existing installations. These, however, were considered as insufficient protection by Soleure. The Canton of Argovia then moved the Federal Court to decree that the shooting be again permitted after completion of the projected improvements. This motion was granted. "The demand of the Government of Soleure", said the court, "that all endangerment be absolutely abolished apparently goes too far." The court found that all risk whatever had not been eliminated, as the region was flat and absolutely safe shooting ranges were only found in mountain valleys; that there was a federal duty for the communes to provide facilities for military target practice and that "no more precautions may be demanded for shooting ranges near the boundaries of two Cantons than are required for shooting ranges in the interior of a Canton". (R. O. 26 I, p. 450, 451; R. O. 41, I, p. 137; see D. Schindler, "The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes", *American Journal of International Law*, Vol. 15 (1921), pp. 172-174.)

No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

In the suit of the State of Missouri *v.* the State of Illinois (200 U.S. 496, 521) concerning the pollution, within the boundaries of Illinois, of the Illinois River, an affluent of the Mississippi flowing into the latter where it forms the boundary between that State and Missouri, an injunction was refused. "Before this court ought to intervene", said the court, "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. (See Kansas *v.* Colorado, 185 U.S. 125.)" The court found that the practice complained of was general along the shores of the Mississippi River at that time, that it was followed by Missouri itself and that thus a standard was set up by the defendant which the claimant was entitled to invoke.

As the claims of public health became more exacting and methods for removing impurities from the water were perfected, complaints ceased. It is significant that Missouri sided with Illinois when the other riparians of the Great Lakes' system sought to enjoin it to desist from diverting the waters of that system into that of the Illinois and Mississippi for the very purpose of disposing of the Chicago sewage.

In the more recent suit of the State of New York against the State of New Jersey (256 U.S. 296, 309), concerning the pollution of New York Bay, the injunction was also refused for lack of proof, some experts believing that the plans which were in dispute would result in the presence of "offensive odors and unsightly deposits", other equally reliable experts testifying that they were confidently of the opinion that the waters would be sufficiently purified. The court, referring to Missouri *v.* Illinois, said: ".... the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted this Tribunal under the Convention. What is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada.

In another recent case concerning water pollution (283 U.S. 473), the complainant was successful. The City of New York was enjoined, at the request of the State of New Jersey, to desist, within a reasonable time limit, from the practice of disposing of sewage by dumping it into the sea, a practice which was injurious to the coastal waters of New Jersey in the vicinity of her bathing resorts.

In the matter of air pollution itself, the leading decisions are those of the Supreme Court in the State of Georgia *v.* Tennessee Copper Company and

Ducktown Sulphur, Copper and Iron Company, Limited. Although dealing with a suit against private companies, the decisions were on questions cognate to those here at issue. Georgia stated that it had in vain sought relief from the State of Tennessee, on whose territory the smelters were located, and the court defined the nature of the suit by saying: "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

On the question whether an injunction should be granted or not, the court said (206 U.S. 230):

> It (the State) has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.... It is not lightly to be presumed to give up quasi-sovereign rights for pay and .... if that be its choice, it may insist that an infraction of them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account.... it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.... Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

Later on, however, when the court actually framed an injunction, in the case of the Ducktown Company (237 U.S. 474, 477) (an agreement on the basis of an annual compensation was reached with the most important of the two smelters, the Tennessee Copper Company), they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".

Great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the Tribunal, be "just to all parties concerned", as long, at least, as the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is,

therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The Tribunal, therefore, answers Question No. 2 as follows: (2) So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments, acting under Article XI of the Convention, should agree upon.

## PART FOUR.

The third question under Article III of the Convention is as follows: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted and maintained by the Trail Smelter?"

Answering this question in the light of the preceding one, since the Tribunal has, in its previous decision, found that damage caused by the Trail Smelter has occurred in the State of Washington since January 1, 1932, and since the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth in Section 3, Paragraph VI of the present part of this decision.

### SECTION 1.

The Tribunal in its previous decision, deferred the establishment of a permanent régime until more adequate knowledge had been obtained concerning the influence of the various factors involved in fumigations resulting from the operations of the Trail Smelter.

For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, during which studies could be made of the meteorological conditions in the Columbia River Valley, and of the extension and improvements of the methods for controlling smelter operations in closer relation to such meteorological conditions, the Tribunal, as said before, appointed two Technical Consultants, who directed the observations, experiments and operations through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940 and the winter seasons of 1938-1939 and 1939-1940. The Tribunal appointed as Technical Consultants the two scientists who had been designated by the Governments to assist the Tribunal, Dr. R. S. Dean and Professor R. E. Swain.

The previous decision directed that during the trial period, a consulting meteorologist, to be appointed with the approval of the Technical Consultants, should be employed by the Trail Smelter. On May 4, 1938, Dr. J. Patterson was thus appointed. On May 1, 1939, Dr. Patterson resigned to take up meteorological service in the Canadian Air Force, and Dr. E. W. Hewson was given leave from the Dominion Meteorological Service and appointed in his stead.

The previous decision further directed the installation, operation and maintenance of such observation stations, of such equipment at the stacks and of such sulphur dioxide recorders (the permanent recorders not to exceed three in number) as the Technical Consultants would deem necessary.

The Technical Consultants were empowered to require regular reports from the Trail Smelter as to the methods of operation of its plant and the latter was to conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal; these instructions could and, in fact, were modified from time to time on the result of the data obtained.

As further provided in the previous decision, the Technical Consultants regularly reported to the Tribunal which, as said before, met in 1939 to consult verbally with them about the temporary régime.

The previous decision finally prescribed that the Dominion of Canada should undertake to provide for the payment of the expenses resulting from this temporary régime.

On May 4, 1938, the Tribunal authorized and directed the employment of Dr. John P. Nielsen, an American citizen, engaged for three years in post-graduate work at Stanford University, in chemistry and plant physiology, as an assistant to the Technical Consultants; Dr. Nielsen continued in this capacity until October 1, 1938.

Through the authority vested in it by the Tribunal, this technical staff was enabled to study the influence of meteorological conditions on dispersion of the sulphurous gases emitted from the stacks of the smelter. This involved the establishment, operation, and maintenance of standard and newly designed meteorological instruments and of sulphur-dioxide recorders at carefully chosen localities in the United States and the Dominion of Canada, and the design and construction of portable instruments of various types for the observation of conditions at numerous surface locations in the Columbia River Valley and in the atmosphere over the valley. Observations on height, velocity, temperature, sulphur dioxide content, and other characteristics of the gas-carrying air currents, were made with the aid of captive balloons, pilot balloons and airplane flights. These observations were begun in May, 1938, and after information as to the inter-relation between meteorological conditions and sulphur-dioxide distribution had been obtained, the observations were continued throughout several experimental régimes of smelter operation during 1939 and 1940.

Periodic examination of crops and timber in the area claimed to be affected were made at suitable times by members of the technical staff.

The full details of the projects undertaken, the methods of study used, and the results obtained may be found in the final report entitled *Meteorological Investigations near Trail, B.C.*, 1938-1940, *by Reginald S. Dean and Robert E. Swain* (an elaborate document of 374 pages accompanied by numerous scientific charts, graphs and photographs, copies of which have been filed with the two Governments and have been made a part of the record by the Tribunal).

The Tribunal expresses the hope that the two Governments may see fit to make this valuable report available to scientists and smelter operators generally, either by printing or other form of reproduction.

SECTION 2.

(*a*)

The investigations during the experimental period make it clear that in the carrying out of a régime, automatic recorders should be located and maintained for the purpose of aiding in control of the emission of fumes at the Smelter and to provide data for observation of the effect of the controls on fumigations.

The investigations carried out by the Technical Consultants have confirmed the idea that the dissipation of the sulphur dioxide gas emitted from the Smelter takes place by eddy-current diffusion. The form of the attenuation curve for sulphur dioxide with distance from the Smelter is, therefore, determined by this mechanism of gas dispersion.

Analysis of the recorder data collected since May, 1938, confirms the conclusion of the Tribunal stated in its previous decision to the effect that "the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur-dioxide is lower and falls off more gradually and less rapidly". The position of the knee in this attenuation curve is somewhat affected by wind velocity and direction, and by other factors.

From an examination of the recorded data, it appears that the Columbia Gardens recorder located 6 miles below the Smelter, is above the knee of the attenuation curve. The Waneta recorder, 10 miles below the Smelter, is still in the region of very rapid decrease of sulphur dioxide while the Northport recorder, 19 miles below the Smelter, is well below the knee of the curve. There is very little variation in the average ratio of concentrations between the various recorders. For example, the average ratio for the years 1932 to 1935, between Columbia Gardens and Northport, was 1 to .31, while the average ratio for the experimental period from May, 1938, to November, 1940, was 1 to .39. The individual variations from this ratio are relatively small. The ratio between Columbia Gardens and Waneta for the period 1932 to 1935 was .6 and that for the period May 1938, to November 1940, was .75. The individual variations of the ratio between Columbia Gardens and Waneta are, however, much greater than those between Columbia Gardens and Northport. It is accordingly found that the Columbia Gardens recorder and the Northport recorder give as complete a picture of the attenuation of sulphur dioxide with distance as can be obtained with any reasonable number of recorders.

It may be fairly assumed that the sulphur dioxide concentration at Columbia Gardens will fall off quite rapidly with distance away from the Smelter, and that a concentration very close to that recorded at Northport will be reached several miles above Northport. Concentrations recorded at intermediate points are functions of a number of variables other than distance from the Smelter. It may be generally assumed that the concentration in the neighborhood of the border will be from .6 to .75 of that recorded at Columbia Gardens. Individual variations, however, are likely to be somewhat greater than this, and in unusual instances concentrations near the border may be substantially equal to those at Columbia Gardens.

Although as a result of the investigations carried out by the Technical Consultants, the conclusion might be warranted that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it main-

tained for a limited period of further investigations, particularly as it was removed from its present location during one winter season of the trial period. As an alternative to Waneta, a location suggested by the United States, Gunderson Farm (on the west bank of the river in Section 12, T. 40, R. 40), was considered. The difficulties inherent in servicing a recorder in that location, particularly in winter time, would not be compensated, it was thought, by any appreciable advantages. It was further considered that Waneta—a location practically identical to that of Boundary which the United States' scientists had selected in the past—jutting out as it does almost into the middle of the Columbia Valley where it swerves to the west, is one of the best sites that could be chosen for a recorder in that vicinity. The Tribunal, having gone into the matter with great care, is convinced that this choice is not adversely affected by the vicinity of the narrow gorge of the Pend-d'Oreille River.

(*b*)

The year is divided into two parts, which correspond approximately with the summer and winter seasons: *viz.*, the growing season which extends from April 1 through the summer to September 30, and the non-growing season which extends from October 1 through the winter to April 1. Atmospheric conditions in the Columbia River Valley during the summer vary widely from those in the winter. During the summer, or growing season, the air is generally in active movement with little tendency toward extended periods of calm, and smoke from the Smelter is rapidly dispersed by the frequent changes in wind direction and velocity and the higher degree of atmospheric turbulence. During the winter, or non-growing season, calm conditions may prevail for several days and smoke from the Smelter may be dispersed only very slowly.

In general, a similar variation in atmospheric stability occurs during the day. The air through the early morning hours until about nine o'clock is not subject to very rapid movement, but from around ten o'clock in the morning until late at night there is usually more wind and turbulence, with the exception of a quiet spell which often occurs during the late afternoon.

During the growing season, there is furthermore a marked diurnal variation of wind changes whose maximum frequency occurs at noon for the general direction from north to south and at seven o'clock in the evening for the general direction from south to north. This diurnal variation of wind changes does not occur so frequently during the non-growing season.

During the growing season, the descent of sulphur dioxide to the earth's surface is more likely to occur at some hours than at others. At about nine to ten o'clock in the morning, there is usually a very pronounced maximum of fumigations, and this morning fumigation occurs with such regularity that it has been the practice of the Smoke Control Office at the Smelter for some time to cut down the emission of sulphur to the atmosphere during the early morning hours and to keep it down until from eight to eleven o'clock in the morning. The amount and duration of the cut are determined after an analysis of the wind velocity and direction, and of the conditions of turbulence or diffusion of the smoke. This is a fundamental feature of the program of smoke control, and the main reason for its success is that it prevents accumulations of sulphur dioxide which tend to descend from higher elevations when the early morning sun disturbs the thermal balance by heating the earth's surface. This early morning diurnal fumigation reaches

all recorders in the valley almost simultaneously, the intensity being usually highest near the Smelter. The concentration of sulphur dioxide during this type of fumigation rises as a rule very rapidly to a maximum in a few minutes and then drops off exponentially, only traces often remaining after two or three hours. A similar diurnal fumigation, usually of shorter duration, is occasionally observed in the early evening due to a disturbance of the thermal balance as the sun sets.

Sulphur dioxide sampling by airplane has indicated that in calm weather and especially in the early morning hours, the effluent gases hold to a fairly well-defined pattern in the early stages of their dispersion. The gases rise about 400 feet above the top of the two high stacks, then level out and spread horizontally along the main axis of the prevailing wind movement. During the relatively quiet conditions frequently found in the early morning, an atmospheric stratum carrying fairly high concentrations of sulphur dioxide and spreading over a large area may be formed.

With the rising of the sun, the radiational heating of the atmosphere near the surface may disturb the thermal balance, resulting in the descent of the sulphur dioxide which had accumulated in the upper layers at approximately 2,400 feet elevation above mean sea level, and extending either upstream or down-stream from the Smelter, depending on wind direction. This readily explains the simultaneous appearance of sulphur dioxide at various distances from the Smelter.

During the non-growing season, the non-diurnal type of fumigation predominates. In this type, the sulphur dioxide leaving the stacks is carried along the valley in a general drift of air, diffusing more or less uniformly as it advances. From two to eight hours are usually required for the smoke to get from Trail to Northport when the drift is down river. Such fumigations are not recorded simultaneously on the various recorders but the gas is first noted nearest the Smelter and then in succession at the other recorders. The concentration at a given recorder often shows very little variation as long as it lasts, which might be for several days depending entirely upon wind velocity and direction.

It is an interesting fact that the agricultural growing season and the non-growing season coincide almost exactly with the periods in which diurnal and non-diurnal fumigations respectively, are dominant. The transition from diurnal to non-diurnal fumigations and *vice versa* occurs in September and April. Diurnal fumigations sometimes occur during the non-growing season but with much less frequency and regularity than during the growing season, and at a later hour because of the later sunrise in winter. Similarly, the non-diurnal type sometimes occurs during the growing season. Its manifestations are then the same as during the winter, the chief difference being that it rarely lasts as long.

Sulphur dioxide recorders can be used to assist in smoke control during both the growing and non-growing season. They are more useful in the latter season, however, because in a non-diurnal fumigation, the gas usually appears at Columbia Gardens some time before it reaches Northport, and high concentrations recorded at the former location serve as warnings that more sulphur dioxide is being emitted than can adequately be dispersed under the prevailing atmospheric conditions. This information may lead to a decrease in the amount of sulphur dioxide emitted from the Smelter in time to avoid serious consequences. With the diurnal type of fumigations, on the other hand, high concentrations of sulphur dioxide may descend from the upper atmosphere to the surface with little or no warning, and the

only adequate protection against this type of fumigation is to prevent accumulations of large amounts of sulphur dioxide, either up or down stream, at or just before the periods when diurnal fumigations may be expected.

(*c*)

Observations over a period of years have indicated that there is little likelihood of gas being carried across the international boundary if the wind in the gas-carrying levels, approximately 2,400 feet above mean seal level, is in a direction not included in the 135° angle opening to the westward starting with north, and has a velocity sufficient to insure that no serious accumulation of smoke occurs. A recording cup anemometer and an anemovane suspended 300 feet above the surface, 1,900 feet above mean sea level, from a cable between the tops of the zinc stack and a neighboring lower stack, indicate the velocity and direction of the wind reliably except when the velocity or direction of the wind at this level differs from that in the gas-carrying level 500 feet or more higher. An attempt has been made to use the geostrophic wind forecasts made by the Weather Bureau at Vancouver for predicting the velocity and direction of the wind at these higher levels, but the results, although promising, have not yet been sufficiently certain to warrant the use of geostrophic winds as a factor in smoke control. (For further details, see Report of the Technical Consultants.)

(*d*)

A very significant factor in determining how much sulphur dioxide can safely be emitted by the Smelter is the rate of eddy current diffusion. When the rate of diffusion is low, smoke may accumulate in parts of the valley. Such accumulations frequently occur up-stream from the Smelter when there is a light up-river breeze.

The main factors governing the rate of diffusion of sulphur dioxide are the turbulence and lapse rate of the air. Turbulence is used instead of the more homely term gustiness to express the action of eddy currents in the air stream. Turbulence, therefore, is expressed in terms of changes in wind velocity over definite intervals of time, and may be measured by observations on standard anemometers, as has been done during the early stages of these meteorological studies. It has been found, however, that different observers using this method of measurement were not in agreement when the changes in velocity occurred rapidly and were of great intensity. It was furthermore found that the sensitivity of standard anemometers was not sufficient to give the desired precision. A number of modifications have been made which have led finally to the design and construction of an instrument called the Bridled Cup Indicator, which is more sensitive than any of the other instruments used, and is also free from personal error in the reading of the instrumental record.

(*e*)

There are several limitations to the application of the turbulence criterion. On a number of occasions, marked fumigations have occurred when the instrument showed that the turbulence was good or excellent. On every occasion of that sort which has been studied, pilot balloon observations revealed that there was a strong down-river wind from the surface of the

valley floor to about 2,500 feet above mean sea level. At about 4,000 feet, however, the height to which the valley sides reached, conditions were calm or very nearly so. Ordinarily, with good turbulence, the sulphur dioxide would be rapidly diffused upward and rise above the sides of the valley without difficulty. The non-turbulent condition at 4,000 feet associated with the calm layer acts effectively as a blanket, preventing the escape of the gas through the top of the valley. The turbulence in the lower layers serves then only to distribute the sulphur dioxide more or less uniformly in the valley. There is no exit through the top, and the gas moves down the valley with no lateral diffusion, in much the same way as if it were flowing along in a giant pipe. This type does not occur very frequently, but when it does, the sulphur dioxide recorder at Columbia Gardens must be used to prevent the building up of high concentrations in the valley. That is the type of fumigation which can be controlled most readily by means of such a recorder.

(*f*)

Another difficulty with the turbulence condition is that, especially during the daytime in summer, the turbulence recorder may indicate very little turbulence, but the diffusion may nevertheless be quite satisfactory. That is because turbulence does not cover all aspects of diffusion and some other factors, such as the lapse rate, must be taken into account.

Lapse rate, which is the technical term for the change of temperature in any given unit interval of height, is inter-related with wind velocity and turbulence, but each may contribute separately in the slow carrying upward of smoke by means of convection currents. Unfortunately, the measurement of lapse rate and its application in smoke control have not yet been fully developed. (For further details, see Final Report of the Technical Consultants.)

(*g*)

The behavior of the air in the valley is influenced also by other general meteorological conditions. For example, experience has shown that when the relative humidity of the air is high, particularly during periods of rain or snow, caution must be used in emitting sulphur dioxide to the atmosphere. Again, when the barometer is steady, weather conditions such as wind direction and velocity, diffusion conditions, etc., are not liable to change. Similarly, unfavorable conditions are likely to persist until the barometer changes noticeably. This suggests a generalization which will be found to hold not only for barometric changes but also for most of the other factors that have been found to influence sulphur dioxide distribution; that fumigations occur chiefly during the period of disturbance that accompanies transitional stages in meteorological conditions.

(*h*)

It has been found by the Technical Consultants that meteorological conditions at the Smelter sometimes prevail under which the instrumental readings at the level where the instruments now are or may be located do not fully reflect the degree of turbulence in the atmosphere at the higher gas-carrying levels. Under those conditions, it is possible that visual observations by trained observers may sometimes determine the turbulence more accurately. Where by such visual observations the conclusion shall be

reached that the turbulence at higher levels is definitely better than at the level of the instruments, the load can sometimes be safely increased from the maximum allowable as determined by the instruments under the régime herein prescribed. Conversely, where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely worse than at the level of the instruments, it will be the duty of the Smelter (and to its advantage in lessening risk of injurious fumigation) to reduce the load from the maximum allowable as determined by the instruments under the régime herein prescribed.

The Tribunal in the régime has taken into consideration this factor of visual observations, to a limited extent and in the non-growing season only. If further experience shall show in the future that more use can be made of this factor, the clause of the régime providing for a method of its alteration may be utilized for a future development of this factor provided it shall appear that it can be done without risk of injury to territory south of the boundary.

(*i*)

The Tribunal is of opinion that the régime should be given an uninterrupted test through at least two growing periods and one non-growing period. It is equally of opinion that thereafter opportunity should be given for amendment or suspension of the régime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the régime prescribed in Section 3 (*infra*) can be amended according to Paragraph VI thereof. This same paragraph may become operative if scientific advance in the control of fumes should make it possible and desirable to improve upon the methods of control hereinafter prescribed; and should further progress in the reduction of the sulphur content of the fumes make the régime, as now prescribed, appear as unduly burdensome in view of the end defined in the answer to Question No. 2, this same paragraph can be invoked in order to amend the régime accordingly. Further, under this paragraph, the régime may be suspended if the elimination of sulphur dioxide from the fumes should reach a stage where such a step could clearly be taken without undue risks to the United States' interests.

Since the Tribunal has the power to establish a régime, it must equally possess the power to provide for alteration, modification or suspension of such régime. It would clearly not be a "solution just to all parties concerned" if its action in prescribing a régime should be unchangeable and incapable of being made responsive to future conditions.

(*j*)

The foregoing paragraphs are the result of an extended investigation of meteorological and other conditions which have been found to be of significance in smoke behavior and control in the Trail area. The attempt made to solve the sulphur dioxide problem presented to the Tribunal has finally found expression in a régime which is now prescribed as a measure of control.

The investigations made during the past three years on the application of meteorological observations to the solution of this problem at Trail have built up a fund of significant and important facts. This is probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke. Some factors, such as atmospheric turbulence and

the movement of the upper air currents have been applied for the first time to the question of smoke control. All factors of possible significance, including wind directions and velocity, atmospheric temperatures, lapse rates, turbulence, geostrophic winds, barometric pressures, sunlight and humidity, along with atmospheric sulphur dioxide concentrations, have been studied. As said above, many observations have been made on the movements and sulphur dioxide concentrations of the air at higher levels by means of pilot and captive balloons and by airplane, by night and by day. Progress has been made in breaking up the long winter fumigations and in reducing their intensity. In carrying finally over to the non-growing season with a few minor modifications a régime of demonstrated efficiency for the growing season, there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a régime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set out to accomplish.

The Tribunal has carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.

It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned".

## SECTION 3.

In order to prevent the occurrence of sulphur dioxide in the atmosphere in amounts, both as to concentration, duration and frequency, capable of causing damage in the State of Washington, the operation of the Smelter and the maximum emission of sulphur dioxide from its stacks shall be regulated as provided in the following régime.

*I. Instruments.*

A. The instruments for recording meteorological conditions shall be as follows:

(*a*) Wind Direction and Wind Velocity shall be indicated by any of the standard instruments used for such purposes to provide a continuous record and shall be observed and transcribed for use of the Smoke Control Office at least once every hour.

(*b*) Wind Turbulence shall be measured by the Bridled Cup Turbulence Indicator. This instrument consists of a light horizontal wheel around whose periphery are twenty-two equally-spaced curved surfaces cut from one-eighth inch aluminium sheet and shaped to the same-sized blades or cups. This wind-sensitive wheel is attached to an aluminium sleeve rigidly screwed to one end of a three-eighth inch vertical steel shaft supported by almost frictionless bearings at the top and bottom of the instrument frame. The shaft of the wheel is bridled to prevent continuous rotation and is so

constrained that its angle of rotation is directly proportional to the square of the wind velocity. One complete revolution of the anemometer shaft corresponds to a wind velocity of 36 miles per hour and, with eighteen equally spaced contact points on the commutator, one make and one break in the circuit is equivalent to a change in wind velocity of two miles per hour, recorded on a standard anemograph. (For further detail, see the Final Report of the Technical Consultants, p 209.)

The instruments noted in (*a*) and (*b*) above, shall be located at the present site near the zinc stack of the Smelter or at some other location not less favorable for such observations.

(*c*) Atmospheric temperature and barometric pressure shall be determined by the standard instruments in use for such meteorological observations.

B. Sulphur dioxide concentrations shall be determined by the standard recorders, which provide automatically an accurate and continuous record of such concentrations.

One recorder shall be located at Columbia Gardens, as at present installed with arrangements for the automatic transcription of its record to the Smoke Control Office at the Smelter. A second recorder shall be maintained at the present site near Northport. A third recorder shall be maintained at the present site near Waneta, which recorder may be discontinued after December 31, 1942.

*II. Documents.*

The sulphur dioxide concentrations indicated by the prescribed recorders shall be reduced to tabular form and kept on file at the Smelter. The original instrumental recordings of all meteorological data herein required to be made shall be preserved by the Smelter.

A summary of Smelter operation covering the daily sulphur balances shall be compiled monthly and copies sent to the Governments of the United States and of the Dominion of Canada.

*III. Stacks.*

Sulphur dioxide shall be discharged into the atmosphere from smelting operations of the zinc and lead plants at a height no lower than that of the present stacks.

In case of the cooling of the stacks by a lengthy shut down, gases containing sulphur dioxide shall not be emitted until the stacks have been heated to normal operating temperatures by hot gases free of sulphur dioxide.

*IV. Maximum Permissible Sulphur Emission.*

The following two tables and general restrictions give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

GROWING SEASON

| | Turbulence Bad | | Turbulence Fair | | Turbulence Good | | Turbulence Excellent |
|---|---|---|---|---|---|---|---|
| | (1) Wind not favorable | (2) Wind favorable | (3) Wind not favorable | (4) Wind favorable | (5) Wind not favorable | (6) Wind favorable | (7) Wind not favorable and favorable |
| Midnight to 3 a.m. . . | 2 | 6 | 6 | 9 | 9 | 11 | 11 |
| 3 a.m. to 3 hrs. after sunrise . . . . . | 0 | 2 | 4 | 4 | 4 | 6 | 6 |
| 3 hrs. after sunrise to 3 hrs. before sunset | 2 | 6 | 6 | 9 | 9 | 11 | 11 |
| 3 hrs. before sunset to sunset . . . . . | 2 | 5 | 5 | 7 | 7 | 9 | 9 |
| Sunset to midnight . . | 3 | 7 | 6 | 9 | 9 | 11 | 11 |

NON-GROWING SEASON

| | Turbulence Bad | | Turbulence Fair | | Turbulence Good | | Turbulence Excellent |
|---|---|---|---|---|---|---|---|
| | (1) Wind not favorable | (2) Wind favorable | (3) Wind not favorable | (4) Wind favorable | (5) Wind not favorable | (6) Wind favorable | (7) Wind not favorable and favorable |
| Midnight to 3 a.m. . . | 2 | 8 | 6 | 11 | 9 | 11 | 11 |
| 3 a.m. to 3 hrs. after sunrise . . . . . | 0 | 4 | 4 | 6 | 4 | 6 | 6 |
| 3 hrs. after sunrise to 3 hrs. before sunset | 2 | 8 | 6 | 11 | 9 | 11 | 11 |
| 3 hrs. before sunset to sunset . . . . . | 2 | 7 | 5 | 9 | 7 | 9 | 9 |
| Sunset to midnight . . | 3 | 9 | 6 | 11 | 9 | 11 | 11 |

*General Restrictions and Provisions.*

(*a*) If the Columbia Gardens recorder indicates 0.3 part per million or more of sulphur dioxide for two consecutive twenty minute periods during the growing season, and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for three consecutive twenty minute periods during the non-growing season and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

(*b*) In case of rain or snow, the emission of sulphur shall be reduced by two (2) tons per hour. This regulation shall be put into effect immediately when precipitation can be observed from the Smelter and shall be continued in effect for twenty (20) minutes after such precipitation has ceased.

(*c*) If the slag retreatment furnace is not in operation the emission of sulphur shall be reduced by two (2) tons per hour.

(*d*) If the instrumental reading shows turbulence excellent, good or fair, but visual observations made by trained observers clearly indicate that there is poor diffusion, the emission of sulphur shall be reduced to the figures given in column (1) if wind is not favorable, or column (2) if wind is favorable.

(*e*) When more than one of the restricting conditions provided for in (*a*), (*b*), (*c*), and (*d*) occur simultaneously, the highest reduction shall apply.

(*f*) If, during the non-growing season, the instrumental reading shows turbulence fair and wind not favorable but visual observations by trained observers clearly indicate that there is excellent diffusion, the maximum permissible emission of sulphur may be increased to the figures in column (5). The general restrictions under (*a*), (*b*), (*c*) and (*e*), however, shall be applicable.

Whenever the Smelter shall avail itself of the foregoing provisions, the circumstances shall be fully recorded and copy of such record shall be sent to the two Governments within one month.

(*g*) Nothing shall relieve the Smelter from the duty of reducing the maximum sulphur emission below the amount permissible according to the tables and the preceding general restrictions and provisions, as the circumstances may require for the prudent operation of the plant.

*V. Definition of Terms and Conditions*

(a) Wind Direction and Velocity—The following directions of wind shall be considered favorable provided they show a velocity of five miles per hour or more and have persisted for thirty minutes at the point of observation, namely north, east, south, southwest, and intermediate directions, that is any direction not included in the one hundred and thirty-five (135) degree angle opening to the westward starting with north.

All winds not included in the above definition shall be considered not favorable.

(b) Turbulence—The following definitions are made of bad, fair, good, and excellent turbulence. The figures given are in terms of the Bridled Cup Turbulence Indicator for a period of one half hour:

| | |
|---|---|
| Bad Turbulence | 0-74 |
| Fair Turbulence | 75-149 |
| Good Turbulence | 150-349 |
| Excellent Turbulence | 350 and above |

If at any time another instrument should be found to be better adapted to the measurement of turbulence, and should be accepted for such measure-

ment by agreement of the two Governments, the scale of this instrument shall be calibrated by comparison with the Bridled Cup Turbulence Indicator.

*VI. Amendment or Suspension of the Régime.*

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the régime herein prescribed and the other Government shall decline to agree to such request, there shall be appointed by each Government, within one month after the making or receipt respectively of such request, a scientist of repute; and the two scientists so appointed shall constitute a Commission for the purpose of considering and acting upon such request. If the Commission within three months after appointment fail to agree upon a decision, they shall appoint jointly a third scientist who shall be Chairman of the Commission; and thereupon the opinion of the majority, or in the absence of any majority opinion, the opinion of the Chairman shall be decisive; the opinion shall be rendered within one month after the choice of the Chairman. If the two scientists shall fail to agree upon a third scientist within the prescribed time, upon the request of either, he shall be appointed within one month from such failure by the President of the American Chemical Society, a scientific body having a membership both in the United States, Canada, Great Britain and other countries.

Any of the periods of time herein prescribed may be extended by agreement between the two Governments.

The Commission of two, or three scientists as the case may be, may take such action in compliance with or in denial of the request above referred to, either in whole or in part, as it deems appropriate for the avoidance or prevention of damage occurring in the State of Washington. The decision of the Commission shall be final, and the Governments shall take such action as may be necessary to ensure due conformity with the decision, in accordance with the provisions of Article XII of the Convention.

The compensation of the scientists appointed and their reasonable expenditures shall be paid by the Government which shall have requested a decision; if both Governments shall have made a request for decision, such expenses shall be shared equally by both Governments; provided, however, that if the Commission in response to the request of the United States shall find that notwithstanding compliance with the régime in force damage has occurred through fumes in the State of Washington, then the above expenses shall be paid by the Dominion of Canada.

SECTION 4.

While the Tribunal refrains from making the following suggestion a part of the régime prescribed, it is strongly of the opinion that it would be to the clear advantage of the Dominion of Canada, if during the interval between the date of filing of this Final Report and December 31, 1942, the Dominion of Canada would continue, at its own expense, the maintenance of experimental and observational work by two scientists similar to that which was established by the Tribunal under its previous decision, and has been in operation during the trial period since 1938. It seems probable that a continuance of investigations until at least December 31, 1942, would provide additional valuable data both for the purpose of testing the effective operation of the régime now prescribed and for the purpose of obtaining information as to the possibility or necessity of improvements in it.

The value of this trial period has been acknowledged by each Government. In the memorandum submitted by the Canadian Agent, under date of December 28, 1940, while commenting on the expense involved, it is stated (p. 8):

> The Canadian Government is not disposed to question in the least the value of the trial period of three years or to underestimate the great benefits that have been derived from the investigations carried on by the Tribunal through its Technical Consultants.

The Agent for Canada at the hearing on December 11, 1940 (Transcript, p. 6318) stated:

> We have had the benefit of an admirable piece of research in fumigations conducted by the Technical Consultants, and we have had the advantage of all of their studies of meteorological conditions. . . .

The Counsel for Canada (Mr. Tilley), in a colloquy with the American Member of the Tribunal at the hearing on December 12, 1940 (Transcript, pp. 6493-6494) said:

> JUDGE WARREN: We stated very frankly to the Agents that we were prepared in March (1938) to render a final decision but that we thought it would be highly unsatisfactory to both parties to do so unless we had some experimentation.
>
> Mr. TILLEY: There is no doubt about that—quite properly, if I may say so, with deference.
>
> JUDGE WARREN: We were trying to do this for the benefit of both parties. We were prepared to answer the questions.
>
> Mr. TILLEY: Nothing could have been more in the interests of the parties concerned than what you did.

In the memorandum submitted by the United States Agent, under date of January 7, 1949, while explaining the reasons for the inability of the United States to offer concrete suggestions in relation to a proposed régime, other than the régime suggested by the United States, it is stated (p. 11):

> It should be understood that the drafting of this Memorandum has not been undertaken in an attempt to minimize the importance of the excellent work performed by meteorologists of the Government of Canada under the direction of the Technical Consultants and their undoubtedly meritorious contribution. . . .

The Counsel for the United States (Mr. Raftis) at the hearing on December 9, stated (Transcript of Record, p. 6080, p. 6089):

> I will say at the outset that I believe the meteorological studies which we (were?) conducted have been very helpful. They have been undoubtedly gone into at considerable length with a definite effort to put the finger on the problem which has been confronting us now for some fifteen years. . . . As I say, I think these studies have been most helpful, because up to that time we had more or less only to leave to conjecture what happened when these gases left the stacks; we did not know through any definite experiments what became of this gas problem.

The scientist employed by the United States, Mr. S. W. Griffin, in his report submitted November 30, 1940, relating to the Final Report of the Technical Consultants, stated (p. 3):

> Regarding the investigations of the Canadian meteorologists in working out the complicated air movements which take place over this irregular terrain, there can be no doubt of the value of their contribution in adding much to the knowledge, both of a fundamental and detailed character, to that which previously existed.
>
> (p. 5) It remains to be determined whether or not the three year period of experimentation may eventually bring about a permanent abeyance of harmful sulphur dioxide fumigations, south of the international boundary. However this may be, there can be little doubt that the knowledge gained in some of the researches described in the report is sufficiently fundamental in character and broad in application that, if published, the work should be of interest and value to any smelter management engaged in processes which pollute the air with sulphur dioxide.

## PART FIVE.

The fourth question under Article III of the Convention is as follows:

> What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

The Tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (*b*) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity

for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.

PART SIX.

Since further investigations in the future may be possible under the provisions of Part Four and of Part Five of this decision, the Tribunal finds it necessary to include in its report, the following provision:

Investigators appointed by or on behalf of either Government, whether jointly or severally, and the members of the Commission provided for in Paragraph VI of Section 3 of Part Four of this decision, shall be permitted at all reasonable times to inspect the operations of the Smelter and to enter upon and inspect any of the properties in the State of Washington which may be claimed to be affected by fumes. This provision shall also apply to any localities where instruments are operated under the present régime or under any amended régime. Wherever under the present régime or any amended régime, instruments have to be maintained and operated by the Smelter on the territory of the United States, the Government of the United States shall undertake to secure for the Government of the Dominion of Canada the facilities reasonably required to that effect.

The Tribunal expresses the strong hope that any investigations which the Governments may undertake in the future, in connection with the matters dealt with in this decision, shall be conducted jointly.

(*Signed*) JAN HOSTIE.
(*Signed*) CHARLES WARREN.
(*Signed*) R. A. E. GREENSHIELDS.

**ANNEX.**

I. *Letter from the Members of the Tribunal to the Secretary of State of the United States and Secretary of State for External Affairs of Canada, May* 6, 1941.

TRAIL SMELTER ARBITRAL TRIBUNAL.
UNITED STATES AND CANADA.

710 MILLS BUILDING,
WASHINGTON, D.C.
May 6, 1941.

SIR:

The Trail Smelter Arbitral Tribunal has received from its scientific advisers in that case, a letter dated April 28, 1941, copy of which is herewith enclosed. The members of the Tribunal think that it is their duty in transmitting this letter to both Governments, to declare that the statement contained therein is the correct interpretation of Clause IV, Section 3 of Part Four of the Decision reported on March 11, 1941.

Respectfully yours,

JAN HOSTIE.
CHARLES WARREN.
R. A. E. GREENSHIELDS.

II. *Letter from the Technical Consultants to the Chairman of the Trail Smelter Arbitral Tribunal, April* 26, 1941.

REGINALD S. DEAN.

1529 ARLINGTON DRIVE,
SALT LAKE CITY, UTAH.
April 28, 1941.

DR. JAN F. HOSTIE,
Trail Smelter Arbitral Tribunal,
710 Mills Building,
Washington, D.C.

DEAR DOCTOR HOSTIE:

A critical reading of the text of Part IV, Section 3 (IV) of the decision of the Tribunal reported on March 11, 1941, reveals a situation which, after careful consideration, we feel should be brought to your attention. Under the heading "Maximum Permissible Sulphur Emission" it is stated that the two tables and the general restrictions which follow give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

If a strict interpretation were placed on this statement as it stands, it would lead often to a complete shut-down of all operations at the Smelter. For example, if the turbulence is bad and the wind not favorable, no sulphur may be emitted. Of course, it was intended that these stipulations were to govern Dwight and Lloyd roasting operations. Small amounts of sulphur dioxide will necessarily escape from the blast furnace and other operations in the Smelter, but these have never been specifically designated in any of the régimes which we have laid down, simply because they are insignificant in amount. In the orderly administration of this final régime, all who have been connected with the previous régimes would not fall within the above stipulation. If, however, the strictest possible interpretation were insisted upon the results would not only be disastrous to the Smelter, but clearly outside of the intended scope of the régime. Tail gases have been recognized all along as a normal part of the smelting operation.

The situation would be fully clarified if the following changes were made in the statement on page 74, Section 3 (IV): The following two tables and general restrictions give the maximum hourly permissible emission of untreated sulphur dioxide from the roasting plants expressed as tons per hour of contained sulphur.

I regret that such a possible interpretation of the régime was not noted by us when it was being formulated. It is brought to your attention now in order to put on record this possible misinterpretation of the régime as it is now worded.

Yours sincerely,

ROBERT E. SWAIN,
R. S. DEAN,
*Technical Consultants.*

## A. – TREATY ON THE EUROPEAN UNION

*Article 13*

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

– the European Parliament,

– the European Council,

– the Council,

– the European Commission (hereinafter referred to as 'the Commission'),

– the Court of Justice of the European Union,

– the European Central Bank,

– the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

*Article 19*

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the

conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

## B. – TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

*Article 108*
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

*Article 218*
(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The

Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

*Article 251*
(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

*Article 252*
(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

*Article 253*
(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

*Article 254*
(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

*Article 255*

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

*Article 256*
(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those

assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

*Article 257*
(ex Article 225A TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

*Article 258*
(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

*Article 259*
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

*Article 260*
(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

*Article 261*
(ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

*Article 262*
(ex Article 229 A TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

*Article 263*
(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

*Article 264*
(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

*Article 265*
(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

*Article 266*
(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

*Article 267*
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

*Article 268*
(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

*Article 269*

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

*Article 270*
(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

*Article 271*
(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

*Article 272*
(ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

*Article 273*
(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

*Article 274*
(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

*Article 275*

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

*Article 276*

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

*Article 277*
(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

*Article 278*
(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

*Article 279*
(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

*Article 280*
(ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

*Article 281*
(ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

*Article 299*
(ex Article 256 TEC)

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority. Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

*Article 340*
(ex Article 288 TEC)

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

## C. – TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY

*Article 12*

Member States, persons or undertakings shall have the right, on application to the Commission, to obtain non-exclusive licences under patents, provisionally protected patent rights, utility models or patent applications owned by the Community, where they are able to make effective use of the inventions covered thereby.

Under the same conditions, the Commission shall grant sublicences under patents, provisionally protected patent rights, utility models or patent applications, where the Community holds contractual licences conferring power to do so.

The Commission shall grant such licences or sublicences on terms to be agreed with the licensees and shall furnish all the information required for their use. These terms shall relate in particular to suitable remuneration and, where appropriate, to the right of the licensee to grant sublicences to third parties and to the obligation to treat the information as a trade secret.

Failing agreement on the terms referred to in the third paragraph, the licensees may bring the matter before the Court of Justice of the European Union so that appropriate terms may be fixed.

*Article 18*

An Arbitration Committee is hereby established for the purposes provided for in this Section. The Council shall appoint the members and lay down the Rules of Procedure of this Committee, acting on a proposal from the Court of Justice of the European Union.

An appeal, having suspensory effect, may be brought by the parties before the Court of Justice of the European Union against a decision of the Arbitration Committee within one month of notification thereof. The Court of Justice of the European Union shall confine its examination to the formal validity of the decision and to the interpretation of the provisions of this Treaty by the Arbitration Committee.

The final decisions of the Arbitration Committee shall have the force of res judicata between the parties concerned. They shall be enforceable as provided in Article 164.

*Article 21*

If the proprietor does not propose that the matter be referred to the Arbitration Committee, the Commission may call upon the Member State concerned or its appropriate authorities to grant the licence or cause it to be granted.

If, having heard the proprietor's case, the Member State, or its appropriate authorities, considers that the conditions of Article 17 have not been complied with, it shall notify the Commission of its refusal to grant the licence or to cause it to be granted.

If it refuses to grant the licence or to cause it to be granted, or if, within four months of the date of the request, no information is forthcoming with regard to the granting of the licence, the Commission shall have two months in which to bring the matter before the Court of Justice of the European Union.

The proprietor must be heard in the proceedings before the Court of Justice of the European Union.

If the judgment of the Court of Justice of the European Union establishes that the conditions of Article 17 have been complied with, the Member State concerned, or its appropriate authorities, shall take such measures as enforcement of that judgment may require.

*Article 81*

The Commission may send inspectors into the territories of Member States. Before sending an inspector on his first assignment in the territory of a Member State, the Commission shall consult the State concerned; such consultation shall suffice to cover all future assignments of this inspector.

On presentation of a document establishing their authority, inspectors shall at all times have access to all places and data and to all persons who, by reason of their occupation, deal with materials, equipment or installations subject to the safeguards provided for in this Chapter, to the extent necessary in order to apply such safeguards to ores, source materials and special fissile materials and to ensure compliance with the provisions of Article 77. Should the State concerned so request, inspectors appointed by the Commission shall be accompanied by representatives of the authorities of that State; however, the inspectors shall not thereby be delayed or otherwise impeded in the performance of their duties.

If the carrying out of an inspection is opposed, the Commission shall apply to the President of the Court of Justice of the European Union for an order to ensure that the inspection be carried out compulsorily. The President of the Court of Justice of the European Union shall give a decision within three days.

If there is danger in delay, the Commission may itself issue a written order, in the form of a decision, to proceed with the inspection. This order shall be submitted without delay to the President of the Court of Justice of the European Union for subsequent approval.

After the order or decision has been issued, the authorities of the State concerned shall ensure that the inspectors have access to the places specified in the order or decision.

*Article 82*

Inspectors shall be recruited by the Commission.

They shall be responsible for obtaining and verifying the records referred to in Article 79. They shall report any infringement to the Commission.

The Commission may issue a directive calling upon the Member State concerned to take, by a time limit set by the Commission, all measures necessary to bring such infringement to an end; it shall inform the Council thereof.

If the Member State does not comply with the Commission directive by the time limit set, the Commission or any Member State concerned may, in derogation from Articles 226 and 227 of the Treaty on the Functioning of the European Union, refer the matter to the Court of Justice of the European Union direct.

*Article 83*

1. In the event of an infringement on the part of persons or undertakings of the obligations imposed on them by this Chapter, the Commission may impose sanctions on such persons or undertakings.

These sanctions shall be in order of severity:

(a) a warning;

(b) the withdrawal of special benefits such as financial or technical assistance;

(c) the placing of the undertaking for a period not exceeding four months under the administration of a person or board appointed by common accord of the Commission and the State having jurisdiction over the undertaking;

(d) total or partial withdrawal of source materials or special fissile materials.

2. Decisions taken by the Commission in implementation of paragraph 1 and requiring the surrender of materials shall be enforceable. They may be enforced in the territories of Member States in accordance with Article 164.

By way of derogation from Article 157, appeals brought before the Court of Justice of the European Union against decisions of the Commission which impose any of the sanctions provided for in paragraph 1 shall have suspensory effect. The Court of Justice of the European Union may, however, on application by the Commission or by any Member State concerned, order that the decision be enforced forthwith.

There shall be an appropriate legal procedure to ensure the protection of interests that have been prejudiced.

3. The Commission may make any recommendations to Member States concerning laws or regulations which are designed to ensure compliance in their territories with the obligations arising under this Chapter.

4. Member States shall ensure that sanctions are enforced and, where necessary, that the infringements are remedied by those committing them.

*Article 103*

Member States shall communicate to the Commission draft agreements or contracts with a third State, an international organisation or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty.

If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned.

The State shall not conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice of the European

Union, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty. An application may be made to the Court of Justice of the European Union at any time after the State has received the comments of the Commission.

*Article 104*

No person or undertaking concluding or renewing an agreement or contract with a third State, an international organisation the date of their accession, may invoke that agreement or contract in order to evade the obligations imposed by this Treaty.

Each Member State shall take such measures as it considers necessary in order to communicate to the Commission, at the request of the latter, all information relating to agreements or contracts concluded after the dates referred to in the first paragraph, within the scope of this Treaty, by a person or undertaking with a third State, an international organisation or a national of a third State. The Commission may require such communication only for the purpose of verifying that such agreements or contracts do not contain clauses impeding the implementation of this Treaty.

On application by the Commission, the Court of Justice of the European Union shall give a ruling on the compatibility of such agreements or contracts with the provisions of this Treaty.

*Article 105*

The provisions of this Treaty shall not be invoked so as to prevent the implementation of agreements or contracts concluded before 1 January 1958 or, for acceding States, before the date of their accession, by a Member State, a person or an undertaking with a third State, an international organisation or a national of a third State where such agreements or contracts have been communicated to the Commission not later than 30 days after the aforesaid dates.

Agreements or contracts concluded between 25 March 1957 and 1 January 1958 or, for acceding States, between the signature of the instrument of accession and the date of their accession, by a person or an undertaking with a third State, an international organisation or a national of a third State shall not, however, be invoked as grounds for failure to implement this Treaty if, in the opinion of the Court of Justice of the European Union, ruling on an application from the Commission, one of the decisive reasons on the part of either of the parties in concluding the agreement or contract was an intention to evade the provisions of this Treaty.

*Article 106a*

1. Article 7, Articles 9 to 9F, Article 48(2) to (5), and Articles 49 and 49A of the Treaty on European Union, Article 16A, Articles 190 to 201b, Articles 204 to 211a, Article 213, Articles 215 to 236, Articles 238, 239 and 240, Articles 241 to 245, Articles 246 to 262, Articles 268 to 277, Articles 279 to 280 and Articles 283, 290 and 292 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.

2. Within the framework of this Treaty, the references to the Union, to the ‘Treaty on European Union’, to the ‘Treaty on the Functioning of the European Union’ or to the ‘Treaties’ in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty.

3. The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.

*Article 144*

The Court of Justice of the European Union shall have unlimited jurisdiction in:

(a) proceedings instituted under Article 12 to have the appropriate terms fixed for the granting by the Commission of licences or sub licences;

(b) proceedings instituted by persons or undertakings against sanctions imposed on them by the Commission under Article 83.

*Article 145*

If the Commission considers that a person or undertaking has committed an infringement of this Treaty to which the provisions of Article 83 do not apply, it shall call upon the Member State having jurisdiction over that person or undertaking to cause sanctions to be imposed in respect of the infringement in accordance with its national law.

If the State concerned does not comply with such a request within the period laid down by the Commission, the latter may bring an action before the Court of Justice of the European Union to have the infringement of which the person or undertaking is accused established.

*Article 157*

Save as otherwise provided in this Treaty, actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court of Justice of the European Union may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

*Article 188*

The contractual liability of the Community shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The personal liability of its servants towards the Community shall be governed by the provisions laid down in the Staff Regulations or in the Conditions of Employment applicable to them.

# STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

*Article 1*

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

## TITLE I

## JUDGES AND ADVOCATES-GENERAL

*Article 2*

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

*Article 3*

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

*Article 4*

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

*Article 5*

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

*Article 6*

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

*Article 7*

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

*Article 8*

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

**TITLE II**

## ORGANISATION OF THE COURT OF JUSTICE

*Article 9*

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

*Article 10*

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice.

*Article 11*

The Court of Justice shall arrange for replacement of the Registrar on occasions when he is prevented from attending the Court of Justice.

*Article 12*

Officials and other servants shall be attached to the Court of Justice to enable it to function. They shall be responsible to the Registrar under the authority of the President.

*Article 13*

At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur.

The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

*Article 14*

The Judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat.

*Article 15*

The Court of Justice shall remain permanently in session. The duration of the judicial vacations shall be determined by the Court with due regard to the needs of its business.

*Article 16*

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

*Article 17*

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations.

Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges.

Decisions of the Grand Chamber shall be valid only if nine Judges are sitting.

Decisions of the full Court shall be valid only if 15 Judges are sitting.

In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.

*Article 18*

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

## TITLE III

## PROCEDURE BEFORE THE COURT OF JUSTICE

*Article 19*

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

*Article 20*

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

*Article 21*

A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.

Article 22

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject-matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based.

The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested.

If the Court rejects the appeal, the decision of the Arbitration Committee shall become final.

If the Court annuls the decision of the Arbitration Committee, the matter may be re-opened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

*Article 23*

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

*Article 23a* (*)

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

*Article 24*

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

*Article 25*

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

*Article 26*

Witnesses may be heard under conditions laid down in the Rules of Procedure.

(*) Article inserted by Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p. 42).

*Article 27*

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

*Article 28*

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

*Article 29*

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

*Article 30*

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

*Article 31*

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

*Article 32*

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

*Article 33*

Minutes shall be made of each hearing and signed by the President and the Registrar.

*Article 34*

The case list shall be established by the President.

*Article 35*

The deliberations of the Court of Justice shall be and shall remain secret.

*Article 36*

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

*Article 37*

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

*Article 38*

The Court of Justice shall adjudicate upon costs.

*Article 39*

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

*Article 40*

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

*Article 41*

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

*Article 42*

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

*Article 43*

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

*Article 44*

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

*Article 45*

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*.

*Article 46*

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

## TITLE IV

## GENERAL COURT

*Article 47*

The first paragraph of Article 9, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Article 17 and Article 18 shall apply to the General Court and its members.

The fourth paragraph of Article 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

*Article 48*

The General Court shall consist of 27 Judges.

*Article 49*

The Members of the General Court may be called upon to perform the task of an Advocate-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.

The criteria for selecting such cases, as well as the procedures for designating the Advocates-General, shall be laid down in the Rules of Procedure of the General Court.

A Member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case.

*Article 50*

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or be constituted by a single Judge.

The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

*Article 51*

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred

to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

– decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;

– acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;

– acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;

(b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

*Article 52*

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

*Article 53*

The procedure before the General Court shall be governed by Title III.

Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from the fourth paragraph of Article 40 and from Article 41 in order to take account of the specific features of litigation in the field of intellectual property.

Notwithstanding the fourth paragraph of Article 20, the Advocate-General may make his reasoned submissions in writing.

*Article 54*

Where an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be transmitted immediately by that Registrar to the Registrar of the General Court; likewise, where an application or other

procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice.

Where the General Court finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice; likewise, where the Court of Justice finds that an action falls within the jurisdiction of the General Court, it shall refer that action to the General Court, whereupon that Court may not decline jurisdiction.

Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.

Where a Member State and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.

*Article 55*

Final decisions of the General Court, decisions disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility, shall be notified by the Registrar of the General Court to all parties as well as all Member States and the institutions of the Union even if they did not intervene in the case before the General Court.

*Article 56*

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

*Article 57*

Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.

The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification.

The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.

*Article 58*

An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.

No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

*Article 59*

Where an appeal is brought against a decision of the General Court, the procedure before the Court of Justice shall consist of a written part and an oral part. In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.

*Article 60*

Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.

By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.

*Article 61*

If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law.

When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may,

if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.

*Article 62*

In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate-General, the Court of Justice shall decide whether or not the decision should be reviewed.

*Article 62a*

The Court of Justice shall give a ruling on the questions which are subject to review by means of an urgent procedure on the basis of the file forwarded to it by the General Court.

Those referred to in Article 23 of this Statute and, in the cases provided for in Article 256(2) of the EC Treaty, the parties to the proceedings before the General Court shall be entitled to lodge statements or written observations with the Court of Justice relating to questions which are subject to review within a period prescribed for that purpose.

The Court of Justice may decide to open the oral procedure before giving a ruling.

*Article 62b*

In the cases provided for in Article 256(2) of the Treaty on the Functioning of the European Union, without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union, proposals for review and decisions to open the review procedure shall not have suspensory effect. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court of Justice; the Court of Justice may state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. If, however, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based, the Court of Justice shall give final judgment.

In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court.

## TITLE IV*a*

## JUDICIAL PANELS

*Article 62c*

The provisions relating to the jurisdiction, composition, organisation and procedure of the judicial panels established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

## TITLE V

## FINAL PROVISIONS

*Article 63*

The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.

*Article 64*

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament.

Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.

## ANNEX I

## THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

*Article 1*

The European Union Civil Service Tribunal (hereafter ‘the Civil Service Tribunal’) shall exercise at first instance jurisdiction in disputes between the Union and its servants referred to in Article 270 of the Treaty on the Functioning of the European Union, including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice of the European Union.

*Article 2*

The Civil Service Tribunal shall consist of seven judges. Should the Court of Justice so request, the Council, acting by a qualified majority, may increase the number of judges.

The judges shall be appointed for a period of six years. Retiring judges may be reappointed.

Any vacancy shall be filled by the appointment of a new judge for a period of six years.

*Article 3*

1. The judges shall be appointed by the Council, acting in accordance with the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union, after consulting the committee provided for by this Article. When appointing judges, the Council shall ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

2. Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union may submit an application. The Council, acting on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such applications.

3. A committee shall be set up comprising seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The committee's membership and operating rules shall be determined by the Council, acting on a recommendation by the President of the Court of Justice.

4. The committee shall give an opinion on candidates' suitability to perform the duties of judge at the Civil Service Tribunal. The committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.

*Article 4*

1. The judges shall elect the President of the Civil Service Tribunal from among their number for a term of three years. He may be re-elected.

2. The Civil Service Tribunal shall sit in chambers of three judges. It may, in certain cases determined by its rules of procedure, sit in full court or in a chamber of five judges or of a single judge.

3. The President of the Civil Service Tribunal shall preside over the full court and the chamber of five judges. The Presidents of the chambers of three judges shall be designated as provided in paragraph 1. If the President of the Civil Service Tribunal is assigned to a chamber of three judges, he shall preside over that chamber.

4. The jurisdiction of and quorum for the full court as well as the composition of the chambers and the assignment of cases to them shall be governed by the rules of procedure.

*Article 5*

Articles 2 to 6, 14, 15, the first, second and fifth paragraphs of Article 17, and Article 18 of the Statute of the Court of Justice of the European Union shall apply to the Civil Service Tribunal and its members.

The oath referred to in Article 2 of the Statute shall be taken before the Court of Justice, and the decisions referred to in Articles 3, 4 and 6 thereof shall be adopted by the Court of Justice after consulting the Civil Service Tribunal.

*Article 6*

1. The Civil Service Tribunal shall be supported by the departments of the Court of Justice and of the General Court. The President of the Court of Justice or, in appropriate cases, the President of the General Court, shall determine by common accord with the President of the Civil Service Tribunal the conditions under which officials and other servants attached to the Court of Justice or the General Court shall render their services to the Civil Service Tribunal to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the Civil Service Tribunal under the authority of the President of that Tribunal.

2. The Civil Service Tribunal shall appoint its Registrar and lay down the rules governing his service. The fourth paragraph of Article 3 and Articles 10, 11 and 14 of the Statute of the Court of Justice of the European Union shall apply to the Registrar of the Tribunal.

*Article 7*

1. The procedure before the Civil Service Tribunal shall be governed by Title III of the Statute of the Court of Justice of the European Union, with the exception of Articles 22 and 23. Such further and more detailed provisions as may be necessary shall be laid down in the rules of procedure.

2. The provisions concerning the General Court's language arrangements shall apply to the Civil Service Tribunal.

3. The written stage of the procedure shall comprise the presentation of the application and of the statement of defence, unless the Civil Service Tribunal decides that a second exchange of written pleadings is necessary. Where there is such second exchange, the Civil Service Tribunal may, with the agreement of the parties, decide to proceed to judgment without an oral procedure.

4. At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement.

5. The Civil Service Tribunal shall rule on the costs of a case. Subject to the specific provisions of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs should the court so decide.

*Article 8*

1. Where an application or other procedural document addressed to the Civil Service Tribunal is lodged by mistake with the Registrar of the Court of Justice or General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Civil Service Tribunal. Likewise, where an application or other procedural document addressed to the Court of Justice or to the General Court is lodged by mistake with the Registrar of the Civil Service Tribunal, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice or General Court.

2. Where the Civil Service Tribunal finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice or the General Court has jurisdiction, it shall refer that action to the Court of Justice or to the General Court. Likewise, where the Court of Justice or the General Court finds that an action falls within the jurisdiction of the Civil Service Tribunal, the Court seised shall refer that action to the Civil Service Tribunal, whereupon that Tribunal may not decline jurisdiction.

3. Where the Civil Service Tribunal and the General Court are seised of cases in which the same issue of interpretation is raised or the validity of the same act is called in question, the Civil Service Tribunal, after hearing the parties, may stay the proceedings until the judgment of the General Court has been delivered.

Where the Civil Service Tribunal and the General Court are seised of cases in which the same relief is sought, the Civil Service Tribunal shall decline jurisdiction so that the General Court may act on those cases.

*Article 9*

An appeal may be brought before the General Court, within two months of notification of the decision appealed against, against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the Civil Service Tribunal directly affects them.

*Article 10*

1. Any person whose application to intervene has been dismissed by the Civil Service Tribunal may appeal to the General Court within two weeks of notification of the decision dismissing the application.

2. The parties to the proceedings may appeal to the General Court against any decision of the Civil Service Tribunal made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months of its notification.

3. The President of the General Court may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Annex and which shall be laid down in the rules of procedure of the General Court, adjudicate upon appeals brought in accordance with paragraphs 1 and 2.

*Article 11*

1. An appeal to the General Court shall be limited to points of law. It shall lie on the grounds of lack of jurisdiction of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant, as well as the infringement of Union law by the Tribunal.

2. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

*Article 12*

1. Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal before the General Court shall not have suspensory effect.

2. Where an appeal is brought against a decision of the Civil Service Tribunal, the procedure before the General Court shall consist of a written part and an oral part. In accordance with conditions laid down in the rules of procedure, the General Court, having heard the parties, may dispense with the oral procedure.

*Article 13*

1. If the appeal is well founded, the General Court shall quash the decision of the Civil Service Tribunal and itself give judgment in the matter. It shall refer the case back to the Civil Service Tribunal for judgment where the state of the proceedings does not permit a decision by the Court.

2. Where a case is referred back to the Civil Service Tribunal, the Tribunal shall be bound by the decision of the General Court on points of law.

## PROTOCOL (No 2)

## ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

*Article 8*

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

## PROTOCOL (No 7)
## ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

*Article 1*

The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.

**PROTOCOL (No 36)**

**ON TRANSITIONAL PROVISIONS**

**TITLE VII**

**TRANSITIONAL PROVISIONS CONCERNING ACTS ADOPTED ON THE BASIS OF TITLES V AND VI OF THE TREATY ON EUROPEAN UNION PRIOR TO THE ENTRY INTO FORCE OF THE TREATY OF LISBON**

*Article 10*

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

[*Article 35* (text prior to the entry into force of the Treaty of Lisbon): 1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and

decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).]

## Jurisdiction of the Court of Justice to give preliminary rulings on police and judicial cooperation in criminal matters

| Member State | Declaration under Article 35(2) EU | Option chosen (point (a) or point (b) of Article 35(3) EU) | Reservation pursuant to Declaration No 10 annexed to the Amsterdam Final Act (Declaration on Article 35 EU (formerly Article K.7)) | Information published in OJ [1] | Provisions of national law adopted further to the reservation pursuant to Declaration No 10 |
|---|---|---|---|---|---|
| Germany | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | Gesetz betreffend die Anrufung des Gerichtshofs der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen nach Art. 35 des EU-Vertrages (EuGH-Gesetz) vom 6. 8. 1998<br>BGBl. 1998 I, p.2035 |
| Austria | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | Bundesgesetz über die Einholung von Vorabentscheidungen des Gerichtshofs der Europäischen Gemeinschaften auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen<br>BGBl. I N°89/1999 |
| Belgium | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | * |
| Bulgaria | * | | | | |
| Cyprus | * | | | | |
| Denmark | no | – | – | – | – |
| Spain | yes | point (a) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | Ley Orgánica 9/1998, de 16 de diciembre<br>BOE 17 de diciembre 1998, núm. 301/1998 [pág. 42266] |
| Estonia | * | | | | |
| Finland | yes | point (b) | no | 1999 L 114, p. 56<br>1999 C 120, p. 24 | – |
| France | yes | point (b) | yes | 2005 L 327, p. 19 | Décret n° 2000-668 du 10 juillet |

*. No official information available

[1] A summary report on the declarations concerning acceptance was published, in identical terms, in OJ 2008 L 70, p. 23, and OJ 2008 C 69, p. 1.

| | | | | | |
|---|---|---|---|---|---|
| | | | | 2005 C 318, p. 1 | 2000<br>Journal Officiel de la République française du 19.07.00, p. 11073 |
| Greece | yes | point (b) | no | no 1999 L 114, p. 5<br>1999 C 120, p. 24 | – |
| Hungary | yes | point (b) [2] | no | 2005 L 327, p. 19<br>2005 C 318, p. 1<br>2008 L 70, p. 23<br>2008 C 69, p. 1 | – |
| Ireland | no | – | – | – | – |
| Italy | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | *[*] |
| Latvia | yes | point (b) | no | 2008 L 70, p. 23<br>2008 C 69, p. 1 | * |
| Lithuania | yes | point (b) | no | 2008 L 70, p. 23<br>2008 C 69, p. 1 | – |
| Luxembourg | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | * |
| Malta | * | | | | |
| Netherlands | yes | point (b) | yes | 1999 L 114, p. 56<br>1999 C 120, p. 24 | * |
| Poland | * | | | | |
| Portugal | yes | point (b) | no | 1999 L 114, p. 56<br>1999 C 120, p. 24 | – |
| Czech Republic | yes | point (b) | yes | 2003 L 236, p. 980 | § 109 odst. 1 písm. d) OSŘ ve znění zákona č. 555/2004 Sb. Parlamentu České republiky, kterým se mění zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, zákon č. 150/2002 Sb., soudní řád správní, ve znění pozdějších předpisů, zákon č. 549/1991 Sb., o soudních poplatcích, ve znění pozdějších předpisů, a zákon č. 85/1996 Sb., o advokacii, ve znění pozdějších předpisů |
| Romania | * | | | | |
| United Kingdom | no | – | – | – | – |

[2] According to the information published in OJ 2008 L 70, p. 23, and OJ 2008 C 69, p. 1, the Republic of Hungary has withdrawn its previous declaration (see OJ 2005 L 327, p. 19, and 2005 C 318, p. 1) that it accepted the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(a) of the Treaty on European Union and has declared that it accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(b) of the Treaty on European Union. This is consistent with Decision (Kormányhatározat) 2088/2003 (V.15) of the Hungarian Government, according to which the Republic of Hungary accepts the jurisdiction of the Court of Justice in accordance with the arrangements laid down in Article 35(3)(b) EU.

| | | | | | |
|---|---|---|---|---|---|
| Slovakia | * | | | | |
| Slovenia | yes | point (b) | yes | 2008 L 70, p. 23<br>2008 C 69, p. 1 | * |
| Sweden | yes | point (b) | no | 1999 L 114, p. 56<br>1999 C 120, p. 24 | |